WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number: **4146/20**
Applicant: **Adam Hall**
Respondent: **Lindsay Brother Management Pty Ltd**
Date of Determination: **27 January 2020**
Citation No: **[2021] NSWWCC 29**

The Commission determines:

1. The Applicant to be paid by the Respondent weekly compensation as follows:

    (a) From 8 October 2018 based on a PIAWE rate of $2143.73 per week,
    (b) The Respondent to pay the Applicant weekly compensation from 17 December 2019 based on a PIAWE of $1166.53 and subject to indexation, with the Respondent to have credit for payments made.

2. The parties to have liberty to apply within 14 days as to the form of order.

A brief statement is attached setting out the Commission's reasons for the determination.

Jane Peacock
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF JANE PEACOCK, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Mr Adam Hall (the applicant) seeks weekly compensation as a result of injury to his back on 4 October 2018 when working as a truck driver.

2. The respondent is Lindsay Brother Management Pty Limited (the respondent). Employers Mutual NSW Limited is the relevant insurer for the purposes of workers compensation.

ISSUES IN DISPUTE

3. There is no dispute that the Applicant was injured on 4 October 2018. There is no dispute about incapacity as a result of that injury. He has been paid and is being paid weekly compensation as a result of the injury on 4 October 2018.

4. The dispute concerns the correct calculation of PIAWE for purposes of weekly compensation being paid under sections 36 and 37 of the *Workers Compensation Act 1987* (the 1987 Act).

5. The Applicant amended his application with leave to rely on PIAWE of $2324.06.

6. The Applicant seeks an award of weekly compensation based on a PIAWE rate of $2324.06. The applicant relies on this rate for the first 52 weeks and submits that this rate also applies after 52 weeks.

7. The PAIWE rate of $2324.06 includes an allowance for remote travel.

8. In the alternative for the first 52 weeks, removing the allowance for remote travel, the applicant seeks an award of weekly compensation based on a PIAWE rate of $2143.73.

9. The Respondent disputes that the rate is $2324.06. The Respondent relies on the ICARE review notice dated 19 May 2020 and submits that the rate for the first 52 weeks is $2063.31 and after 52 weeks is $1086.11 subject to indexation.

PROCEDURE BEFORE THE COMMISSION

10. The parties attended a conciliation arbitration by telephone. The parties were both legally represented by counsel. The applicant was represented by Mr Goodridge of counsel and the respondent was represented by Mr Beran of counsel. Conciliation took place however the parties were unable to come to a resolution of the matter. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the entire dispute.

EVIDENCE

Documentary Evidence

11. The following documents filed on behalf of each party were admitted into evidence before the Commission by consent and taken into account in making this determination:

For the applicant:

(a) The Application and all documents attached.
(b) Statement of the Applicant dated 17 August 2020 and filed with an Application to Admit Late Documents.

For the respondent:

(a) The Reply and all documents attached.

Oral Evidence

12. The applicant did not seek leave to adduce further oral evidence.

13. The respondent did not seek leave to cross-examine Mr Hall.

FINDINGS AND REASONS

14. There is no dispute that the Applicant was injured on 4 October 2018 and was incapacitated as a result of that injury. Findings are not sought on the issue of injury or incapacity.

15. The correct calculation of PIAWE is the subject of dispute in the particular circumstances of the applicant. The calculation of the PIAWE applicable to the first 52 weeks is in dispute as well as the calculation of the PIAWE applicable after the first 52 weeks.

16. The applicant was injured on 4 October 2018 and it is common ground that the former section 44 of the 1987 Act applies.

17. The former Section 44 provides as follows:

"**44C Definition—pre-injury average weekly earnings**

(1) In this Division, ***pre-injury average weekly earnings***, in respect of a relevant period in relation to a worker, means the sum of:

(a) The average of the worker's ordinary earnings during the relevant period (excluding any week during which the worker did not actually work and was not on paid leave) expressed as a weekly sum, and
(b) any overtime and shift allowance payment that is permitted to be included under this section (but only for the purposes of the calculation of weekly payments payable in the first 52 weeks for which weekly payments are payable).

44E Definitions applying to pre-injury average weekly earnings—ordinary earnings

(1) Subject to this section, in relation to pre-injury average weekly earnings, the ***ordinary earnings*** of a worker in relation to a week during the relevant period are:
(a) if the worker's base rate of pay is calculated on the basis of ordinary hours worked, the sum of the following amounts:

(i) the worker's earnings calculated at that rate for ordinary hours in that week during which the worker worked or was on paid leave,

(ii) amounts paid or payable as piece rates or commissions in respect of that week,
(iii) the monetary value of non-pecuniary benefits provided in respect of that week, or
(b) In any other case, the sum of the following amounts:
(i) the actual earnings paid or payable to the worker in respect of that week;
(ii) amounts paid or payable as piece rates or commissions in respect of that week,
(iii) the monetary value of non-pecuniary benefits provided in respect of that week.

(2) A reference to ordinary earnings does not include a reference to any employer superannuation contribution.

44H Definition applying to pre-injury average weekly earnings and current weekly earnings—ordinary hours of work

In relation to pre-injury average weekly earnings and current weekly earnings, the ***ordinary hours of work***:
(a) in the case of a worker to whom a fair work instrument applies are:
(i) if the ordinary hours of work in relation to a week are agreed or determined in accordance with a fair work instrument between the worker and the employer—those hours, or
(ii) in any other case, the worker's average weekly hours (excluding anyek during which the worker did not actually work and was not on paid leave) during the relevant period, or
(b) in the case of a worker to whom a fair work instrument does not apply:
(i) if the ordinary hours of work are agreed between the worker and the employer, those hours, or
(ii) in any other case, the worker's average weekly hours (excluding any week during which the worker did not actually work and was not on paid leave) during the relevant period.

44G Definition applying to pre-injury average weekly earnings and current weekly earnings—base rate of pay

(1) In relation to pre-injury average weekly earnings and current weekly earnings, a reference to a base rate of pay is a reference to the rate of pay payable to a worker for his or her ordinary hours of work but does not include any of the following amounts (referred to in this Division as base rate of pay exclusions):
(a) incentive based payments or bonuses,
(b) loadings,
(c) monetary allowances,
(d) piece rates or commissions,
(e) overtime or shift allowances,
(f) any separately identifiable amount not referred to in paragraphs (a) to (e).

(2) In relation to pre-injury average weekly earnings and current weekly earnings, if, at the time of the injury:
(a) a worker's base rate of pay is prescribed by a fair work instrument that applies to the worker, and
(b) the worker's actual rate of pay for ordinary hours is higher than that rate of pay, the worker's actual rate of pay is to be taken to be the worker's base rate of pay."

18. On 29 April 2019, the insurer advised the applicant that they had calculated the PIAWE applicable to the first 52 weeks at $2010.41.

19. On 3 December 2019, the insurer advised the applicant that he had reached 52 weeks of entitlements and as a result the overtime and shift allowance components of the PIAWE were removed such that entitlements were based only on ordinary earnings which with indexation was calculated to be $1120.

20. On 29 April 2020, the applicant requested a review. The applicant submitted to the insurer that the PIAWE for the first 52 weeks should be calculated at $2324.06 and as all of applicant's earnings are ordinary earnings, there should be no 52 weeks step down and the PIAWE should remain at $2324.06.

21. The insurer issued a review notice on 19 May 2020. The Respondent relies on the PIAWE as specified in the dispute notice dated 19 May 2020 as follows:

    (a) the PIAWE for the first 52 weeks at $2063.31.
    (b) the PIAWE after the first 52 weeks at $1086.11.

22. Tuning first to the calculation of PIAWE for the first 52 weeks.

23. The dispute in relation to the calculation of the PIAWE in the first 52 weeks concerns the question of the REMSERVE deduction and whether the remote travel allowance should be included.

24. The applicant submitted that the ICARE has dealt with the REMSERVE deduction in error by means of "double elimination".

25. It is common ground that the REMSERVE deduction on the applicant's payslip of $157.52 per week is a form of salary sacrifice.

26. It is common ground that the REMSERVE deduction should be included as part of the PIAWE.

27. The Respondent submitted in written submissions as follows:

> "The Respondent submits that it has not taken into consideration the deduction noted as REMSERV as this relates to a salary packaging arrangement that has no bearing on the calculation of PIAWE.
>
> The Respondent refutes the Applicant's submission that REMSERV has been 'doubly eliminated' or that the PIAWE was calculated on the basis of the Applicant's taxable income. The Respondent submits the Applicant's PIAWE was correctly calculated on the basis of his relevant gross earnings and without regard to any adjustments to the Applicant's taxable income which relate to his salary packing arrangement. The Respondent relies on the review notice of 19 May 2020 in this regard, and not the 'icare data input summary' as referred to by the Applicant."

28. Despite the applicant's counsel making detailed submissions referring to items of various payslips, the respondent's counsel made no attempt to meet this approach. The Respondent's counsel was unhelpful when asked to address with particularity on this point. The Respondent's counsel simply maintained that he was instructed that the REMSERVE deduction was not excluded. I refer to the transcript.

29. The Respondent said it relies on the review notice dated 19 May 2020 and the calculations contained therein. The review notice clearly specifies that REMSERVE payment was excluded from the calculation of PIAWE:

> "Earnings noted as 'REMSERVE' have been excluded as they relate to a salary packaging arrangements that has no bearing on the calculation of PIAWE."

30. This reference to the exclusion of REMSERVE is at the end of a list of items that the insurer has expressed as either having "excluded" or "included". Items excluded were "annual leave loading' and "remote travel". There is no basis on the face of this notice to read that REMSERVE was included in the calculation when it has been clearly expressed as excluded.

31. My attempts to elicit from the Respondent's counsel his assistance in marrying up the list of exclusions with the actual mathematical calculations undertaken by the insurer were met with responses that were surprisingly unhelpful. In summary it was submitted that on his instructions REMSERVE was included. He further submitted that he had "no idea" what the document referred to at 43 page of the Reply was. This is a document filed in evidence in the Respondent's own case. This document is untitled but is a calculation of PIAWE seemingly undertaken by ICARE. This document shows a PIAWE calculated at $2052.44. Again, this document refers to REMSERVE being excluded along with annual leave loading being excluded.

32. The applicant's counsel made detailed written submissions about the REMSERVE deduction and amplified his approach in oral submissions. The Applicant submitted: (emphasis in original)

> "
> - The issue is not the intended approach of iCare. The issue is the mathematical application of iCare's approach.
>
> - ICare have used to calculate PIAWE the "taxable income" on the bottom of the payslip. Again, I refer you to ARD 94. The bottom of the payslip has already deducted, for the purposes of calculating taxable income, the REMSERV deduction.
>
> - Salary packaging is merely an arrangement between employer and employee to make the net income more tax effective. The lease payment of $157.52 is made on a before tax basis. Where this occurs a grossed up after tax deduction is deducted from the salary in the sum of $175.01. This is taxed at the rate of only 10%. In the absence of salary packaging the $175.01 would be taxed at the marginal rate and the worker would be required to make the $157.52 payment out of his after-tax salary.
>
> - If ARD 94 is compared with ARD 96 the position becomes even clearer. ARD 96 is a payslip when the worker was entirely in receipt of workers compensation payments. You will see that the amount of workers compensation paid at the top of the payslip is $1989.70. The taxable income however is described as being only $1832.18. Again, the difference is $157.52. This is because this is the before tax deduction of the lease payments being made on behalf of the worker for his private vehicle. Again, the before tax deduction needs to be grossed up by a factor of 9/10 to calculate the after-tax deduction.
>
> This is simply a case in which the employer at ARD 96 understood the correct approach in respect of Remserv however, iCare subsequently failed to correctly understand the nature of the deduction.

- It is quite telling that the employer has not put on any evidence. The respondent relies upon iCare's understanding or misunderstanding of the payslips and the enterprise agreement.

  The worker has taken some considerable care to calculate every relevant week and this is set out at ARD 190.

  ICare at Reply page 48 (in my copy possibly page 33) have included a calculation and data input sheet. The document is wrongly described as being authored by the employer. It can be seen that this document has actually been created by iCare. The document refers to receiving information from the employer and has iCare's reference to notes and the relevant sections. For convenience I will refer to this document as "iCare data input summary".

  The iCare data input summary says:
  "Excluded items annual leave loading
  Remserv before tax deduction"
  What iCare have failed to appreciate is that the bottom of the payslip is the summary of "taxable income" which is not relevant. As totalled at ARD 190 the question is not the "taxable income" but rather "the actual earnings paid or payable to the worker".

33. I am satisfied given the wording of the dispute notice and persuaded by the calculation identified by the Applicant's counsel that the REMSERVE deduction of $157.52 per week has been wrongly excluded. This needs to be added back in.

34. As to remote travel allowance, I am not persuaded it should form part of the calculation of PIAWE as it is an allowance that goes toward ameliorating expenses when travelling to remote areas. It is only payable when the applicant travels to a remote area. It cannot therefore form part of PIAWE.

35. In the event this was my finding, the applicant's counsel provided the alternative calculation as follows:

    "For convenience I have calculated the alternate findings for PIAWE including Remserv but not remote travel $2,143.73."

36. I find that the PIAWE for the first 52 weeks is $2143.73. This is the amount sought by the applicant if remote travel was to be excluded. I note that this represents a difference with ICARE's calculations of $80.42 per week (that is $2143.73 minus $2063.31 equals $80.42 per week). This additional weekly amount will be payable to the applicant. The order I will make for the first 52 weeks will be as follows:

    - The Applicant to be paid by the Respondent weekly compensation from 8 October 2018 based on a PIAWE rate of $2143.73 per week, with the Respondent to have credit for payments made.

37. Turning then to PIAWE after first 52 weeks.

38. Consideration of this issue involves the correct interpretation of the former section 44.

39. The applicant's counsel identified this issue as: "Post 52 weeks section 44E(1)(b) not 44E(1)(a)" and submitted as follows (emphasis in original):

> "This submission focuses on the wording of the legislation. ICare have treated as "overtime" the items described by iCare as "Additional KM BD and Pick Up &" [sic]; see **iCare data input summary**.
>
> These items ought only be treated as overtime if they are items within section 44E(1)(a). In all other cases section 44E(1)(b) applies.
>
> Section 44E(1)(a) is not apt. In short, the reason for this is that the worker's base rate of pay is not "calculated on the basis of ordinary hours worked".
>
> The applicant drove a truck. He was a linehaul driver. The enterprise agreement variously refers to linehaul drivers or "LT" drivers. Both terms are interchangeable.
>
> Clause 12 relevantly provides:
>
> **'12. Classifications & Rates of pay**
>
> 12.1 The classifications and rates of pay for employees principally engaged to perform linehaul work are provided in clause 5 of Schedule 1.
> 12.2…
>
> 12.3 The rates of pay and other remuneration to LT employees prescribed in this agreement have been calculated taking into consideration all allowances, penalties and any other remuneration which would otherwise apply to employees under any applicable Award(s).'
>
> It is important to note that the rates provided for in clause 5 of schedule 1 are said to be calculated taking into account "all allowances, penalties and any other remuneration which would **otherwise apply** to employees under any applicable Award(s)"
>
> That is, the worker does not receive those payments under the award, because they are averaged into the kilometre rates paid by the employer to the worker.
>
> Clause 5 of schedule 1 requires particular attention. There are two parts to the clause, 5.1 and 5.2.
>
> Under 5.1 the worker is deemed to have done his 38-hour working week when he has completed 2515 km. Thereafter he is paid at the rate under 5.2.
>
> The rates under 5.1 ($1055.28/2525) and under 5.2 are both $0.4196 per km.

Take 3 examples.

a. In 38 hours, the worker drives 2515 km.
b. In 38 hours, the worker drives 1515 km
c. In 38 hours, the worker drives 3515 km.

In circumstance 1 the worker will earn $1,055.28.

In circumstance 2 the worker may earn $1,055.28 or a sum calculated under 5.2 of $635.69 (i.e. 1515 x $0.4196) as 5.1 states:

"In the event that a driver does not perform the weekly base kilometres, and provided this is not a consequence of such work not being allocated to them, they will be paid for the actual number of kilometres travelled at the rates specified in 5.2.

In circumstance 3 the same 38 hours of work will entitle the worker to $1,474.88 (i.e. $1,055.28 plus 1000 x $0.4196).

These examples demonstrate that the Applicant was not paid according to the hours he worked.

Clause 6 of Sch 1 provides that the distances are deemed so that detours and actual distances are ignored.

Whilst it can be understood that the calculations of distances to be driven have in general terms referenced, as a background fact, the award it is not the case to say that the worker's pay is calculated by hours. It is the driver, and not the employer, who accepts the benefit or burden of good or bad traffic conditions.

It is important to appreciate that section 44E(1)(b) has been drafted as the catchall by using the words "in any other case". Subsection 1(b) is intended to capture the universe of cases, such as this one, that does not fall strictly within subsection 1(a)."

40. The Respondent submits that "the application brought by the Applicant in relation to the calculation of his pre injury average weekly earnings (**PIAWE**) and the manner in which it is calculated is without basis." The Respondent submitted as follows: (emphasis in original)

"• The Applicant's earnings and conditions are covered by the Lindsay Transport Enterprise Agreement 2015 dated 21 October 2015 (**EA**).

• Paragraph 3.1 of the EA defines full time employment as:

'*A full-time employee is an employee engaged by an employer for an average of up to 38 ordinary hours per week, calculated over a four-week period*'.

- Paragraph 4.1.1 of the EA defines ordinary hours as:

  '*Ordinary hours of work will be a maximum of 38 per week, which may be average over a period not in excess of 28 days*'.

- Paragraph 4.1.3 of the EA defines overtime as:

  '*Subject to 4.1.1, the ordinary hours for each set distribution driver and line haul employee performing work covered by this schedule are the number of hours required to earn the applicable minimum weekly rate specified in 5.1, by applying the methodology contained in clause 5. All time worked after such amounts have been earned pursuant to clause 5.3 or 5.4 will be overtime and any payment made in relation to such work will be a payment in respect of overtime*'.

- Paragraph 5 of the EA provides separate definitions of the pay rates for both ordinary hours of work and overtime.

- Paragraph 5.1 defines ordinary hours of work as:

  '*Line haul employees, other than casuals, will be paid the following minimum weekly retainers in recognition of, and remuneration for, their ordinary hours of work (as prescribed in clause 4 of this schedule). This will be dependent upon the employee being ready, willing and able to perform their base weekly kilometres during the relevant weekly period…*'.

- Paragraph 5.2 of the EA defines overtime as:

  '*In addition to the weekly retainers (set out in clause 5.1) full time line haul employees will be paid the following kilometre rates by way of remuneration for all overtime worked (as described in clause 4.1.2 of this schedule) in travelling kilometres which are in excess of the weekly base distances set out for each line haul employee classification...*'.

- The Respondent calculated the Applicant's PIAWE by reference to the EA and the Applicant's pay slips for the period of 5 October 2017 to 3 October 2018 (**the relevant period**), and excluding any weeks with unpaid leave, in accordance with the former sections 44C to 44G of the 1987 Act.

- The Respondent submits that the overtime and shift allowance component of the PIAWE calculation was correctly removed after 52 weeks in accordance with section 44C(1)(b) of the 1987 Act.

- The Respondent refutes the Applicant's submissions dated 18 August 2020. It is the Respondent's submission that the Applicant's PIAWE was correctly calculated in its review notice dated 19 May 2020, with reference to the EA which provides coverage for the Applicant's earnings and conditions of employment.

- The Respondent submits that the EA quite clearly provides separate definitions for both ordinary hours of work and overtime, which is appropriate in the context of the former section 44C of the 1987 Act which provides for the separate of PIAWE into ordinary earnings and overtime and shift allowances.

- The Respondent has calculated the Applicant's PIAWE in relation to the pre and post 52-week periods by reference to paragraphs 5.1 and 5.2 of the EA, and having regard to the former section 44C(1) of the 1987 Act. The Respondent relies on the detailed discussion of the individual components of the Applicant's earnings in the review notice of 19 May 2020 and their classification of 'ordinary earnings' and 'overtime and shift allowance' in this regard."

41. The former section 44 subsection C to G of the 1987 Act define the approach to be taken in the calculation of PIAWE, for the first 52 weeks and after the first 52 weeks. The subsections provide a series of definitions which must be read as a whole to be properly understood. The subsections define PIAWE, ordinary earnings, and ordinary hours.

42. Section 44C defines **PIAWE** to comprise the average of **ordinary earnings** plus overtime and shift allowances (but only for the first 52 weeks).

43. You then turn to section 44E for the definition of ordinary earnings.

44. Ordinary earnings are defined differently in s44E depending on whether the worker's base rate of pay is calculated on the basis of **ordinary hours** worked (44E(1)(a)) or not (44E(1)(b)).

45. The applicant says that, as he was paid on the basis of kms travelled as evidenced by his payslips, then section 44E(1)(b) applies.

46. However, regard must be had to the totality of the evidence and in this case, a fair work instrument applies.

47. You then turn to section 44H for the definition of **ordinary hours** of work.

48. Section 44H(a)(i) provides that in the case of a worker to whom a fair work instrument applies, then "if the ordinary hours of work are agreed or determined in accordance with a fair work instrument between the worker and the employer" - those hours are the ordinary hours of work.

49. Under the fair work instrument that applies to the applicant, the ordinary hours of work are defined for the worker as a full-time employee as set out in the respondent's submissions as follows: (emphasis in original)

" - The Applicant's earnings and conditions are covered by the Lindsay Transport Enterprise Agreement 2015 dated 21 October 2015 (**EA**).

- Paragraph 3.1 of the EA defines full time employment as:

'*A full-time employee is an employee engaged by an employer for an average of up to 38 ordinary hours per week, calculated over a four-week period*'.

- Paragraph 4.1.1 of the EA defines ordinary hours as:

  '*Ordinary hours of work will be a maximum of 38 per week, which may be average over a period not in excess of 28 days*'.

- Paragraph 4.1.3 of the EA defines overtime as:

  '*Subject to 4.1.1, the ordinary hours for each set distribution driver and line haul employee performing work covered by this schedule are the number of hours required to earn the applicable minimum weekly rate specified in 5.1, by applying the methodology contained in clause 5. All time worked after such amounts have been earned pursuant to clause 5.3 or 5.4 will be overtime and any payment made in relation to such work will be a payment in respect of overtime*'.

- Paragraph 5 of the EA provides separate definitions of the pay rates for both ordinary hours of work and overtime.

- Paragraph 5.1 defines ordinary hours of work as:

  '*Line haul employees, other than casuals, will be paid the following minimum weekly retainers in recognition of, and remuneration for, their ordinary hours of work (as prescribed in clause 4 of this schedule). This will be dependent upon the employee being ready, willing and able to perform their base weekly kilometres during the relevant weekly period…*'.

- Paragraph 5.2 of the EA defines overtime as:

  '*In addition to the weekly retainers (set out in clause 5.1) full time line haul employees will be paid the following kilometre rates by way of remuneration for all overtime worked (as described in clause 4.1.2 of this schedule) in travelling kilometres which are in excess of the weekly base distances set out for each line haul employee classification...*'."

50. The fair work instrument defines the applicant's earnings as a full-time employee to comprise ordinary hours of work plus overtime.

51. Under the fair work instrument, the applicant's ordinary hours of work are deemed to be 38 hours per week. The fair work instrument converts the kms travelled to ordinary hours of work such that there is a base rate of pay which is separate from overtime and shift allowances. I am persuaded by the respondent's submissions in this regard. As overtime does not form part of the PIAWE after 52 weeks, this means that there is in fact a step down in the PIAWE after 52 weeks.

52. The final issue that then arises is whether the amounts paid to the applicant for "pick up and delivery" (PUD) constitute overtime or shift allowances and are therefore excluded after 52 week or amount to commission or piece rates and should be included in the post 52 week PIAWE calculation.

53. The applicant submitted on this issue as follows:

> "If the Commission finds (contrary to our submissions above) that section 44E(1)(a) applies to the calculation of the Applicant's earnings, then the Applicant submits that the amounts for "Pick Up & Delivery" do not represent "overtime" or a "shift allowance". Therefore, this amount should not be removed from the calculation of PIAWE after 52 weeks. Section 44E(1)(a) states that a worker's ordinary earnings include the base rate of pay, amount paid or payable as piece rates or commissions, and the monetary value of non-pecuniary benefits. "Pick up & Delivery" is similar to a "piece rate". It is not "overtime" or a "shift allowance". Therefore, it is included in the calculation of PAIWE after 52 weeks."

54. The Respondent relies on the approach taken by ICARE in the dispute review notice dated 19 May 2020 wherein it advised:

> "Earnings noted as pick up and delivery were included in the calculation as overtime and shift allowances, in accordance with Clause 9.6 of Schedule 1 of the Enterprise Agreement, which provides that "time spent by a linehaul employee performing PUD work will not form part if the employee's ordinary hours of work."

55. The PUD is defined by the fair work instrument as not forming part of the ordinary hours of work but is paid on an hourly basis. The PUD does not equate to commission commonly understood to be based on sales and the PUD does not equate to piece rates commonly understood to be payment by piece instead of an hourly or weekly rate. The fair work instrument defines the pay arrangements for the applicant to comprise ordinary earnings and overtime. When regard is had to all of the evidence the PUD effectively comprise an overtime or shift allowance paid on an hourly basis and is not payable after 52 weeks.

56. The effect of these findings is that the PIAWE steps down after 52 weeks to comprise ordinary earnings and to exclude overtime and does not include PUD.

57. The review notice of 19 May 2020 is correct on this issue but the step down will be from the PIAWE for the first 52 week of $2143.73. As the discrepancy was identified to be $80.42 per week, this gets added back in such that the PIAWE after 52 weeks will be $1086.11 (ICARE figure) plus $80.42 which is $1166.53 which will be subject to indexation.

58. Accordingly, the order I will make is as follows:

> (a) The Respondent to pay the Applicant weekly compensation from 17 December 2019 based on a PIAWE of $1166.53 and subject to indexation, with the Respondent to have credit for payments made.

59. The parties can have liberty to apply with respect to the form of order within 14 days.