Independent
Review Office

IRO Regional Seminars

Ballina

March 2024

IRO acknowledges traditional owners

We acknowledge the Bundjalung People as the Traditional Custodians of the land we are meeting on today, and part of the oldest surviving continuous culture in the world. We recognise their continuing connection to Country and thank them for protecting this land and its ecosystems since time immemorial.

We pay our respects to Elders past and present, and extend that respect to all First Nations people present today

Agenda

- **Welcome** – Jeffrey Gabriel, A/Independent Review Officer
- **Pre-Injury Average Weekly Earnings** – Kevin Sawers, SA, Walker Law Group
- **ILARS Update** – Michael Vella, Manager, IRO
- **IRO Solutions Update** – Chris Cramp, Dispute Resolution Officer, IRO
- **Estoppel in the Personal Injury Commission** - Jeffrey Gabriel, A/Independent Review Officer
- **IRO Priorities 2024 and Closing Remarks** - Jeffrey Gabriel, A/Independent Review Officer

Independent
Review Office

Pre-Injury Average Weekly Earnings

Kevin Sawers
Walker Law Group

Walker

We Listen, We Understand, We Resolve

PIAWE fundamentals and PIC decisions/insights

Walker

We Listen, We Understand, We Resolve

Agenda

- Why is PIAWE important to review?
- The PIAWE we are looking at today
- PIAWE fundamentals
- A few examples
- Recent PIC decisions/insights
- Questions

Why is PIAWE important to review?

It could be wrong!

Errors in workers comp victims payments for six years with 25 per cent underpaid by icare

Michael Evans
March 9, 2020 — 12.00am

Save | Share

A review of payments to 3000 workers compensation claimants from the state-government owned insurer icare has revealed half contained errors, with a quarter of recipients underpaid over a six-year period.

There are concerns the true figure may be higher and cost the agency millions.

In the latest controversy surrounding icare, a review conducted last year and revealed by the regulator last week identified errors in around half of the 3000 reviewed claims from 2012-18.

One quarter "were potentially underpaid, at least initially, and a similar proportion were potentially overpaid".

Errors have been made in icare's workers compensation payments.

Why is PIAWE important to review?

Sometimes PIAWE definitely is wrong

SIRA's claims management guide:

Interim PIAWE

If an insurer is not able to either approve, or refuse to approve, an application for agreement by day seven from initial notification of injury, then they may give effect to the agreed amount as the PIAWE. This is an interim payment decision and allows the insurer to make weekly payments based on the agreed amount of PIAWE until the application for approval of the agreement has been determined.

Why is PIAWE important to review?

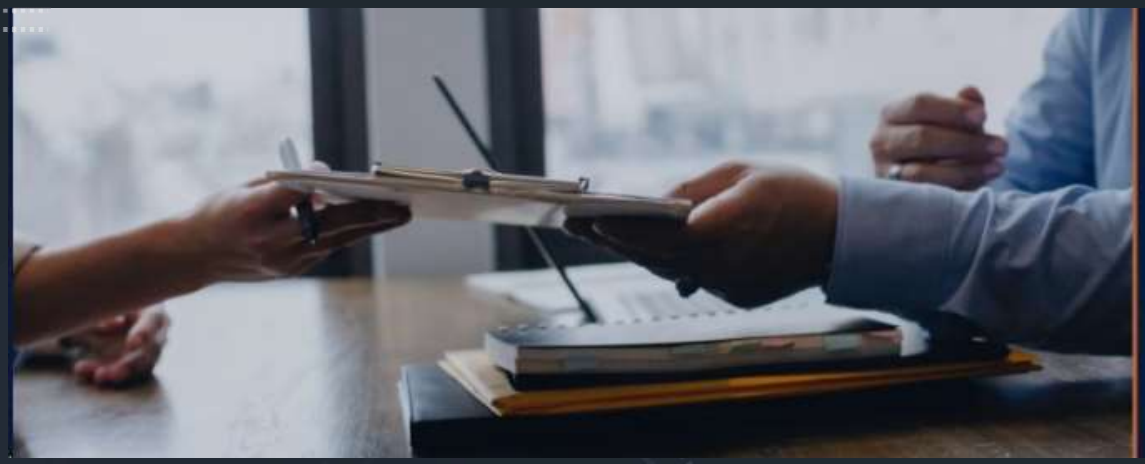
PIAWE is itself a work capacity decision

It is a reviewable decision

Workers Compensation Act NSW 1987

43 Work capacity decisions by insurers

(1)The following decisions of an insurer are
"work capacity decisions" --
(d) a decision about the amount of an injured worker's **pre-injury average weekly earnings** or current weekly earnings,



Walker

We Listen, We Understand, We Resolve

The PIAWE we are considering today

- **Current PIAWE**
- Applied in full to workers injured on or after 21 October 2019
- Schedule 3 of the Workers Compensation Act NSW 1987 including a PIAWE agreement
- Workers Compensation Regulation 2016
- Sections 79-82D Workers Compensation Act NSW 1987
- Personal Injury Commission has jurisdiction over PIAWE

The PIAWE we are considering today

- **We wont be covering:**

- Clause 8EA of the Workers Compensation Regulation 2016 introduced to allow for **Adjustment for prescribed periods relating to COVID-19**

Walker
LAW GROUP

- **We wont be covering:**

- Clause 8F of the Workers Compensation Regulation 2016
- **Principal Member Harris' decision of Kategiannis v Decjuba Pty Ltd [2020] NSWWCC 101**
- **Member Wright decision of Almanaa v FBS Formwork Group Pty Ltd [2021] NSWPIC 455**
- Acting Deputy President Geoffrey Parker SC **of Randstad Pty Ltd v Vardareff [2023] NSWPICPD 78 (8 December 2023)**

Walker

LAW GROUP

Walker

We Listen, We Understand, We Resolve

PIAWE fundamentals

PIAWE fundamentals

Schedule 3 of the Workers Compensation Act NSW 1987

Fundamentally PIAWE then is a maths equation that can be expressed like this:

Gross pre-injury earnings

÷ **=** **Pre-injury average weekly earnings**

Relevant earning period

PIAWE fundamentals

Schedule 3 of the Workers Compensation Act NSW 1987

Fundamentally PIAWE then is a maths equation that can be expressed like this:

Gross pre-injury earnings (dollars)

÷

Relevant earning period (time)

=

Pre-injury average weekly earnings (PIAWE)

PIAWE fundamentals (relevant earning period / time)

- **Schedule 3 of the Workers Compensation Act NSW 1987**
- **A closer look at the Relevant earning period (time)**
- **Defined in Schedule 3(2)(2)**

PIAWE fundamentals

- **Schedule 3 of the Workers Compensation Act NSW 1987**
- **2 Meaning of "pre-injury average weekly earnings“**
- (2) Except as provided by this clause (or by regulations made under this clause), in calculating the "pre-injury earnings" received by **a worker in employment** for the purposes of subclause (1), no regard is to be had to earnings in the employment paid or payable to the worker for work performed before or after the period of 52 weeks ending immediately before the date of the injury ("the relevant earning period").

PIAWE fundamentals (relevant earning period / time)

1 February 2019

Commencement of employment

PIAWE fundamentals (relevant earning period / time)

- **Schedule 3 of the Workers Compensation Act NSW 1987**

- **2 Meaning of "pre-injury average weekly earnings“**

- (2) Except as provided by this clause (or by regulations made under this clause), in calculating the "pre-injury earnings" received by a worker in employment for the purposes of subclause (1), no regard is to be had to earnings in the employment paid or payable to the worker for work performed before or after the period of 52 weeks ending immediately before **the date of the injury** ("the relevant earning period").

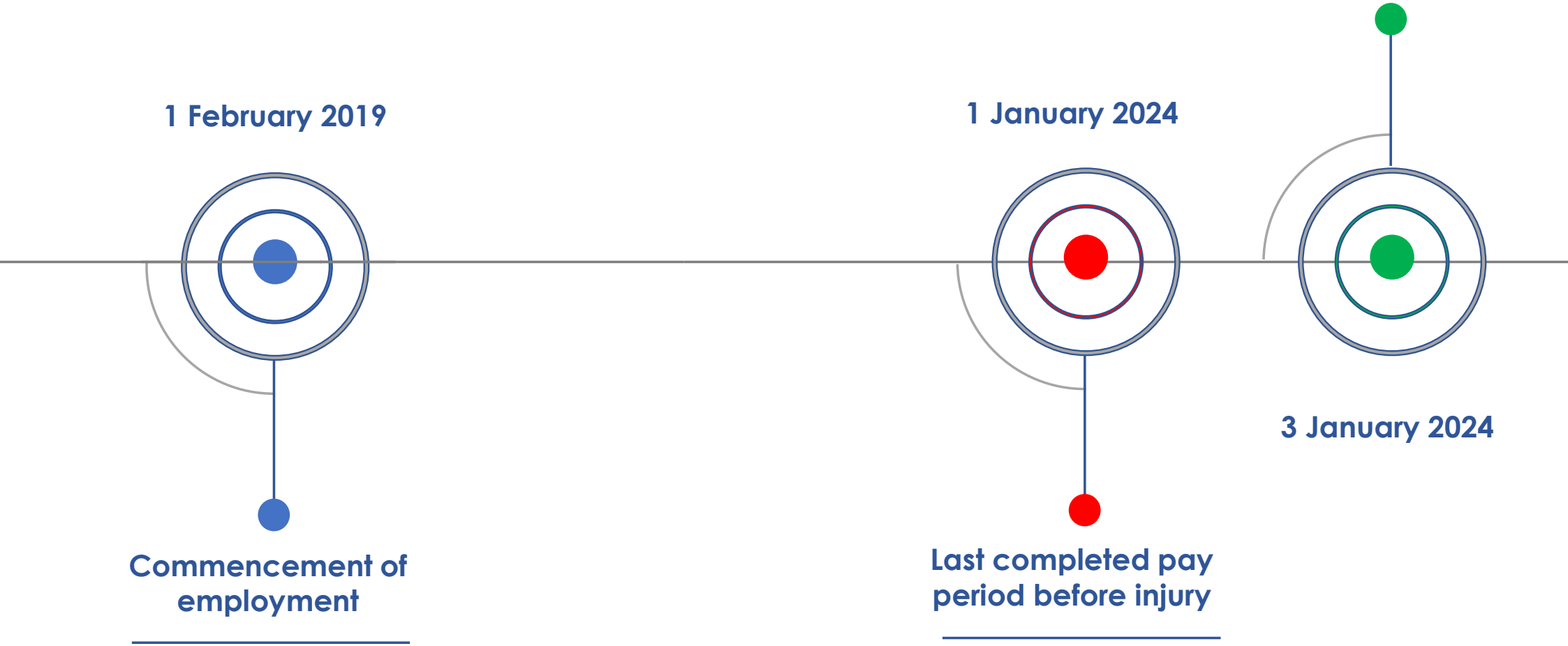
PIAWE fundamentals (relevant earning period / time)

PIAWE fundamentals (relevant earning period / time)

- **Workers Compensation Regulation 2016**
- **8D Alignment of relevant earning period with pay period**

- (1) The relevant earning period for a worker in employment may be adjusted to align the relevant earning period with any regular interval at which the worker is entitled to receive payment of earnings for work performed in the employment.

PIAWE fundamentals (relevant earning period / time)



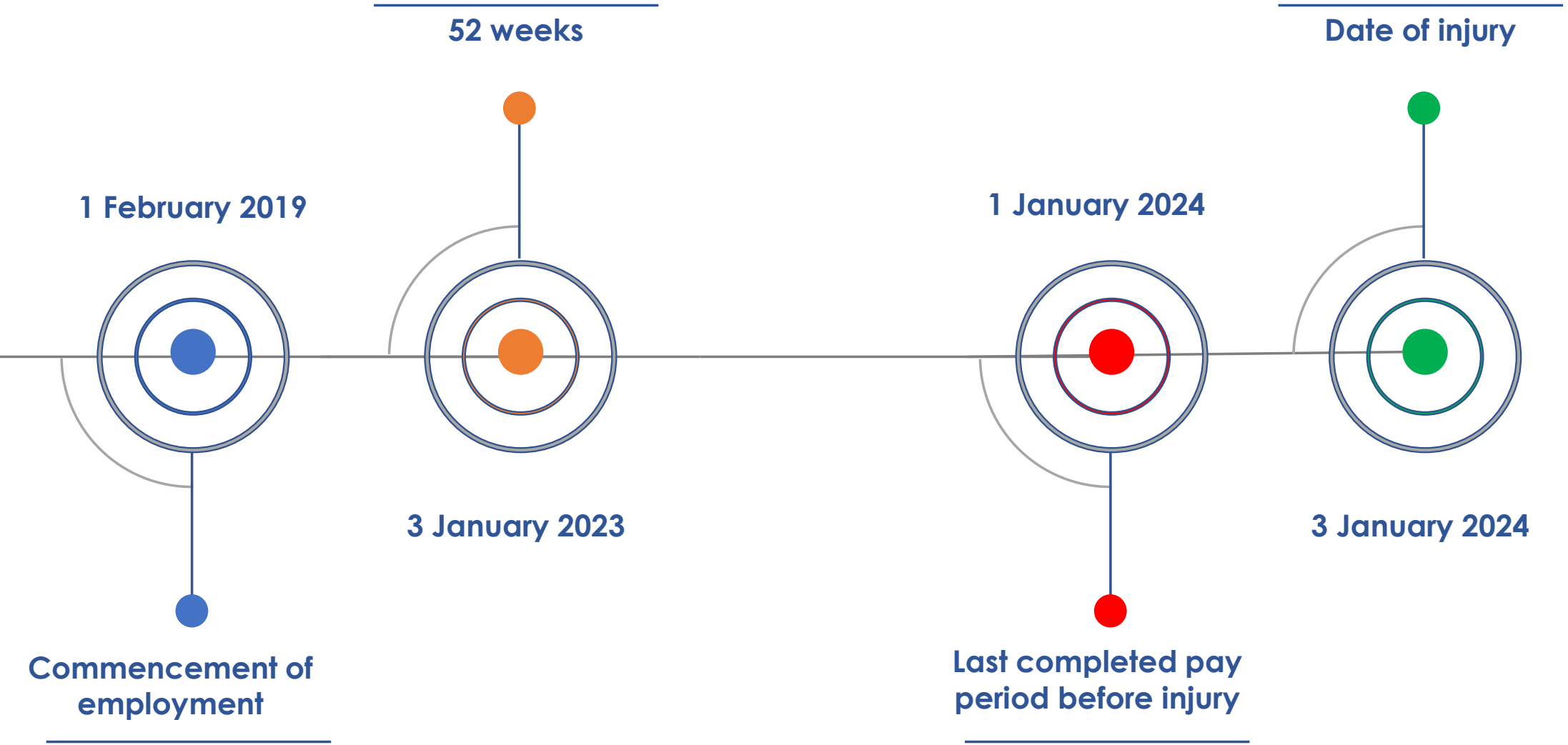
PIAWE fundamentals (relevant earning period / time)

Schedule 3 of the Workers Compensation Act NSW 1987

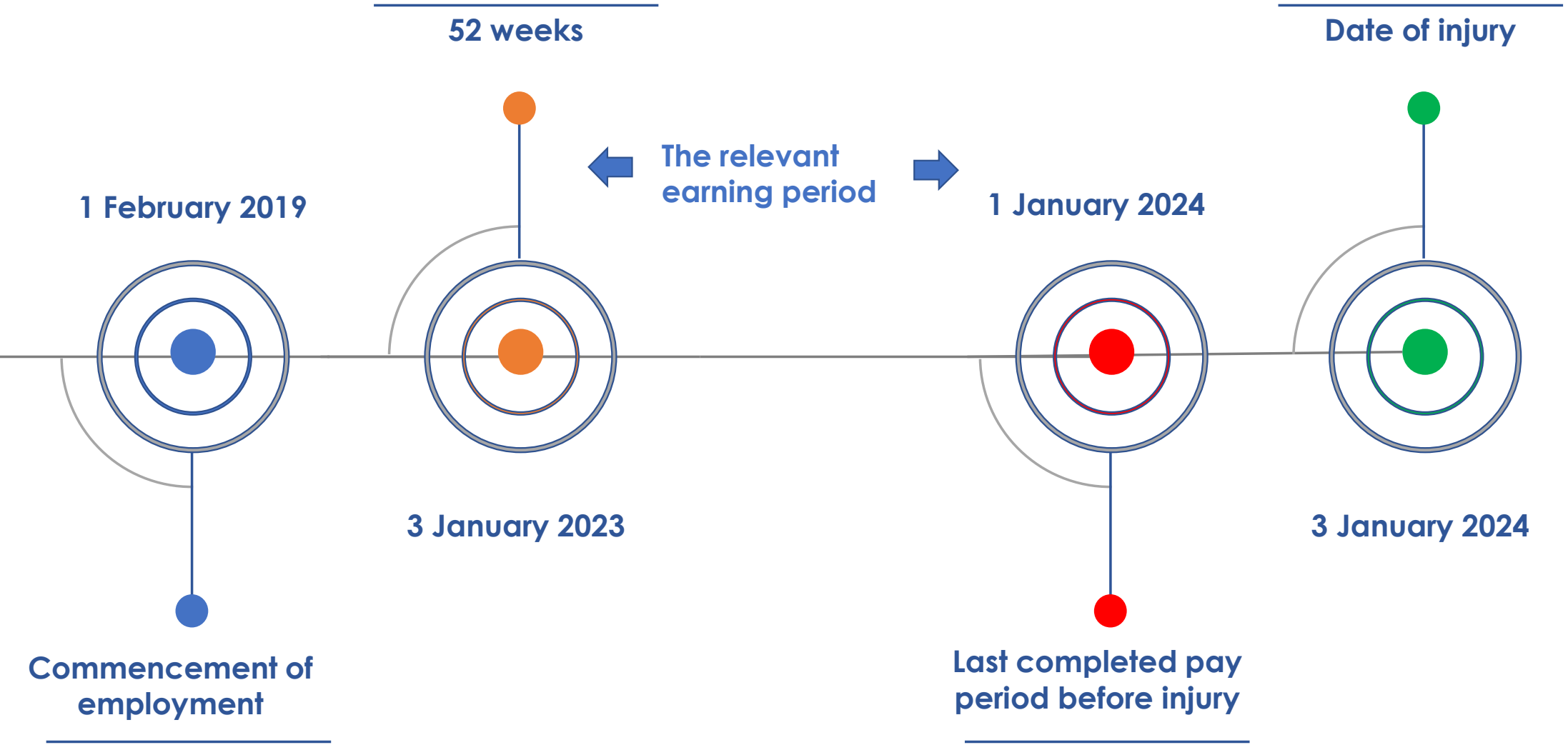
2 Meaning of "pre-injury average weekly earnings“

(2) Except as provided by this clause (or by regulations made under this clause), in calculating the "pre-injury earnings" received by a worker in employment for the purposes of subclause (1), no regard is to be had to earnings in the employment paid or payable to the worker for work performed before or after the **period of 52 weeks** ending immediately before the date of the injury **("the relevant earning period"**).

PIAWE fundamentals (relevant earning period / time)



PIAWE fundamentals (relevant earning period / time)



PIAWE fundamentals (relevant earning period / time)

- Adjusting the relevant earning period
- **Schedule 3 of the Workers Compensation Act NSW 1987**
- **2 Meaning of "pre-injury average weekly earnings“**
- (3) The regulations may provide for the adjustment of the relevant earning period for a worker in employment (including, for example, by extending or reducing the period)—
- (a) to take into account any period of unpaid leave or other change in earnings circumstances in the employment, or

PIAWE fundamentals (relevant earning period / time)

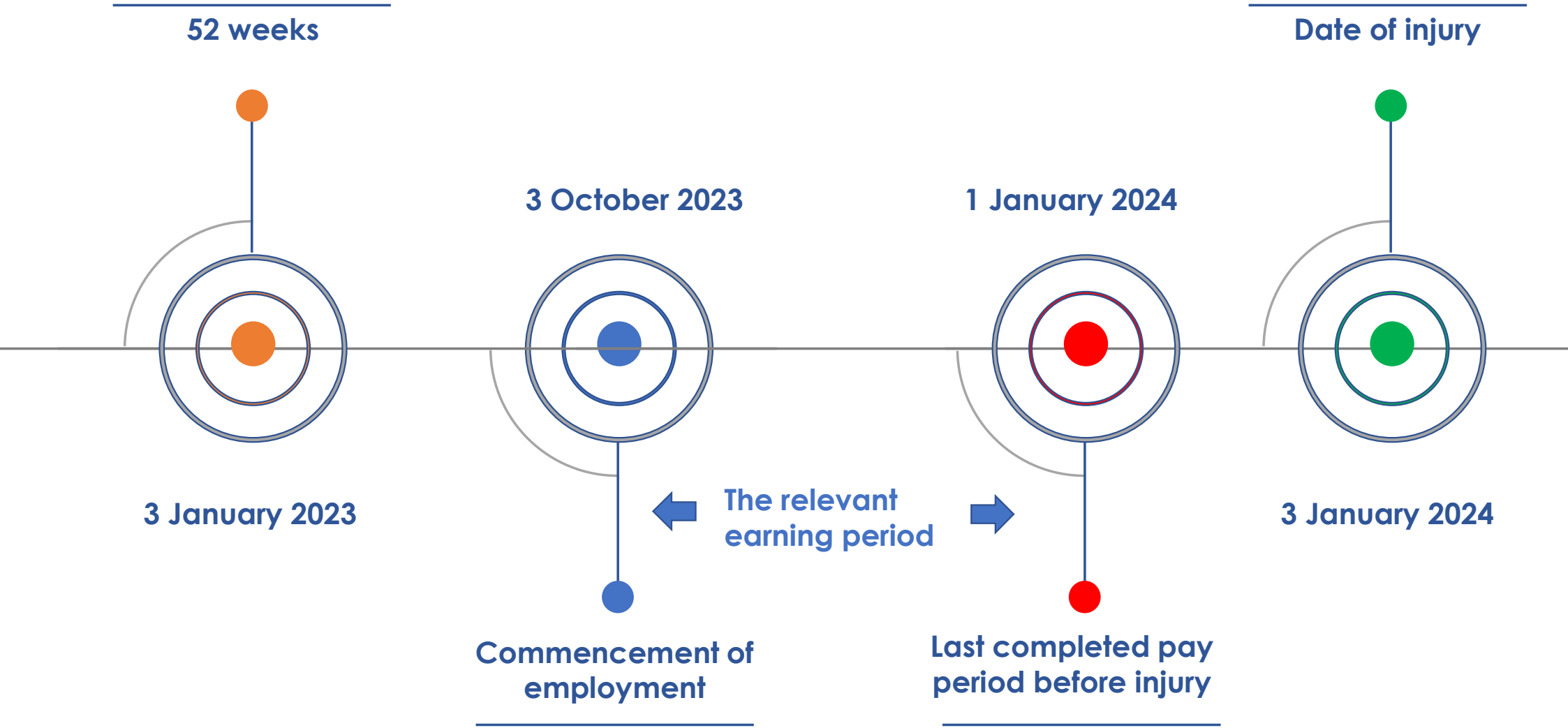
Workers Compensation Regulation 2016

8B Adjustment for workers not continuously employed

(1) The relevant earning period for a worker in employment is to be adjusted in accordance with this clause if the worker was not engaged in the employment from the beginning of the unadjusted earning period.

(2) The relevant earning period for the worker in the employment is to be adjusted by **excluding any period before the day on which the worker was first engaged in the employment.**

8B Adjustment for workers not continuously employed



PIAWE fundamentals (relevant earning period / time)

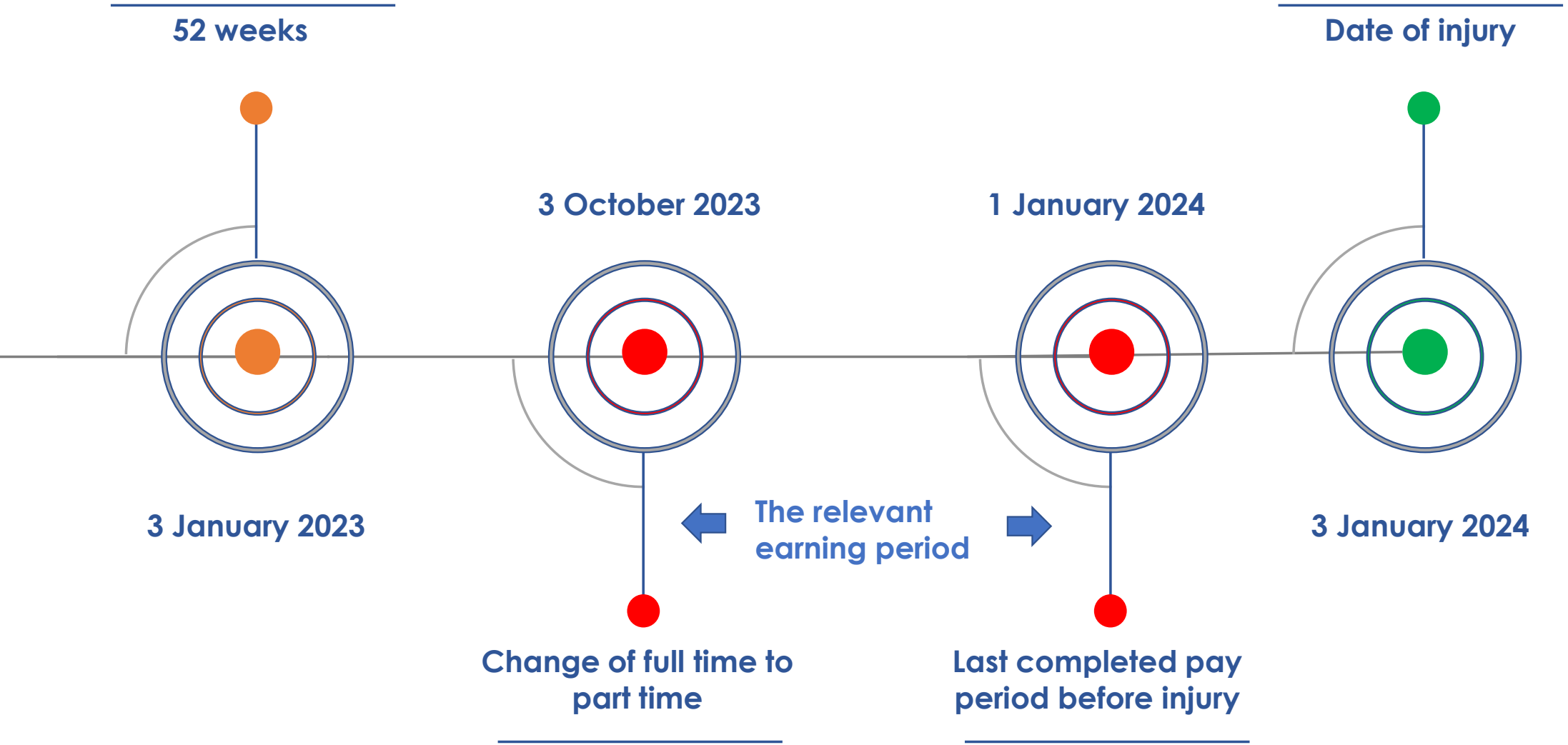
- Adjusting the relevant earning period

- **8C Adjustment for financially material change to earnings Workers Compensation Regulations 2016**

(1) The relevant earning period for a worker is to be adjusted in accordance with this clause if, during the unadjusted earning period, there was a change of an ongoing nature to the employment arrangement resulting in a financially material change to the earnings of the worker (for example, a change from full-time to part-time work).

(2) The relevant earning period is to be adjusted by excluding from the period any period before the change to the earnings of the worker occurred.

8C Adjustment for financially material change to earnings



PIAWE fundamentals (relevant earning period / time)

- Adjusting the relevant earning period
- **8E Adjustment for unpaid leave Workers Compensation Regulation2016**
- (1) The relevant earning period for a worker is to be adjusted in accordance with this clause if, during any **period of not less than seven consecutive calendar days** within the unadjusted earning period—
- (a) no earnings in the employment were paid or payable to the worker, and
- (b) the worker took a period of unpaid leave (***the unpaid leave period***) commencing on the first day of that consecutive period..

8E Adjustment for unpaid leave

PIAWE fundamentals (gross earnings / dollars)

A closer look at the Gross pre-injury earnings (dollars)

PIAWE fundamentals (gross earnings / dollars)

Minimum

- Clause 8AB of the Workers Compensation Regulation 2016 sets a minimum PIAWE of $155.00

Maximum

- PIAWE calculation is subject to section 34 of the Workers Compensation Act NSW 1987 which sets a maximum weekly compensation amount, currently $2423.60 per week as of 01/10/23. This is indexed every six months.

PIAWE fundamentals (gross earnings / dollars)

- **Schedule 3 of the Workers Compensation Act NSW 1987**
- **6 Meaning of "earnings"**
- (1) The **"earnings"** received by a worker in respect of a week means the amount that is the income of the worker received by the worker for work performed in any employment during the week.

PIAWE fundamentals (gross earnings / dollars)

- **Schedule 3 of the Workers Compensation Act NSW 1987**

- **6 Meaning of "earnings"**

- (2) The **"income"** of a worker does not include—
- (a) any minimum amount paid to a superannuation fund or scheme in respect of the week to avoid an individual superannuation guarantee shortfall, within the meaning of the *Superannuation Guarantee (Administration) Act 1992* of the Commonwealth, for the worker, or.

PIAWE fundamentals (gross earnings / dollars)

- **Schedule 3 of the Workers Compensation Act NSW 1987**

- **6 Meaning of "earnings"**

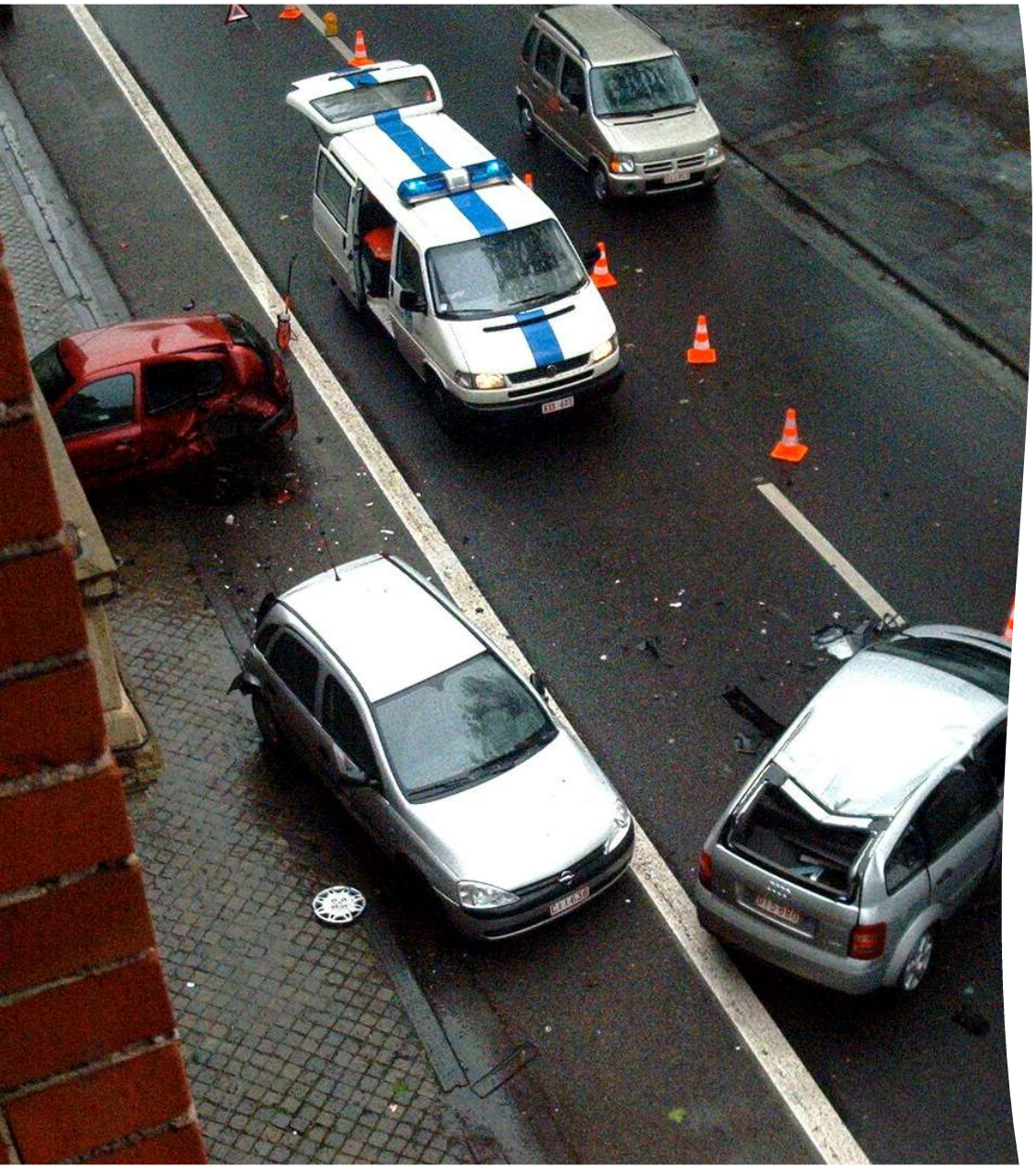
- (2) The **"income"** of a worker does not include—
- (b) the monetary value of any non-monetary benefit provided to the worker for the performance of work by the worker, or

PIAWE fundamentals (gross earnings / dollars)

- **Schedule 3 of the Workers Compensation Act NSW 1987**

- **6 Meaning of "earnings"**

- (3) However, the monetary value of a non-monetary benefit of a worker is to be included as part of the income of the worker for the purposes of the calculation of the weekly payments of compensation payable to the worker if the worker is not entitled to the use of the benefit.



PIAWE fundamentals (gross earnings / dollars)

- **Schedule 3 of the Workers Compensation Act NSW 1987**

- **6 Meaning of "earnings"**

- (2) The **"income"** of a worker does not include—
- (c) any payment in respect of loss of earnings under a scheme to which the workers compensation legislation relates or under any other insurance or compensation scheme, or

PIAWE fundamentals (gross earnings / dollars)

- **Schedule 3 of the Workers Compensation Act NSW 1987**

6 Meaning of "earnings"

(2) The **"income"** of a worker does not include—

(d) any payment made without obligation by the employer.

PIAWE fundamentals (gross earnings / dollars)

Member Capel in Taylor-Craig v Smartgroup Benefits Pty Ltd [2023] NSWPIC 137 at para 106

"Further, the respondent indicated that nothing in the clause constituted a promise or guarantee that he would receive any discretionary benefit. In other words, any payment was made at the respondent's discretion, and it was under no obligation to pay the bonus."

PIAWE fundamentals (gross earnings / dollars)

Taylor-Craig v Smartgroup Benefits Pty Ltd [2023] NSWPIC 137 at para 10”7

“Therefore, I am satisfied that the respondent was under no obligation to pay the bonus or discretionary payment to the applicant, and consistent with cl 6(2)(d) of Schedule 3 of the 1987 Act, the bonuses should be excluded from the calculation of the applicant’s PIAWE.

PIAWE fundamentals (gross earnings / dollars)

Schedule 3 of the Workers Compensation Act NSW 1987

10 Effect of Commonwealth jobkeeper scheme

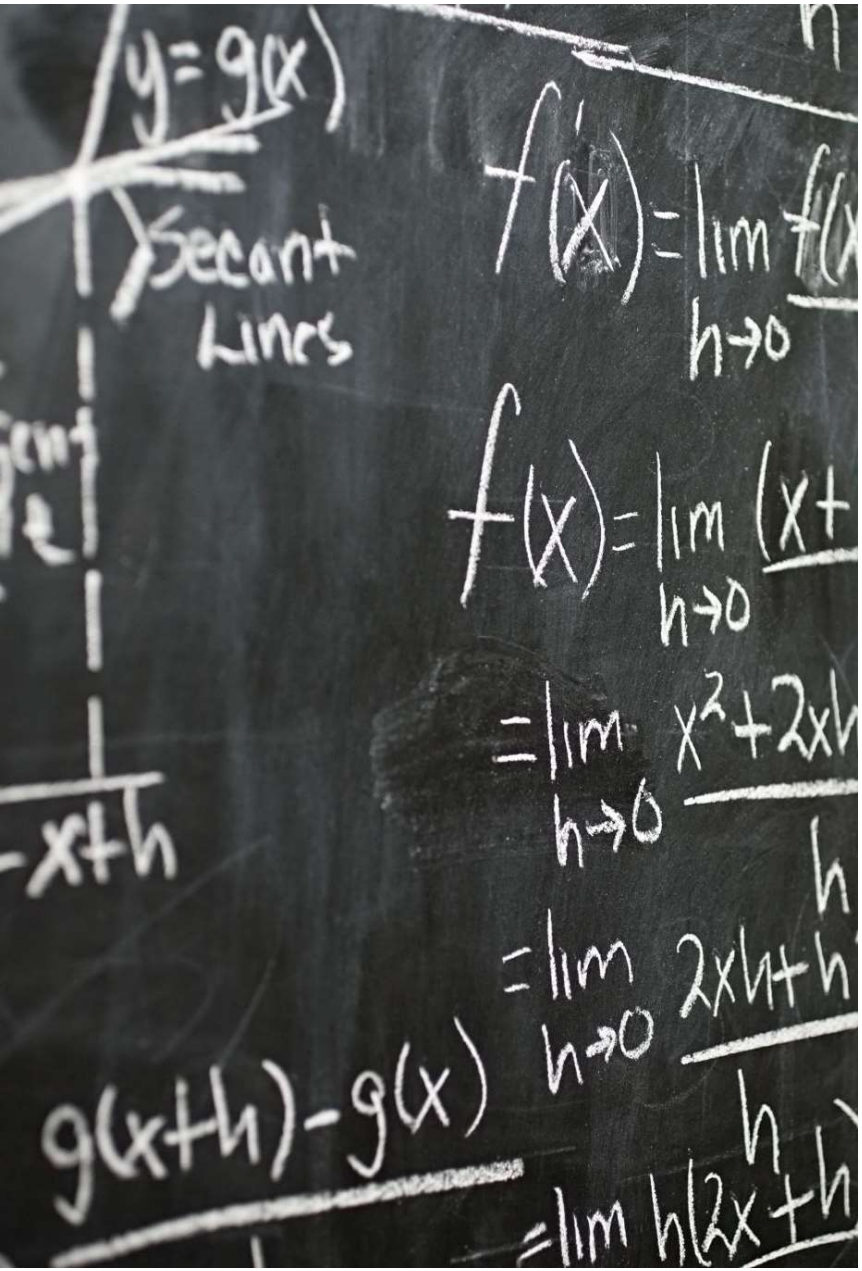
(2) For the purposes of determining the **"pre-injury average weekly earnings"** of a worker who received jobkeeper scheme payments during the relevant earning period for the worker, for each week to which a jobkeeper scheme payment applies, the worker's earnings in the employment to which the payment relates are taken to be the amount of income the worker is entitled to receive for work performed in the employment in that week.

PIAWE fundamentals (gross earnings / dollars)

Schedule 3 of the Workers Compensation Act NSW 1987

6 Meaning of "earnings"

(1) The **"earnings"** received by a worker in respect of a week means the amount that is the income of the worker received by the worker for work performed in **any employment during the week**.



PIAWE fundamentals

Basic examples

PIAWE example

Commenced employment

1 February 2019

Commencement of employment

PIAWE example

Date of injury

1 February 2019

Commencement of employment

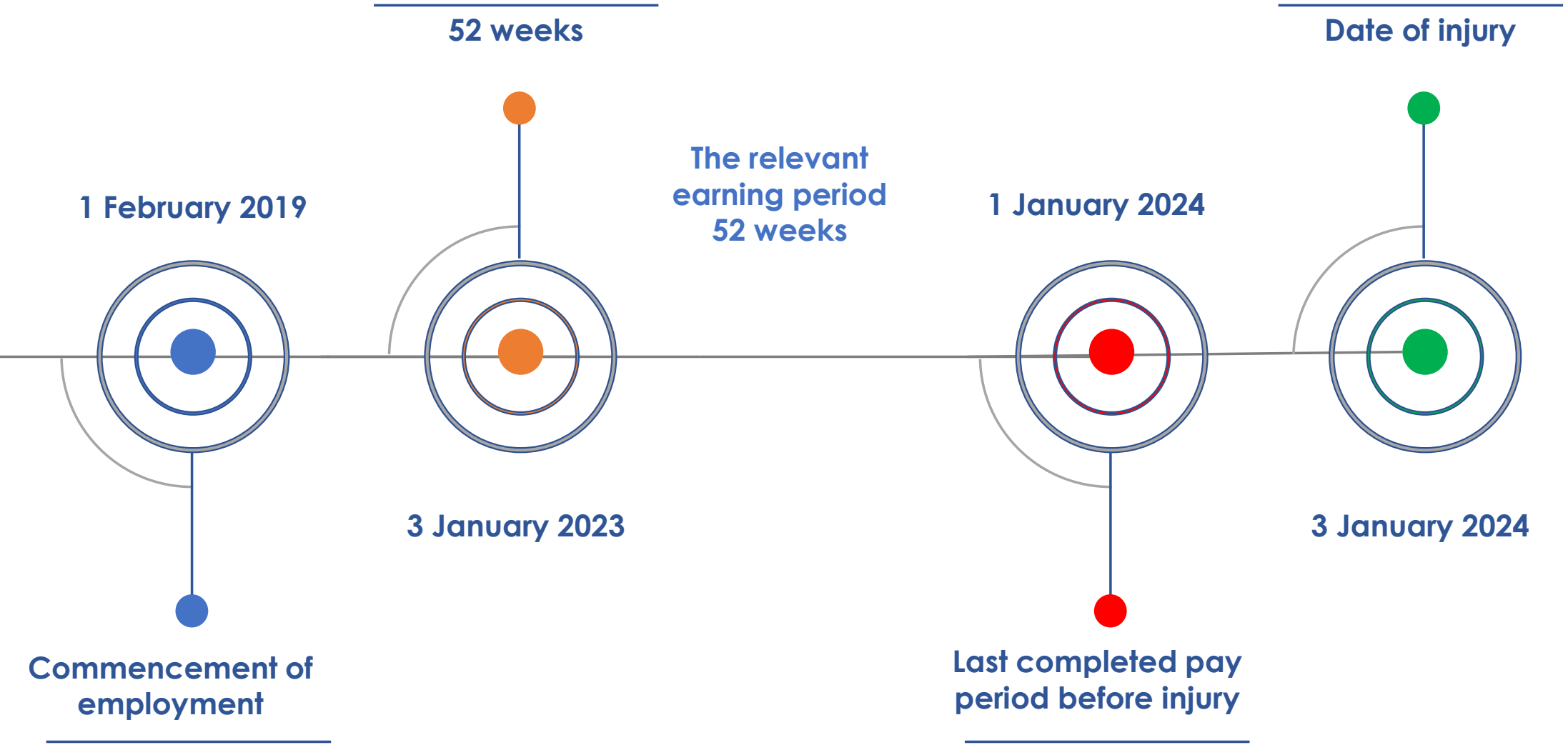
Date of injury

3 January 2024

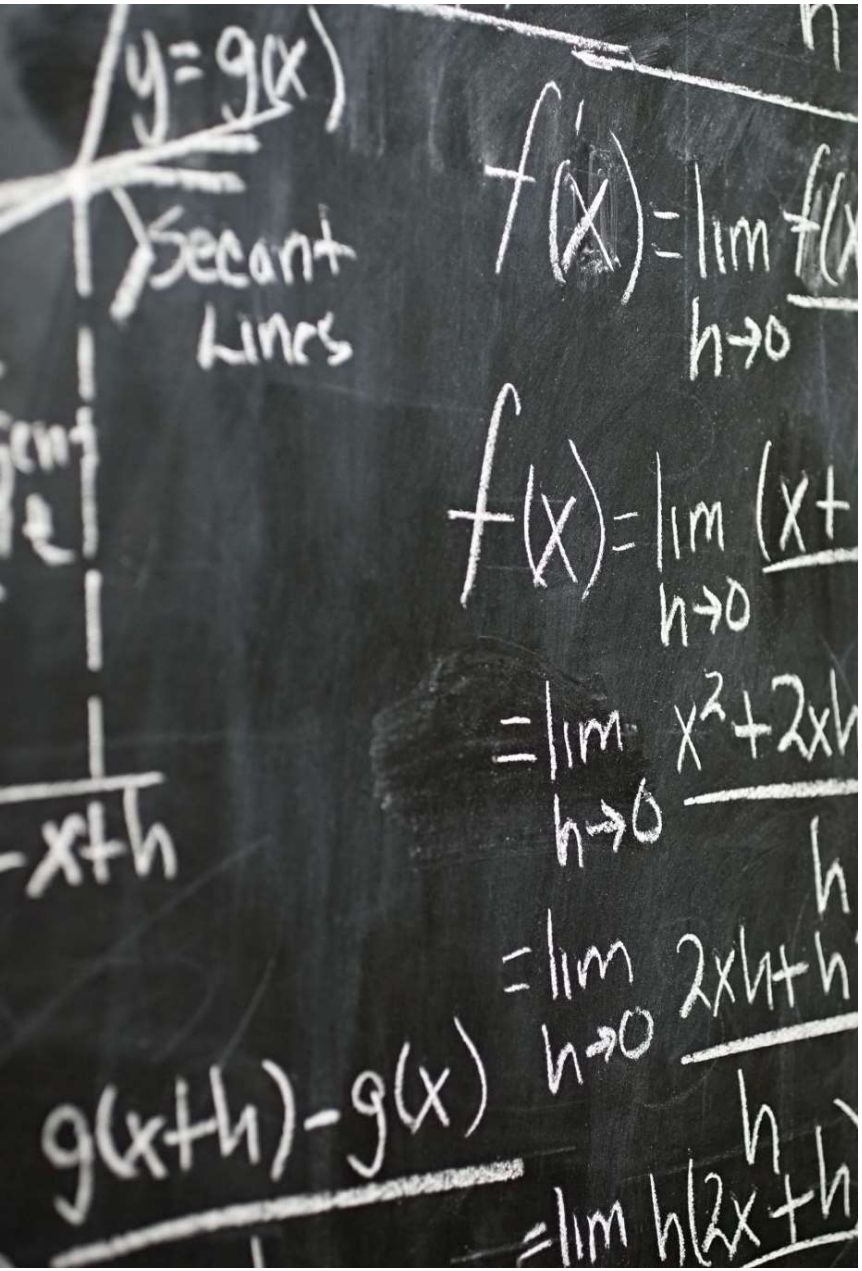
PIAWE example

Adjusted to last completed pay

PIAWE example



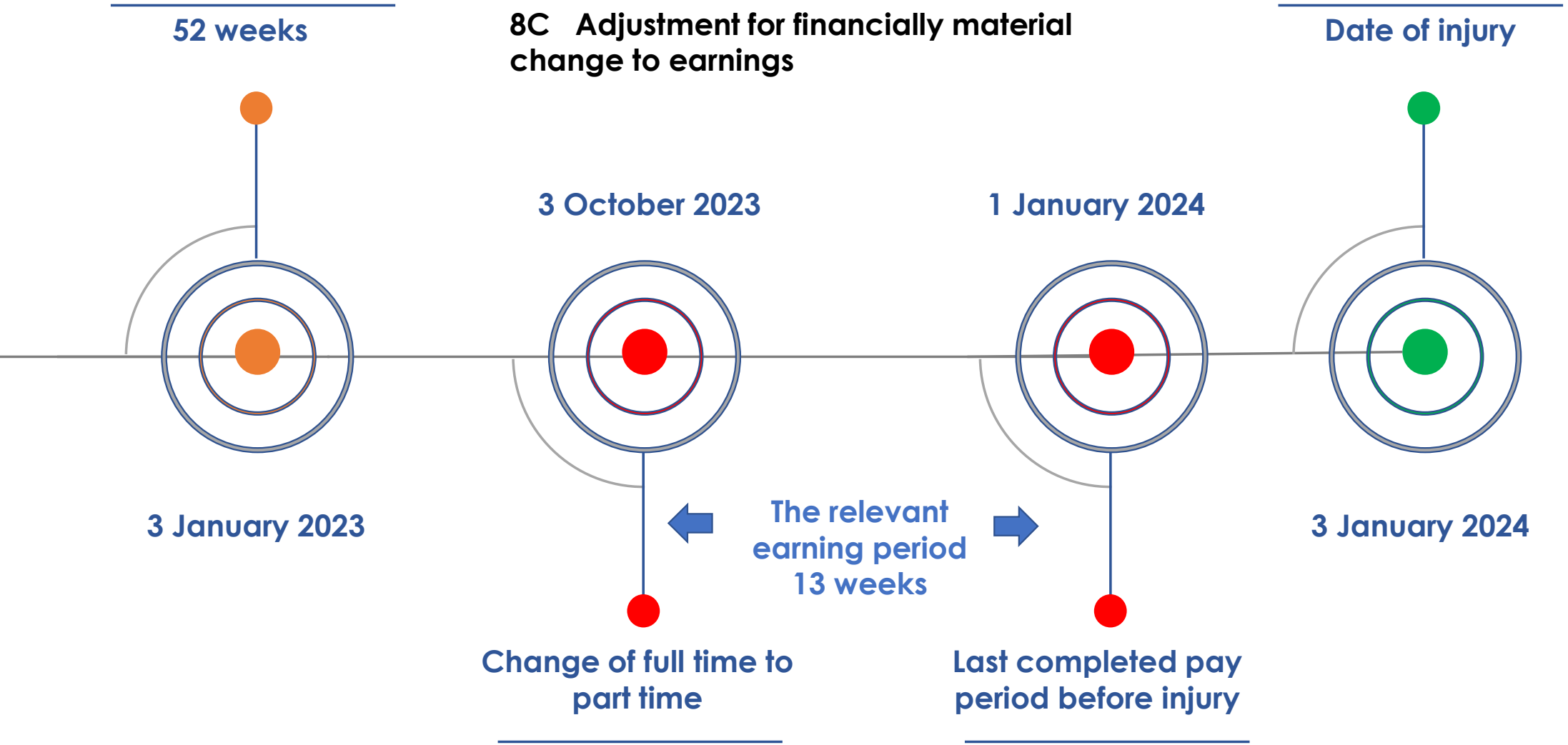
PIAWE example



PIAWE example

- Relevant earning period
- 52 weeks from 03 January 2023 to 1 January 2024
- Earnings $104,000.00
- $104,000.00 / 52
- PIAWE of $2000.00 per week

PIAWE example

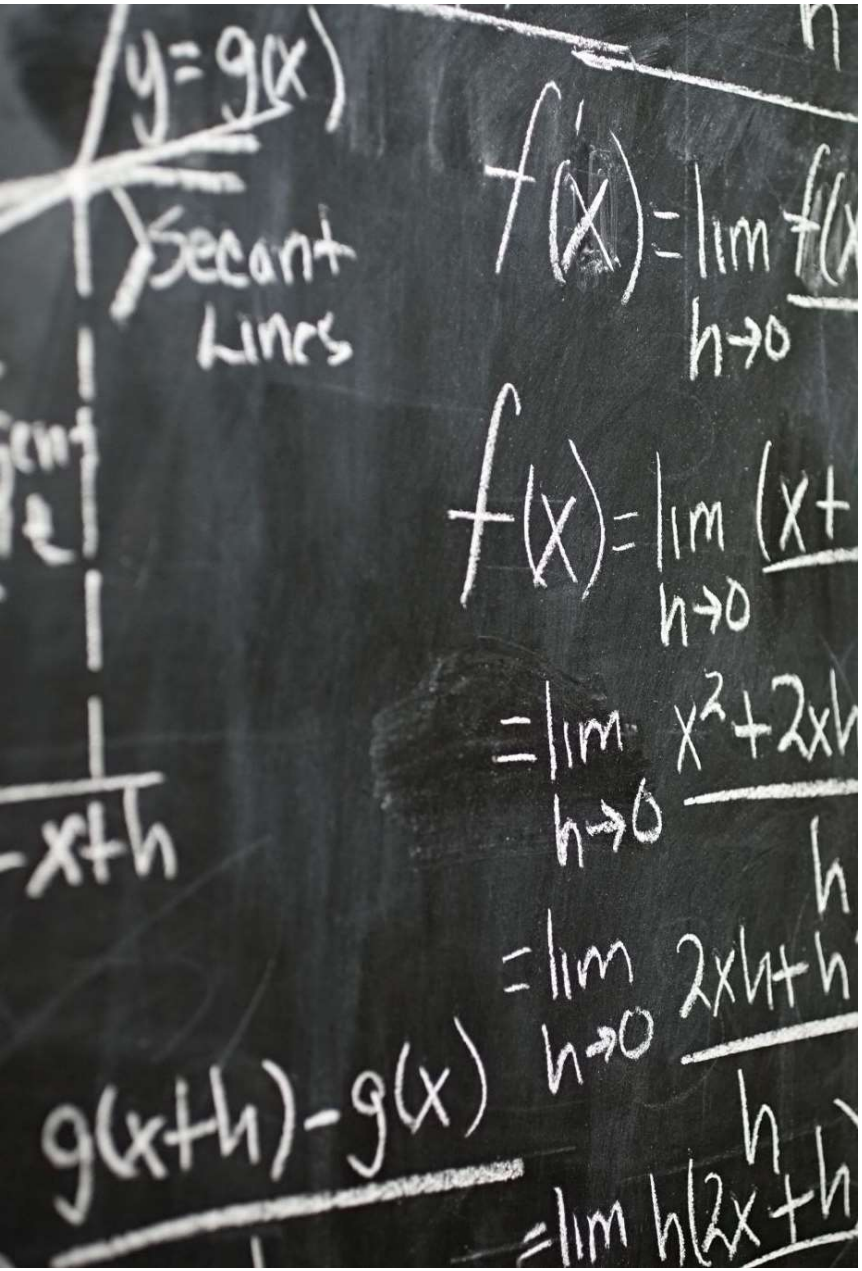


PIAWE example

52 weeks

8C Adjustment for financially material change to earnings

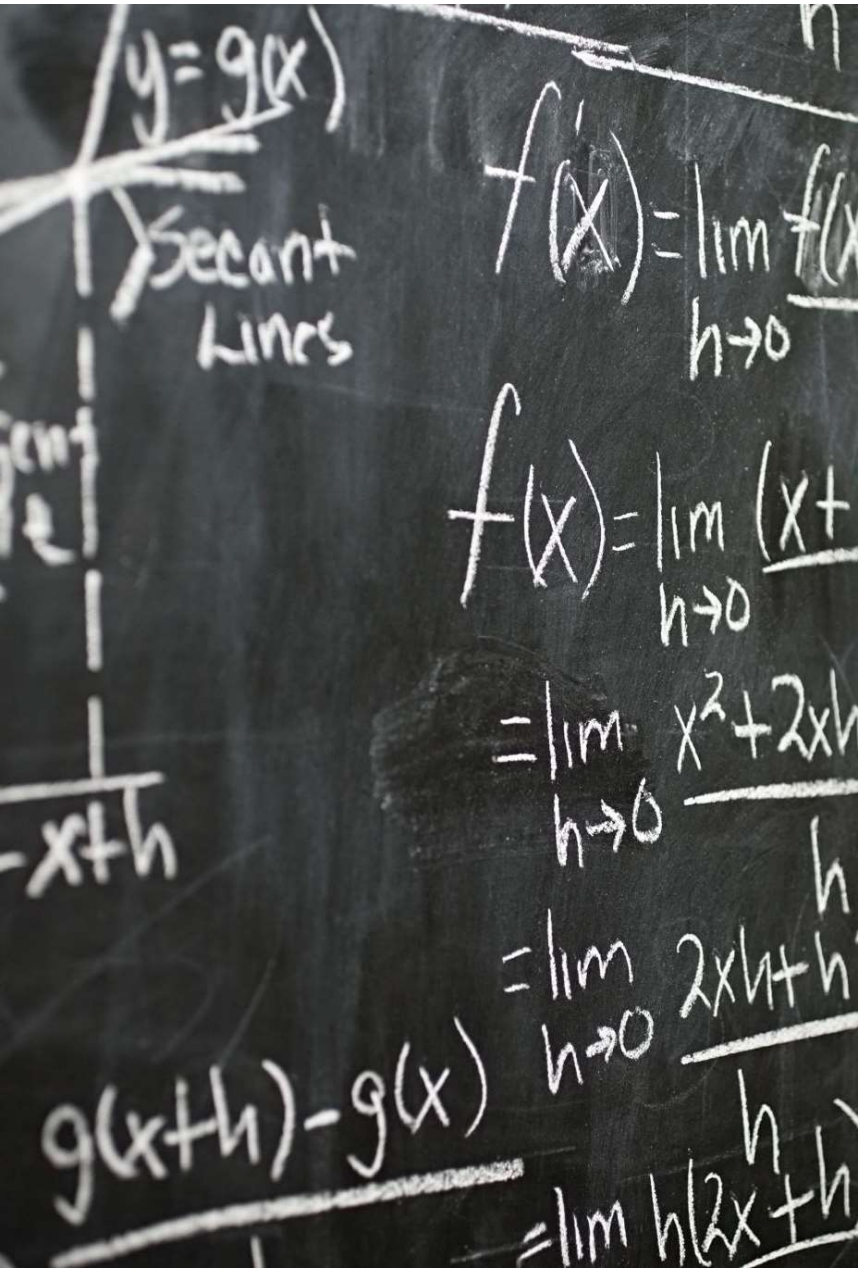
Date of injury



PIAWE example

- PIAWE over 52 weeks was $2000.00 per week
- Relevant earning period is now adjusted because of ongoing change from full time to part time
- 13 weeks from 03 October 2023 to 1 January 2024
- Earnings $13,000.00
- $13000/13 weeks
- PIAWE of $1000.00 per week

8E Adjustment for unpaid leave—
Schedule 3, clause 2(3)(a) of 1987 Act



PIAWE example

- PIAWE over 13 weeks was $1000.00 per week
- Relevant earning period is now adjusted because of three week unpaid leave from 7 November 2023 to 27 November 2023
- 13 weeks from 03 October 2023 to 1 January 2024 reduced to 10 weeks
- Earnings $13,000.00
- $13000/10 weeks
- PIAWE of $1300.00 per week

Walker

We Listen, We Understand, We Resolve

PIAWE in the PIC

Some recent decisions and our insights

Ongoing financial material changes

Our experience is that an hourly rate increase during the 52 weeks is not treated as an ongoing financial material change adjusting the relevant earning period

When there is an hourly rate increase, all the income, both before the increase and then after, are averaged over the whole 52 weeks

Cain v Tamwort Aboriginal Medical Service [2021] NSWPIC 193

Facts

- **Cain v Tamworth Aboriginal Medical Service [2021] NSWPIC 193**
- **Facts**
- Mr Cain employed more than one year before injury
- 25/06/20 hourly rate increase from $24.00 per hour to $26.00 per hour
- 04/08/20 date of injury
- Insurer calculates piawe over 52
- Approx $920.00 per week
- Mr Cain claimed that his PIAWE should be calculated off the $26.00 per hour rate only leaving $988.00 per week

Cain v Tamworth Aboriginal Medical Service [2021] NSWPIC 193

8C Adjustment for financially material change to earnings

(1) The relevant earning period for a worker is to be adjusted in accordance with this clause if, during the unadjusted earning period, there was a change of an ongoing nature to the employment arrangement resulting in a financially material change to the earnings of the worker (for example, a change from full-time to part-time work).

(2) The relevant earning period is to be adjusted by excluding from the period any period before the change to the earnings of the worker occurred.

Cain v Tamworth Aboriginal Medical Service [2021] NSWPIC 193

Member Wright at para 26

- "Wages or other consideration are a condition of the contract of service. A change to the hourly rate of pay is a change in the wages paid to the worker. Hence, a change in the hourly rate of pay is a change of an ongoing nature to the employment arrangement.

Cain v Tamworth Aboriginal Medical Service [2021] NSWPIC 193

Member Wright's decision (para 37)

- "Accordingly, I find that the change in the applicant's hourly rate of pay from $24 to $26 with effect from 25 June 2020 was, pursuant to regulation 8C, a change of an ongoing nature to the employment arrangement resulting in a financially material change to the earnings of the applicant. Pursuant to regulation 8C(2) the relevant earning period is from 25 June 2020 to 3 August 2020. I accept the applicant's submission that the payslips for this period disclose that the applicant's PIAWE were $988, being $26 per hour for a 38 hour week."

Secretary, Department of Communities and Justice v Farrugia [2023] NSWPICPD 75 (28 November 2023)

- Injury 4 May 2022
- Insurer calculates PIAWE using 52 weeks relevant earning period
- On 28 March 2022 Ms Farrugia changed and progressed from 'Correctional Officer, Level 02' to 'Correctional Officer, FST CLSS Level 01'
- The relevant Award provided "for Correctional Officers who have completed twelve (12) months service on the 2nd year rate to progress to the rank of First Class Correctional Officer, subject to [certain] criteria"

Secretary, Department of Communities and Justice v Farrugia [2023] NSWPICPD 75 (28 November 2023)

- The base rate of pay for a 'Correctional Officer, Level 02' was $68,246 per annum
- The base rate for 'Correctional Officer, FST CLSS Level 01' was $72,077.
- Ms Farrugia argued that this classification change along with the pay increase activated clause 8C
- At Conciliation Arbitration Member Wynyard agreed

Secretary, Department of Communities and Justice v Farrugia [2023] NSWPICPD 75 (28 November 2023)

The Insurer appealed the decision on the following grounds:

Ground 1 alleges failure to give adequate reasons (in determining that clause 8C applied). Ground 2 alleges the Member erred in finding:

The classification change from Correctional Officer, Level 02 to Correctional Officer, FST CLSS Level 01 constituted a change within the meaning of cl 8C.

Secretary, Department of Communities and Justice v Farrugia [2023] NSWPICPD 75 (28 November 2023)

The Award was contractual or a contractual guarantee of a financially material change to the earnings of the respondent.

Secretary, Department of Communities and Justice v Farrugia [2023] NSWPICPD 75 (28 November 2023)

The sense of the appeal seems to be that clause 8C shouldn't be activated as the insurer/employer took the view it was just the normal operation of the Award under which Ms Farrugia was employed?

Secretary, Department of Communities and Justice v Farrugia [2023] NSWPICPD 75 (28 November 2023)

Acting Deputy President Michael Perry at para 44

'The issue appears to largely boil down to what "employment arrangement" means. This requires consideration of the text, context and purpose of the matter to be interpreted.'

Secretary, Department of Communities and Justice v Farrugia [2023] NSWPICPD 75 (28 November 2023)

Acting Deputy President Michael Perry at para 45

The statute authorising cl 8C, the 1987 Act, provides some assistance in the interpretation of it. Schedule 3, cl 2(3) relevantly provides "for the adjustment of the relevant earning period ... (a) to take into account any period of unpaid leave or other change in earnings circumstances in the employment ..." (emphasis added). The emphasised words are consistent with the statute contemplating regulations in many and varied situations where there is a change in earnings circumstances in the employment, and likely in a more general rather than limited way.

Secretary, Department of Communities and Justice v Farrugia [2023] NSWPICPD 75 (28 November 2023)

Acting Deputy President Michael Perry at para 46

'When cl 8C provides for an adjustment where "there was a change of an ongoing nature to the employment arrangement", it is difficult to see how the legislative intention would be to limit the type of change – except of course in the way spelt out in Sch 3, cl 2(3)(a) ("earnings circumstances in the employment") and in cl 8C ("of an ongoing nature to the employment arrangement resulting in a financially material change to the earnings")'

Secretary, Department of Communities and Justice v Farrugia [2023] NSWPICPD 75 (28 November 2023)

Acting Deputy President Michael Perry at para 54

…**"employment arrangement" in my opinion refers to the nature of the employment relationship, that is, whether it be, for example, by contract, award or other arrangement, and includes the various ingredients of the arrangement, which include other arrangements within the purview of that arrangement including, for example, terms or clauses or understandings (of contracts, agreements or awards or other arrangements)…**

Secretary, Department of Communities and Justice v Farrugia [2023] NSWPICPD 75 (28 November 2023)

Acting Deputy President Michael Perry at para 81

‘My redetermination is that the change in the respondent’s employment classification under the Award from Correctional Officer, Level 02 to Correctional Officer, FST CLSS Level 01 did constitute a change of an ongoing nature to the employment arrangement resulting in a financially material change to her earnings within the meaning of cl 8C.’

Insights gained concerning ongoing financial material changes

An ongoing increase to an hourly rate of pay can adjust the relevant earning period

This will often lead to an increase in the overall calculated PIAWE

Unpaid leave

Our experience is that insurers often don't apply unpaid leave for casual workers

This inevitably leads to a reduced PIAWE outcome

Wake v State Emergency Services [2022] NSWPIC 50

- **8E Adjustment for unpaid leave—Schedule 3, clause 2(3)(a) of 1987 Act**

- (1) The relevant earning period for a worker is to be adjusted in accordance with this clause if, during any period of not less than seven consecutive calendar days within the unadjusted earning period—

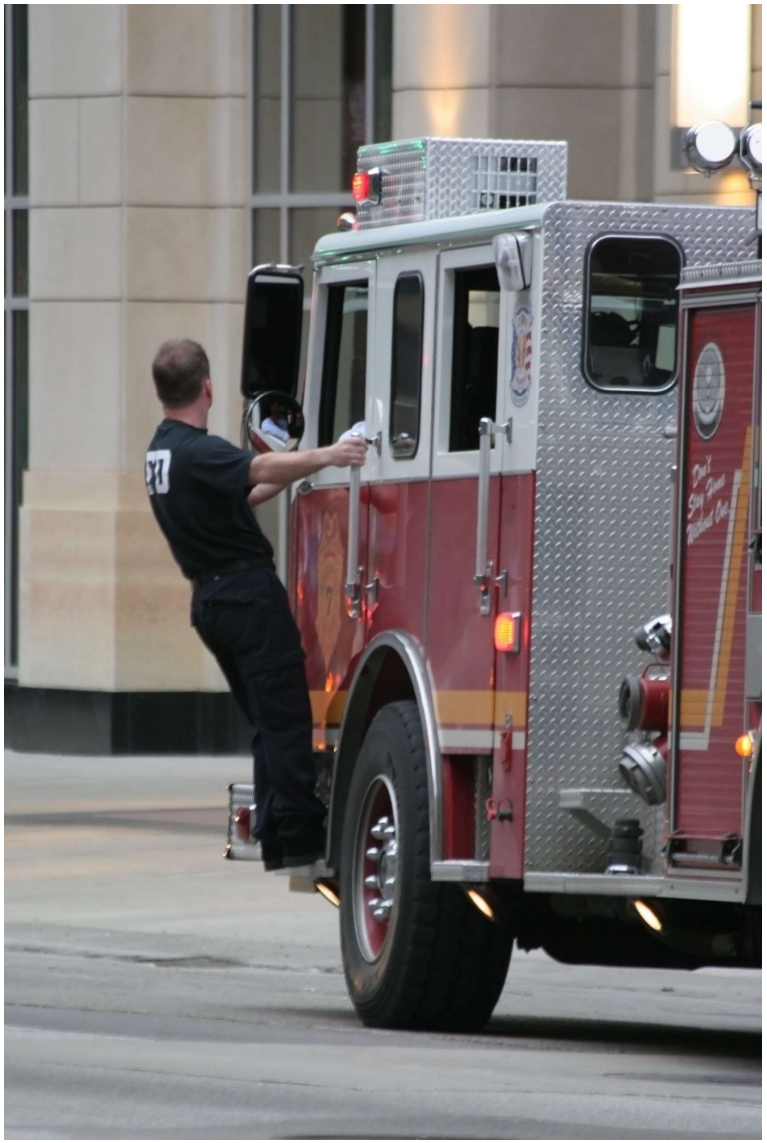
- (a) no earnings in the employment were paid or payable to the worker, and

- (b) the worker took a period of unpaid leave (***the unpaid leave period***) commencing on the first day of that consecutive period..

Wake v State Emergency Services [2022] NSWPIC 50

Member Wright comments at para 47

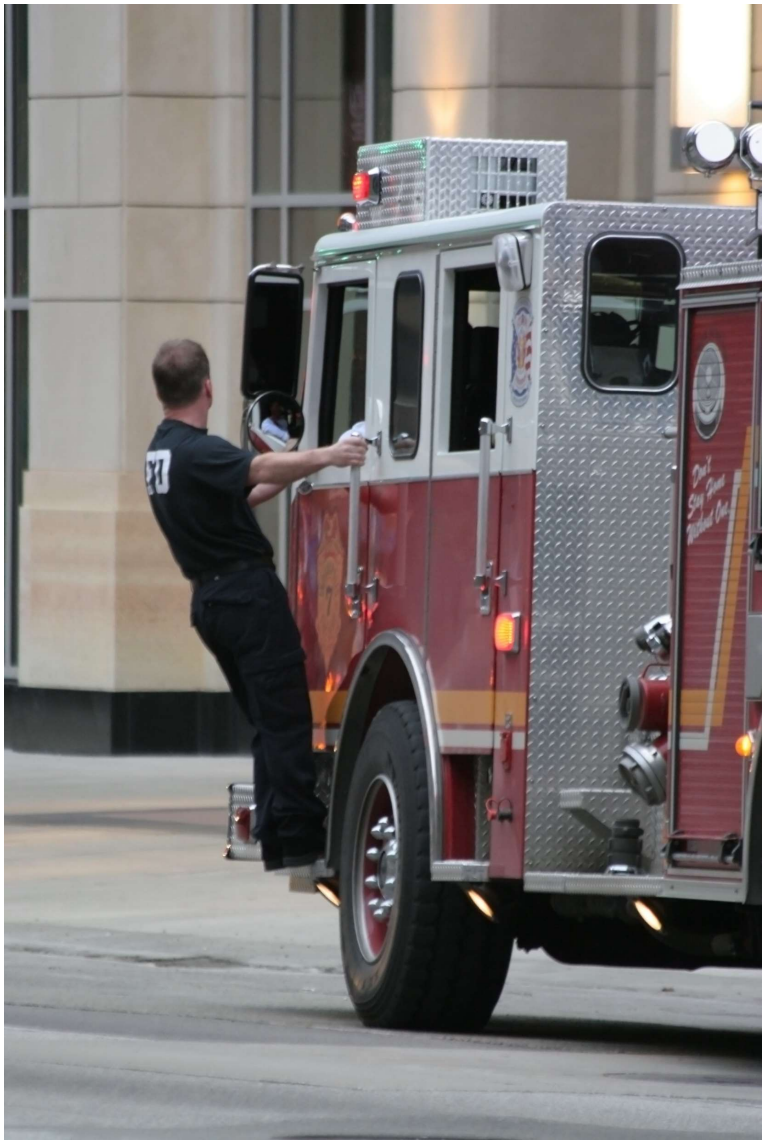
- 47. This outcome, in my view, would not be anomalous with other not uncommon working situations, such as casual, seasonal or piecemeal workers who may experience unfortunate periods of not receiving earnings in any particular week. As a simple example, a casual worker, who earns $500 gross per week for work performed in a particular week, may work 26 weeks out of the relevant 52 weeks, for example they work every other week. If earnings received are regarded as "0" for weeks not worked and average weeks include weeks not worked, then the PIAWE calculation results in $250 gross per week. The interpretation that I have found in my view avoids such anomalous situations.



Field v Secretary, Department of Education [2023] NSWPIC 214

Member Sweeney at para 43

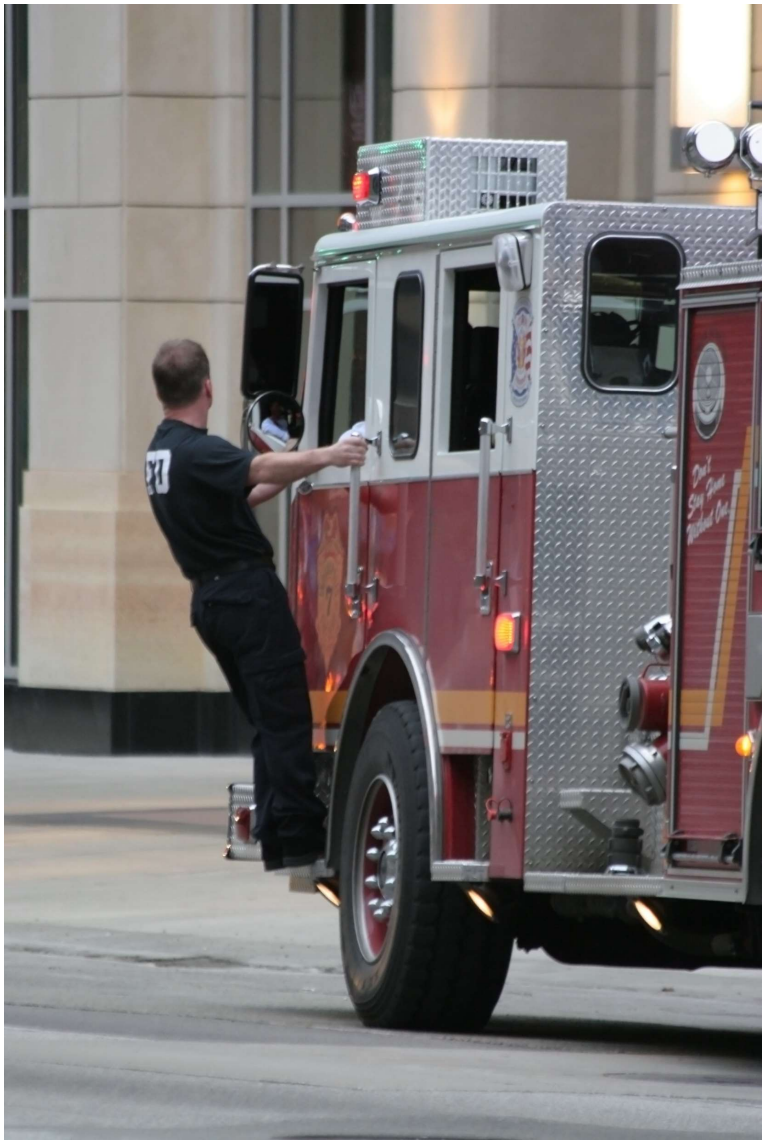
- In my opinion none of the clauses assist the applicant's case. Uninstructed by the reasoning in *Wake,* I would hold that the methodology adopted by the respondent in calculating PIAWE complied with the statutory scheme. While, in my opinion, the outcome in that case does not sit comfortably with the language of Schedule 3, I do not conclude that it is plainly wrong. In the circumstances, it is appropriate that I follow it, pending determination of the issue by the Presidential unit. Accordingly, I hold that the respondent has erred in its calculation of PIAWE



Nounou v Allstaff Australia Sydney Pty Limited [2023] NSWPIC 234

Member Burge para 16

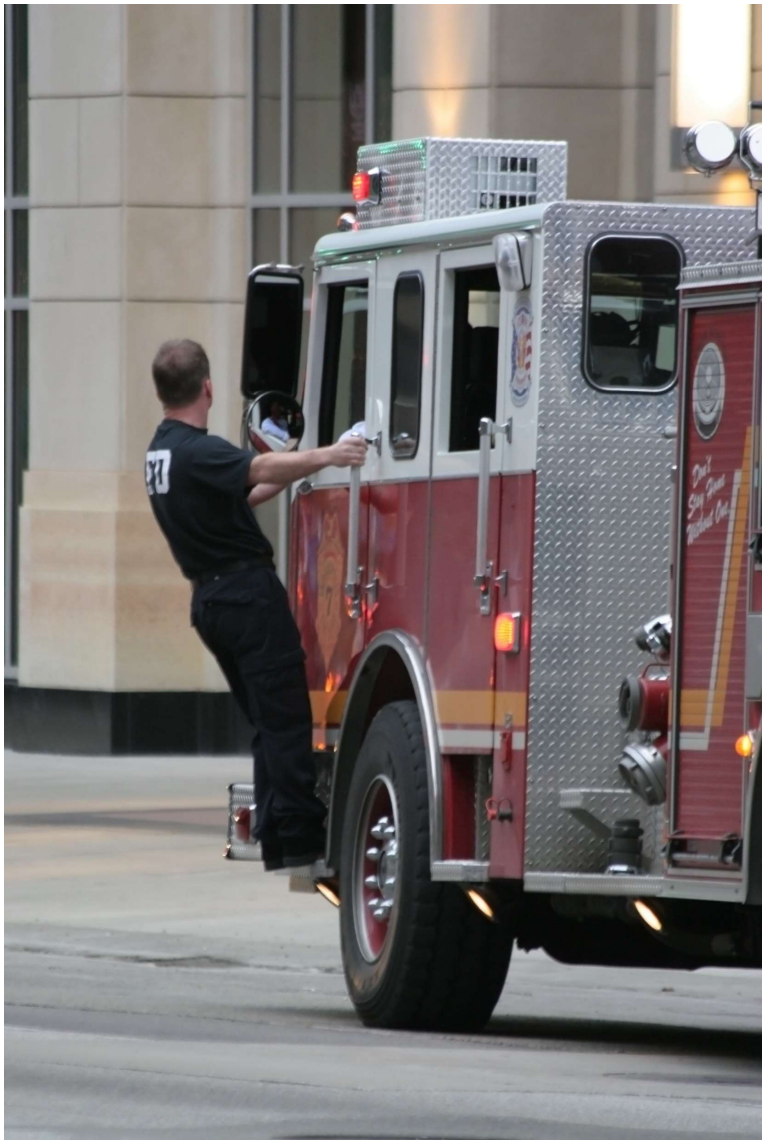
- For the respondent, Mr Grant conceded, quite appropriately, the applicant was on leave in accordance with agreed fact 7. He also conceded that in the period of unpaid leave, the applicant was not paid wages. He nevertheless relied upon paragraph 3 of the statement of Mr Wilford, state manager of the respondent and particularly, paragraph 3, where Mr Wilford stated:“3. As a casual employee, Mr Nounou is paid a higher rate of pay by way of casual loading to compensate him for the inconsistent nature of employment and payment by the hour for entitlements such as annual leave, personal leave and public holidays that permanent employees are entitled to.”



Nounou v Allstaff Australia Sydney Pty Limited [2023] NSWPIC 234

Member Burge para 17

- I have little difficulty accepting the accuracy of Mr Wilford's statement; however, it does not obviate the operation of cl 8E of the 2016 Regulation. The respondent having appropriately conceded the applicant was on unpaid leave for a period of not less than seven consecutive days during which he was not paid any income by it, cl 8E of the 2016 Regulation is in my view operable. Nothing in the clause, notwithstanding Mr Wilford's observations, excludes casual employees from its operation.



Insights gained concerning unpaid leave

Casual workers may be entitled to have leave at least 7 days in length, treated as unpaid leave

Applying this approach will usually lead to an increased PIAWE

When workers compensation payments are made for a prior claim, during the relevant earning period

Insurers often exclude the weekly compensation paid but include the weeks it was paid when calculating PIAWE

This inevitably leads to a reduced PIAWE outcome

Nitchell v Secretary (Department of Communities and Justice) [2022] NSWPIC 625

The facts

- Ms Nitchell sustained an injury on 17 March 2022.
- The insurer used a full 52 weeks prior to the injury to calculate PIAWE as the relevant earning period time for calculation.
- Over the 52 weeks of the relevant earning period time, Ms Nitchell received $88,116.76 in payments.
- During the 52 weeks of the relevant earning period, Ms Nitchell had received 14 weeks of weekly compensation for a prior workers compensation injury.
- The 14 weeks were a mix of no capacity for work and capacity for light duties with ‘make up’ pay paid in that period returning to pre-injury duties 21 February 2022

Nitchell v Secretary (Department of Communities and Justice) [2022] NSWPIC 625

The facts

- The workers compensation payments in these 14 weeks totalled $16,162.23.
- The insurer excluded/removed the workers compensation payments when calculating the earnings leaving $71,954.53 gross earnings correctly consistent with Clause 6(2)(c) of the Schedule.
- The insurer divided the $71,954.53 by a full 52 weeks to calculate Ms Nitchell's PIAWE
- The insurer calculated the PIAWE to be $1,383.74 per week

- **Schedule 3 of the Workers Compensation Act NSW 1987**

- **6 Meaning of "earnings"**

- (2) The **"income"** of a worker does not include--…
- (c) any payment in respect of loss of earnings under a scheme to which the workers compensation legislation relates or under any other insurance or compensation scheme, or

Nitchell v Secretary (Department of Communities and Justice) [2022] NSWPIC 625

Member Wynyard at para 68

- "Thus **an apparent anomaly arises** – cl (6) provides that the period when compensation and reduced earnings were paid is to be excluded from the PIAWE (as the income is not "earnings") but cl(2)(2) requires an insurer to apply the period of 52 weeks ending immediately before the date of the subject injury in calculating the PIAWE. The only lawful adjustment to the period is pursuant to the regulations which "may" be made, which brings us back to regulation 8C."

Nitchell v Secretary (Department of Communities and Justice) [2022] NSWPIC 625

Member Wynyard at para 73

- "…This **lacuna in the scheme** has resulted in the insurers applying the whole period notwithstanding that part of it related to the receipt of income which was expressly excluded from the calculation. This is **unconscionable**."

Nitchell v Secretary (Department of Communities and Justice) [2022] NSWPIC 625

Member Wynyard at para 83

- In Bermingham v Corrective Services of NSW McHugh JA said at 203:
- "[It] is not only when Parliament has used words inadvertently that a court is entitled to give legislation a strained construction. **To give effect to the purpose of the legislation, a court may read words into a legislative provision if by inadvertence Parliament has failed to deal with** an eventuality required to be dealt with if the purpose of the Act is to be achieved."

Nitchell v Secretary (Department of Communities and Justice) [2022] NSWPIC 625

Member Wynyard at para 88

- "… read the words "immediately before the date of injury" in Schedule 3(2)(2) as meaning "immediately before the date of injury, or as adjusted where a worker receives income as defined by Clause 6((2)(c) hereof."

Nitchell v Secretary (Department of Communities and Justice) [2022] NSWPIC 625

Member Wynyard's decision

- "86. The insurer contravened the provisions of Schedule 3(6)(2)(c) when it included in the calculation of the PIAWE the period when the applicant had been in receipt of compensation for her unrelated injury.

- 87. The 52 week period provided for the calculation of the PIAWE is adjusted by deducting the 14 weeks to which Schedule 3(6)(2)(c) applied.

Secretary, Department of Communities and Justice v Nitchell [2023] NSWPICPD 36

The insurer raised one ground of appeal

- "The Member erred in his interpretation of Schedule 3 of the *Workers Compensation Act 1987* ... in that the Member determined that the relevant earning period could be adjusted by deducting 14 weeks by applying the definition of earnings from Schedule 3(6)(2)(c).

Secretary, Department of Communities and Justice v Nitchell [2023] NSWPICPD 36

DP Wood appeal decision para 75

- … it was not open to the Member to read into the clause a provision which adjusted the relevant earning period. The clause, and the context in which the clause was expressed, did not infer any such intention but rather made provision for the circumstances in which the regulations could permit the relevant earning period to be adjusted.

Secretary, Department of Communities and Justice v Nitchell [2023] NSWPICPD 36

DP Wood re-determined para 86

- … I note that, at the oral hearing, the parties were given the opportunity to address as to how the relevant earning period should be adjusted if reg 8C applied. Both parties were in agreement that, in those circumstances, the period from 18 March 2021 to the respondent's return to work after the earlier injury should be excluded

Secretary, Department of Communities and Justice v Nitchell [2023] NSWPICPD 36

DP Wood re-determined para 87

- Consequently, as the change of an ongoing nature to the respondent's earnings, which would have continued but for the second injury, occurred on 21 February 2022, the respondent's relevant earning period as adjusted is from 21 February 2022 until 17 March 2022…

Secretary, Department of Communities and Justice v Nitchell [2023] NSWPICPD 36

Reliance on 8C

- DP Wood has similarly relied on clause 8C in another appeal matter of **Secretary, Department of Communities and Justice v Pell [2023] NSWPICPD 19**

- DP Wood referred to 8C favourably in**Secretary, Department of Communities and Justice v Stewart [2023] NSWPICPD 35** but on the facts preferred clause 8C

Insights gained when workers compensation payments are made for a prior claim during the relevant earning period

Consideration should be given to applying clause 8C and return to pre-injury duties at end of the prior claim as an ongoing financially material change

Applying this approach will usually lead to an increased PIAWE

- Questions?

Independent
Review Office

ILARS Update

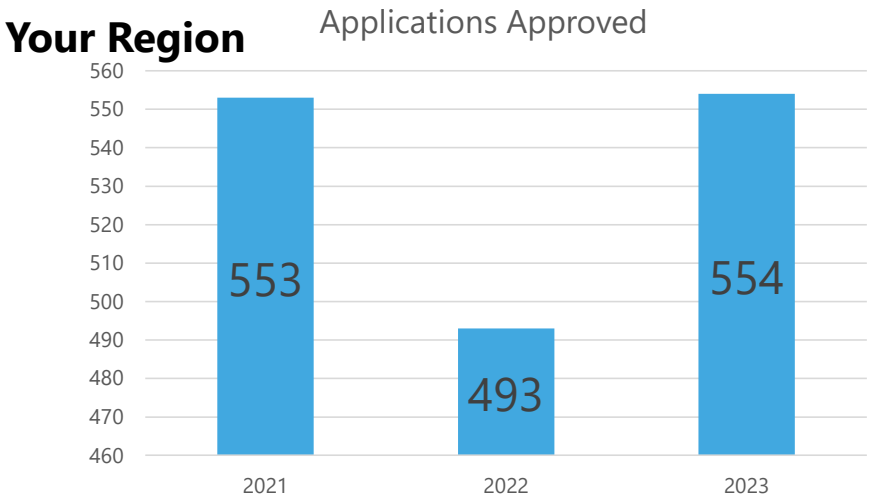
Michael Vella
Manager ILARS

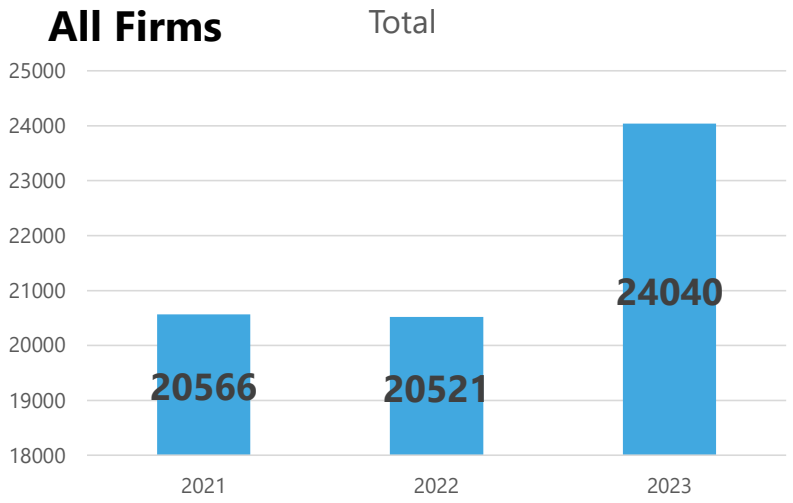
ILARS Update

- ILARS – key statistics
- Applications and invoices – how to improve efficiency
- Right to reviews under the ILARS Funding Guidelines
- Changes to ILARS Processes
  - Automated Updates
  - Centralised email management

Applications Approved

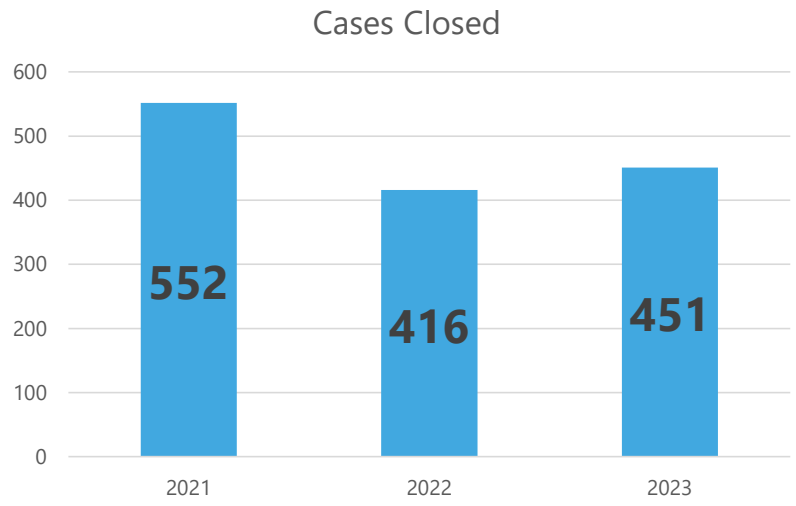
Your region includes North Coast and Queensland.



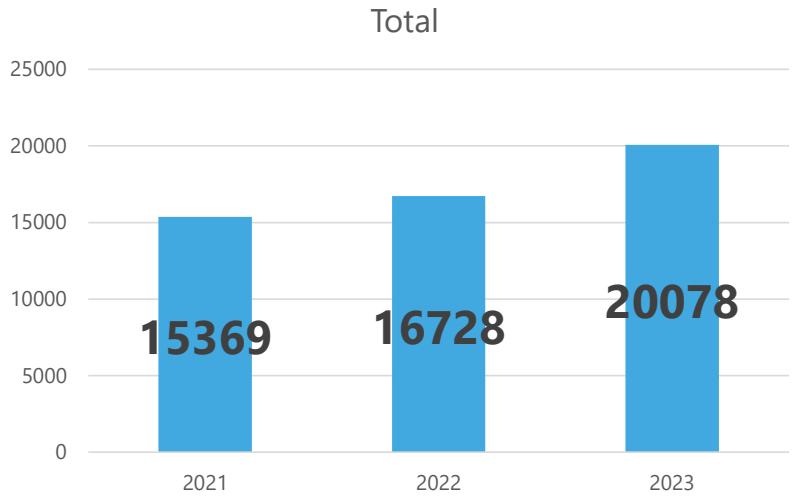


Closed Cases

Your Region



All Firms



Cases Closed continued

Year	Total of All Closed Matters in Region
2021	3.6%
2022	2.5%
2023	2.2%

Stages of Cases

Stages	Number of cases	Percentage	% all Firms
Stage 1	264	31%	30%
Stage 2	395	47%	50%
Stage 3	164	19%	19%
Stage 4	8	1%	1%
Stage 4 Conditional	14	2%	1%
Grand Total	845	100%	100%

Injured persons in your Region

	Hearing	Lower extremity	Psychiatric and psychological disorders	The spine	Upper extremity	Grand Total
Your Regions	14	223	340	343	321	1241
All other Regions	1084	465	833	627	802	3811
Total	1098	688	1173	970	1123	5052
AL's in your region	1%	32%	29%	35%	29%	25%
-Excluding Hearing loss						31%

Where do your injured workers come from

Row Labels	Hearing	Lower extremity	Psychiatric and psychological disorders	The spine	Upper extremity	Grand Total
North Coast	12	196	316	302	294	1120
Queensland	2	27	24	41	27	121
South Coast		5	9	15	9	38
Tamworth		6		13	8	27
Hunter			4	5	8	17
Other Region	0	16	43	19	26	104
Total	14	250	396	395	372	1427

Application for Grants issues - 2021-23

Issue	All Regions		Your Region	
	Number	%	Number	%
Request for further information	4977	8%	111	7%
Remind Request for further information	900	18%	13	12%
Average time to approve application - All accepted applications (Days)	4.5		4.3	
Where NO request made for further information (Days)	3.0		3.1	
Where a request is made for further information (Days)	24.9		23.0	

Applications

- Supporting material
- Explanation of the merit/arguable case of a request for funding
- Details of insurer's response to claims. Be Mindful of the timeframes for responses to claims by Insurers.
- Requests for Updates
- Correct ILARS reference in the subject line in correspondence
- Accurate details in application for funding
- Attaching PDF's, not links

Invoices - 2021-23

Issue	All Regions		Your Region	
	Number	%	Number	%
Invoices processed from law firms	53237		2933	6%
Number of cases with invoice errors	12797	24%	836	29%
An invoice may have more than one issue and may be returned more than once				
Grant related issues	11453	22%	310	11%
Invoice related issues	5395	10%	199	7%
Issues with MRP invoices	2674	3%	78	2%

Recurring Themes

- Unique tax invoice number
- Only one event number for costs per Tax invoice can be used (except for appeals)
- Date Missing or incorrect
- ILARS reference incorrect or missing
- GST added to disbursements

Recurring Themes continued

- Incorrect amounts
- Copies of medico-legal reports
- Specify the Doctor, date of examination and category of report
- EFT details
- Format –PDF is required
- Invoices do not tally

Invoices in Your Region - Requests for amendment

Grant related errors	
Disbursements exceed approved funding	23%
Legal cost exceed approved funding -	19%
Supporting documents not supplied	55%
Invoice related errors	
No unique invoice number-	13%
Wrong amount -	41%
Wrong GST -	15%

Impact of Invoice errors

Causes a failure in the payment system

Multiple interactions

Causes delay in the payment of the invoice

Reviews of Funding Decisions under the ILARS Guidelines

Clause 2.12 of the Funding Guidelines sets out the review process

- 2.12.1 When the IRO will review a funding decision
- 2.12.2 What a review will consider
- 2.12.3 How a review will be conducted
- 2.12.4 Possible outcomes of a review of a funding decision
- 2.12.5 Final Review

Example of review - Request for Stage 2 Funding

- AL submits the following to the PL
  - Certificate of Capacity

- Funding Request is refused by IRO and further information is sought

- AL seeks review and provides additional information with submissions
  - That the IP is MMI and that in their opinion the WPI>10%

Examples of reviews - Request for Stage 2 Funding (cont)

- Learnings
  - Had the information provided to the reviewer been available to the PL stage 2 would have been provided
  - There would have been a far more timely funding of this matter
  - Far fewer interactions and emails

Example of review - Request for Gastrointestinal Assessment

1. AL obtains a second medical report without prior approval
2. The Orthopaedic assessment (the first assessment) noted the absence of gastroscopy and endoscopy or, at the very least, physical examination
3. PL noted non-compliance with the guidelines for the evaluation of permanent impairment

Example of review - Request for Gastrointestinal Assessment (cont)

- On review
  - AL submissions provided on review noted that the IP had undergone a gastroscopy and endoscopy as a result of the complaints made to the NTD

- Learnings
  - The IRO Guidelines and SIRA guidelines inform the information sought from AL's
  - It is crucial that all available information sought by the PL be provided to ensure that the correct decision is made the first time

What have we learned from reviews?

- There is great benefit when the Approved Lawyer provides all relevant and up to date information to the Principal Lawyer when the request for funding is first made
  - You can always provide the additional information to the Principal Lawyer after they decline your request rather than asking for a Director Review

- If there is a difficulty with a request from a Principal Lawyer please call them to discuss the circumstances of the matter
  - Ask the Principal Lawyer what further information they need to approve your request

Changes to update requests

What has changed

- Requests are consistent – about 250-300 per day

What is expected of you

- Timely response to update requests

Where contact is unsuccessful

- After 12 months your grant maybe closed

Where contact is unsuccessful

Your attention is drawn to clause 2.14 of the ILARS Funding Guidelines

- Where a grant matter remains open for a period of twelve (12) months without any progress, the grant matter may be closed without payment of legal costs
- A fresh application maybe required to continue funding
- Submissions will be required to support the payment of any costs on the closed matter
- Please respond to our update requests to avoid closure of your grant

Key Messages

- Completion of all the fields in the Update form assists IRO
- Where information is received by you please advise IRO by forwarding the information to the ILARSALmail@iro.nsw.gov.au
- Please use the ILARS grant number for the live grant in the subject line
- Where extension requests are made please address the merit test and the arguable case test
- If there is a doubt please call the Grant Manager or an ILARS Manager
- When you call 13 94 76 the call is answered by our Solutions team who deal with Injured Persons and not ILARS cases. They often cannot assist you and will pass your message onto the Principal Lawyer or paralegal managing your matter
- Updates
  - Please respond to the update requests.
  - Please reply using the email option on the email rather than creating a new email.
  - Please use the templates provided in your response

Changes to how we send and process emails

- The Centralised Email Management System will send all emails to you from a new mail box - ILARSALmail@iro.nsw.gov.au
- Please send New Funding applications to ILARSCONTACT@iro.nsw.gov.au
- Please ensure that you use only the current live grant number in the subject line of the email.
- If you have issued a tax invoice the matter is closed – please do not use that ILARS grant reference number – you need a fresh funding application.

What impact will the email changes have upon you?

There is no change to how you send new applications to ILARS	• Please continue to use ILARScontact@iro.nsw.gov.au
For current ILARS matters, when sending emails to ILARS or responding to ILARS emails	• Please use ILARSALmail@iro.nsw.gov.au in the "To" field and include the ILARS case number – C/NN/YYYYY or G/NN/YYYYY in the subject line

Independent
Review Office

IRO Solutions and the IRO Direction

Chris Cramp
Dispute Resolution Officer, Solutions

IRO Solutions Jurisdiction

- Complaints

Schedule 5, Clause 8 of the *Personal Injury Commission Act 2020*

- Workers Compensation Enquiries
- Early Solutions

Schedule 5, Clause 9 (2)

"The purpose of ILARS is to…provide assistance in finding solutions for disputes between workers and insurers."

Independent Review Office

INDEPENDENT REVIEW OFFICE DIRECTION 2023-25

MISSION OF THE INDEPENDENT REVIEW OFFICE

The Independent Review Office (IRO) helps persons who are injured at work or in motor accidents and insurers find fair solutions to complaints and claims. IRO also recommends improvements to the statutory compensation schemes for workers compensation and motor accident injuries. IRO is established under the *Personal Injury Commission Act 2020*.

IRO SERVICES – WHAT WE DO

- help persons who are injured and insurers find fair and fast solutions
- fund experienced lawyers to assist workers who are injured access their workers compensation entitlements
- identify, report on and recommend solutions to emerging and systemic issues in the statutory compensation schemes.

IRO VALUES – HOW WE WORK

IRO has six core Values that inform how we do our work:

- integrity, trust, service, and accountability, which we share with the NSW government sector
- independence and expertise, which are unique to IRO.

IRO PRIORITIES AND STRATEGIES – WHERE WE WILL FOCUS

<table>
<tr>
<td rowspan="2">An effective and valued agency</td>
<td>Achieving fair and quick solutions for injured persons' complaints and claims
increasing IRO's capacity and capability to deal with motor accident injury complaints
identifying more opportunities to implement early solutions in Independent Legal Assistance and Review (ILARS) matters</td>
<td>Enabling injured workers' access to appropriate legal assistance
acting on the recommendations of the 2022 ILARS Review
completing the review of medical report provider arrangements and appeal costings, and acting on the outcomes
reviewing matters where workers' outcomes not improved to identify any opportunities to refine Funding Guidelines</td>
<td>Offering insights that improve the operation of the injury compensation schemes
making suggestions to improve the complaint and claim handling of insurers
contributing to external reviews of the injury compensation schemes
improving the experience of injured persons who are dissatisfied with the compensation schemes</td>
</tr>
<tr>
<td rowspan="2">A great place to work</td>
<td colspan="3">Fostering the wellbeing and expertise of IRO's team
enhancing the connection and effectiveness of IRO teams and team members in a hybrid work environment
responding to the results of IRO's People Matter Employee Surveys
making ongoing development of IRO's team a hallmark of our culture, and supporting the training and development of every IRO team member</td>
</tr>
<tr>
<td colspan="3">Improving how we work
embedding continuous improvement as a way of working at IRO
improving how we engage with those who rely on us
increasing the quality and value of our data, and improving the use of data in all our functions
embedding good practice in our financial, governance, ICT, and risk management arrangements</td>
</tr>
</table>

IRO SUCCESS MEASURES – HOW WILL WE KNOW IF OUR STRATEGIES ARE SUCCESSFUL

- improving satisfaction by injured persons as measured by user experience surveys
- achieving timeliness and quality measures in how we perform our work
- identifying more ILARS matters for early solutions
- increasing IRO team member engagement as measured by People Matter surveys.

Operationalising our function

- **The IRO Complaint Handling Protocol**
  - Defines how and which matters we deal with
  - Consultation with industry participants
  - A complaint outcome that is “fair and reasonable”
  - What complaints we may not deal with?
    - Matters the subject of the PIC
    - Where no attempt to resolve with insurer

CTP Focus

- Uplift in CTP work
  - CTP Care
  - Adapt to changes in legislation
  - Emerging case law from PIC
- Deal with increasing volumes
- More engagement with insurers

IRO Early Solutions

- Specifically called out in PIC Act
- No Response to Claim (NRTC)

  TIP: If NRTC – carefully check timelines and check with insurer before seeking Stage 3 funding

- Medical disputes pilot
- Other early solutions

IRO Early Solutions – Medical Dispute Pilot

- A limited pilot
- To assist parties to find early solutions for disputes about medical treatment
- Run through Solutions Group in parallel with No Response To Claim (NRTC) and other early solution matters
- Applies to disputes meeting eligibility criteria

IRO Early Solutions – Medical Dispute Pilot

- Eligibility criteria:
  - Eligible for funding
  - Approved Lawyer (AL) asks for stage 3 funding
  - Liability for injury not disputed
  - Only medical/treatment disputes
  - Only disputed on basis of insufficient evidence
  - Not affected by s.59A
  - Medical support
  - AL has already requested s.287A review
  - Currently excludes ifnsw/TMF (except Department of Education)

IRO Complaints – the numbers

- 1 July – 31 December 2023
  4091 WC complaints (compared to 3766 in the same period H1 2022-2023)
  359 CTP complaints (compared to 408 in the same period H1 2022-2023)

Common Workers Compensation Matters

Percentage of all workers compensation complaints for H1 2023-24

- Delay in determining liability 29.1%
- Delay in payment 23.3%
- Denial of liability 9.7%
- Request for documents 9.2%
- General Case Management 9.2%

Common CTP Complaint Matters

Percentage of all motor accident complaints for H1 2023-24

Subjects

- Treatment and care 29.5%
- Income support/weekly payments 23.6%
- Case Manager 10.0%

Issues

- Decisions 39.0%
- Timeliness 30.1%
- Service/Communication 17.8%

CTP Focus

Treatment and Care

- Complaints related to medical expenses and domestic assistance
- Most prominent issue for this complaint subject is timeliness
- Timeliness is critical in claims where compensation period is limited (e.g., minor injury / threshold injury or at fault claims). Claimants often miss out due to untimely decisions.
- Changes to minor / threshold injuries
- Case studies

CTP Focus

Income Support/Weekly Payments

- Biggest driver of IRO CTP complaints in 2022-23 but not the biggest driver in H1 2023-2024
- Time taken to commence weekly payments
- Time taken to confirm PAWE, meaning extended periods on interim rate
- Case studies

CTP Focus

Case Manager

- Complaints of this kind often relate to customer service issues
- Often tied to processing of benefits
- Case studies

After the IRO Intervention

IRO Impact

- At a local level with insurer – changes to payment cycles
- Referral of matters to SIRA
- Aggregated data and significant matters
- Contributes to SIRA's regulatory work
  - Licence conditions on insurers
  - Penalties
- Legislative change

Key Lessons from our Experience in Complaints

Service

- Unreturned phone calls + emails are behind a lot of complaints
- Communication – keep claimants updated
- Timeliness
- Start weekly payments ASAP – MAIA claims
- Try to find out the issue behind the question

Detail

- Notices that lack detail attract complaints. e.g., dispute notices in MAIA claims

How to help IRO help you deliver early Solutions to Injured Workers - Approved Lawyers

ILARS Grant Number (if applicable)

A clear summary the issues and proposed solution – remember IRO does not adjudicate disputes

All necessary information (copy of claim, communication serving the claim, details of how, when and to what address the claim was made)

Details of any follow up with insurer (when/how/who)

If there has been any acknowledgement by the insurer or their representative about the claim/issue (including date and nature of communication)

How to help IRO help you deliver Early Solutions - Insurers

If you are relying on a document/decision, please provide it.

If a claim has been overlooked in error, please provide a date for when the claim will be determined, and, when it is determined please provide a copy of the decision once issued.

If you consider you are inside timeframes for a decision, please provide a brief timeline establishing that.

Independent
Review Office

Estoppel in the Personal Injury Commission

Jeffrey Gabriel

Independent Review Officer

What is meant by:

Res Judicata	Issue Estoppel	Anshun Estoppel
A thing, matter, or determination that is adjudged or final. i.e. a claim, issue, or cause of action that is settled by a judgment conclusive as to the rights, questions, and facts involved in the dispute.	A long-established principle that prevents a party to a proceeding denying to the contrary an issue of fact or law that was established in previous proceedings.	An estoppel that prevents a party from making a claim which should have been pursued by that party in earlier proceedings: *See: Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589

Relevant cases

Res Judicata & Issue Estoppel	
Etherton v ISS Property Services Pty Ltd	[2019] NSWWCCPD 53
Anshun Estoppel	
Miller v Secretary, Department of Communities & Justice (No. 9)	[2021] NSWPICPD 29
Geary v UPS Pty Ltd	[2021] NSWPICPD 47
OneSteel Reinforcing Pty Ltd t/as Liberty OneSteel Reinforcing v Dang	[2022] NSWPICPD 32
Racing NSW v Goode	[2023] NSWPICPD 43
Inner West Council v BFZ	[2023] NSWPICPD 62

Res Judicata & Issue Estoppel

Etherton v ISS Property Services Pty Ltd

- In 2015, the worker injured his right leg. The Insurer disputed the claim under ss 4, 9A, 33 & 60 WCA.
- On 9/02/2016, he filed an ARD and claimed weekly payments & s 60 expenses for right TKR surgery.
- On 5/05/2016 an Amended COD – Consent Orders issued, which:
  - Added an allegation of injury due to the nature & conditions of employment until 15/04/2015.
  - Entered an award for the respondent for that alleged injury.
  - Awarded the appellant a closed period of weekly payments, with an award for the respondent thereafter.
  - Awarded the appellant s 60 expenses up to $3,871.25.
  - Entered an award for the respondent with respect to a claim for right total knee replacement surgery.

Etherton

- The appellant later claim compensation under s 66 WCA for 18% WPI, based on an opinion from Dr Giblin, which was based on the right total knee replacement.
- The insurer disputed the claim and relied upon the Consent Orders.
- ***Arbitrator Wynyard*** entered an award for the respondent. He held that:

  1. Dr Giblin either ignored or was unaware of the Consent Orders; and
  2. The effect of the Consent Orders was that the appellant could not claim that the right TKR resulted from the injury on 15/04/2015.

Etherton

- **On appeal**, the appellant alleged that the Arbitrator erred:

  1. In finding that he was estopped from proceeding with the s 66 claim;

  2. In acting ultra vires to determine a medical dispute; and

  3. By construing the 2018 amending Act as having retrospective effect.

- ***President Phillips*** upheld the appeal. His reasons included:

  - In *Bouchmouni v Bakhos Matta t/as Western Red Services,* Roche DP held that Consent Orders can give rise to res judicata estoppel, but only to the extent of what was '*necessarily decided*': (*Habib* at [186] per McColl JA);

  - In deciding what was '*necessarily decided*', the Commission will closely examine the pleadings and particulars, the s 74 notice, and the legislation, because that forms part of the mutually known facts and assists in objectively determining the '*genesis*' and '*aim*' of the orders: (*Isaacs* at [75]; *Spencer Bo*wer at [39]; *DTR No*minees at [429]);

Etherton

- Consent Orders should be construed by reference to what a reasonable person would understand by the language used in the orders, having regard to the context in which the words appear and the purpose and object of the transaction: (*Cordon Investments* at [52]);
- Where the words in the Consent Orders are ambiguous or susceptible of more than one meaning, extrinsic evidence is admissible to show the facts which the negotiating parties had in their minds: (*Codelfa* at 350).
- Prior negotiations that tend to establish objective background facts which were known to both parties and the subject matter of the consent orders will be admissible (*Codelfa* at 352).
- However, evidence of prior negotiations that are reflective of the parties' actual (subjective) intentions is not receivable: (*Codelfa* at 352).

Etherton

- His Honour found that:
    - When the Consent Orders issued, the pleading and body of evidence alleged a frank injury to the right knee on 15/04/2015.
    - The award for the respondent for the s 60 claim for the TKR with respect to that frank injury causes problems, as Dr Giblin was not instructed about it.
    - Based on *Habib*, the Consent Orders '*necessarily decided*' that there were awards for the respondent regarding the allegation of right knee injury due to the nature and conditions of employment until 15/04/2015 and s 60 expenses after 4/03/2016 (including that the right TKR surgery was not reasonably necessary as a result of the frank injury).
    - When the Consent Orders issued, the pleading and body of evidence alleged a frank injury to the right knee on 15/04/2015.
    - The award for the respondent for the s 60 claim for the TKR with respect to that frank injury causes problems, as Dr Giblin was not instructed about it.

Etherton

- Based on *Habib*, the Consent Orders '*necessarily decided*' that there were awards for the respondent regarding the allegation of right knee injury due to the nature and conditions of employment until 15/04/2015 and s 60 expenses after 4/03/2016 (including that the right TKR surgery was not reasonably necessary as a result of the frank injury).
- The Consent Orders *did not necessarily decide* whether the appellant suffered a frank injury to his right knee on 15/04/2015, although orders 4 and 5 could only apply to that injury.
- Therefore, the Arbitrator erred in finding that the appellant *was estopped* from seeking compensation under s 66 WCA and no relevant estoppel arose from the Consent Orders.

- ***His Honour rejected grounds (2) and (3).***
  - This was not a not a claim in relation to compensation paid or payable in respect of any period before 1/01/2019 (the appellant sought a referral to an AMS under s 66 WCA). Therefore, Part 19L(2) does not apply.
  - The effect of Pt 19L(1) is that the 2018 amendments apply, and the Arbitrator acted within power in determining the claim under s 66 WCA.
  - As the Arbitrator assessed 10% WPI, the appellant was not entitled to recover compensation under s 66 WCA.

Anshun Estoppel

Miller (No 9)

- This was a claim for death benefits, the worker died after suffering an Asthma attack whilst working in remote NSW. This appeal was against a decision by ***Arbitrator Harris*** dated 8/01/2021, which found an *Anshun* estoppel.
- The respondent argued that:

  (1) These proceedings sought "*the same entitlement … arising out of the same fact circumstance and relating to the same compensation*" and that the appellants made a conscious decision not to allege injury under s 4(a) WCA at first instance;

  (2) This was unreasonable having regard to the benefits of finality of litigation and other matters identified by the President in *Miller No. 5; and*

  (3) The appellants bore the onus of proving that it was not unreasonable to pursue the s 4(a) claim in these proceedings and they failed to adduce any evidence about why it was not claimed initially.

Miller (No 9)

- The appellants appealed on multiple grounds and alleged that the Arbitrator erred:

  (1) In finding that they failed to provide evidence about why they chose to argue a particular injury in *Miller No 1* and to raise a different injury in *Miller No 4*;

  (2) In finding that they failed to adduce evidence about why they chose not to allege a s 4(a) injury initially;

  (3) In finding that their explanation, that they were not aware of a s 4(a) injury, did not stand up to any proper analysis;

  (4) In finding that it was unreasonable for them to not file evidence about why they could not rely upon s 4(a) initially;

  (5) In rejecting their submissions that the "*rules of evidence are not strictly applied in the PIC*" as being relevant to the consideration of the *Anshun* principle;

Miller (No 9)

6. In rejecting their argument that the "legislation is considered to be beneficial" when considering the Anshun principle;
7. In deciding that both proceedings relate to the same factual circumstances and involved similar causes of action;
8. In finding that at the time of Miller (No. 1), they knew that the deceased suffered both an asthma attack (a s 4(b)(ii) disease) and "*anoxia and cardiac arrest*" (a s 4(a) injury);
9. In finding that the factual matrix showed that the current subject matter was relevant to that in the previous proceedings; and
10. In failing to consider and refer to the obligation to conduct proceedings according to law, with due regard to equity, good conscience, and the substantial merits of the case.

Miller (No 9)

Deputy President Snell dismissed the appeal.

- He rejected grounds (1), (4), (7) and (9) as being without merit.
- He considered grounds (2), (3) and (8) together and rejected them.
- He considered grounds (5) and (10) together and rejected them.
- He held that in *Miller No. 5*, the President specifically held that the principles in *Anshun* apply in an appropriate case. His Honour accepted that "*whether the principle of estoppel is engaged must be considered in the rubric of the practices and procedure applicable to proceedings in the Commission*".
- He rejected ground (6) and found that the appellants had not demonstrated, based on any authority or reasoned argument, that finding that the legislation is "*beneficial in a general sense*" would change the result.

Geary v UPS Pty Ltd

- The appellant injured his neck and both shoulders at work and he claimed compensation under s 66 WCA for 37% WPI (cervical spine & both upper extremities) based on assessments from Dr Guirgis & s 60 expenses for proposed left shoulder surgery.
- On 29/11/2018, the WCC issued Consent Orders, which:
  - Amended the ARD to plead injuries to the cervical spine and right shoulder and consequential injuries to the left shoulder and neck;
  - Entered an award for the respondent for the alleged injury and the consequential injury to the neck;
  - Discontinued the claim under s 66 WCA; and
  - Noted that the respondent would pay s 60 expenses for left shoulder surgery.
- On 14/01/2021, he claimed compensation under s 66 WCA for 46% WPI (cervical spine + both upper extremities + scarring) for an injury deemed to have occurred on 1/02/2018.
- The respondent disputed the claim.

Geary

- On 9/02/2021, the appellant filed an amended ARD, which alleged injury to the neck as a result of the nature and conditions of employment until 12/12/ 2018 and, alternatively, a consequential injury to the neck due to "*overuse, overcompensation and overload following on from the right and left shoulder injuries and surgeries.*"

- ***Member Perry*** found that there was an Anshun estoppel, based on the Presidential decisions in *Fourmeninapub Pty Ltd v Booth, Habib and Miller (No 9).*

  - The relevant question is "*whether the claim made in the 2021 proceedings was so closely related to the 2019 proceedings that it would have been reasonably expected to have been raised at the time, having regard to the substance of the proceedings?*"

  - Disease was integral to the dispute (Dr Guirgis apportioned 90% of WPI to a disease, Dr Endrey-Walder provided a similiar opinion and all doctors diagnosed a disease in the shoulders).

  - Discontinuing the s 66 claim did not mean that an *Anshun* estoppel did not apply, as the doctrine is concerned with substance and not form: *Habib*;

  - The facts in both proceedings were essentially the same;

Geary

- Consent orders may create an estoppel and the parties clearly intended for an injury to the cervical spine to be pleaded, and for there to be an award for the respondent with respect that alleged injury and/or consequential injury; and
- The consent orders made it clear enough that the applicant '*could not succeed in gaining compensation for a consequential benefit*'.

- On appeal, the appellant argued that:

1. The 2019 COD must be read in the light of the pleadings, which alleged a frank injury;
2. The only claim determined in 2019 was the s 60 claim (left shoulder surgery) and it was not unreasonable that disease injuries to the shoulders and cervical spine were not pleaded then;
3. The fact that the s 66 claim was discontinued meant that there was no *Anshun* estoppel, and it would not align with the PIC's practice to apply *Anshun* to "*mechanisms of injuries and body parts, the liability for which was only required to be determined in respect of a claim that was discontinued and hence not so determined*"; and
4. "*A worker is entitled to pursue his rights independently*".

Geary

- ***President Phillips DCJ*** dismissed the appeal and he held that.
  - *Anshun* estoppel is available in PIC proceedings;
  - In *Israel v Catering Industries (NSW) Pty Ltd* [2017] NSWCCPD 53, Wood DP set out various authorities (at [114]–[119]) that dealt with the application of Anshun estoppel.
  - The mere fact that a party chooses to litigate a matter in other proceedings in and of itself is insufficient to ground an Anshun estoppel.
  - However, this does not mean that every decision to litigate separate claims will always be permissible from an Anshun point of view.
  - Rather, such a decision will only give rise to an Anshun estoppel if it was unreasonable not to have pleaded this cause in the earlier action.
  - The 2020 Act did not modify or derogate from the approach to Anshun estoppel by the WCC or Compensation Court.

Geary

- In *Bruce v Grocon Ltd* [1995] NSWWCC 10, Neilson J summarised the relevant principles:
  - The principle in *Anshun* extends to claims and defences;
  - Estoppel will arise if in second or further proceedings there would be a judgment inconsistent with a judgment in the first proceedings, or the granting of remedies inconsistent with the remedy originally granted, or the declaration of rights of parties inconsistently with the determination of those rights made in the earlier proceedings;
  - the matter being agitated in the second or further proceedings must be relevant to the original proceeding; and
  - it was unreasonable not to rely on that matter in the original proceedings; such unreasonableness would depend on the facts of each particular case.

Geary

- His Honour dismissed ground (1). He held that:
    - The claim for disease injury to the neck was connected with the subject matter of the 2019 proceedings;
    - The Member exercised a discretion of the type in *House v The King* [1936] 55 CLR 499 at 504-505 (House) and the appellant must prove error in exercising that discretion:

        "*If a judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution, for his if it has the materials for doing so.*"

- The appellant did not challenge the finding that the facts pleaded in both proceedings were essentially the same;
- The Member found there was no explanation about any difficulties that existed, or might reasonably have been perceived, in raising a disease injury earlier. This pointed towards it being unreasonable to have not relied on a disease injury in 2019; and

Geary

- It is "*artificial in the extreme*" for the appellant to assert that the claim for the neck injury was not a claim or issue connected with the 2019 proceedings. It cannot be said that he or his solicitors were ignorant about the medical evidence regarding his condition before those proceedings were commenced.
- His Honour rejected ground (2).
    - He found that this was not argued before the Member and a Member cannot have erred in law in relation to an argument that was not put to him.
- His Honour also rejected ground (3).
    - Reading the decision as a whole, it is abundantly clear that the Member carefully considered the authorities and applied them in find that there was an Anshun estoppel regarding the disease injury to the neck in the 2021 proceedings.

Geary

- His Honour rejected ground (4).
  - The appellant effectively argued that different causes of action were pursued in the 2019 and 2021 proceedings, but in *Anshun*, the High Court stated:

    "*By 'conflicting' judgments we include judgments which are contradictory, though they may not be pronounced on the same cause of action. It is enough that they appear to declare rights which are inconsistent in respect of the same transaction*".

  - The Court's finding in *Anshun* is entirely relevant to consideration of this ground and the Member found that the two sets of proceedings were "*essentially the same*".
  - This is exactly what happened in *Anshun* and it was an approach that found no favour with the Court.

OneSteel Reinforcing Pty Ltd t/as Liberty OneSteel Reinforcing v Dang

- The worker claimed compensation for a back injury on 25/09/2016 (deemed).
- On 24/07/2019, Consent Orders were issued, which:
  - Amended the ARD to claim weekly benefits from 2/11/2016;
  - Awarded the worker weekly payments from 25/11/2016 to 2/05/2019 with an award for the respondent thereafter;
  - The respondent agreed to pay s 60 expenses up to $5,500, with an award for the respondent thereafter; and
  - Noted that the worker acknowledged that as and from 2/05/2019, he was able to earn "as much or more than he would have earned had he remained in the employ of the respondent uninjured" in suitable employment.

Dang

- On 1/12/2020, the worker sought approval from the insurer for an MRI scan of his lumbar spine.
- The appellant asserted that there was no further entitlement under s 60 WCA by reason of the Consent Orders.
- He then claimed compensation under s 66 WCA for 12% WPI.
- The appellant disputed that claim and asserted that the worker was prevented from making this claim "as it was based on medical evidence that existed at the time of the prior proceedings and was not disclosed". It alleged prejudice and that that "*the full extent of the claim brought in 2019*" had resolved.
- The worker then filed an ARD claiming s 60 expenses (including costs of the MRI scan) and compensation under s 66 for an injury on 25/09/2016.
- ***Senior Member Capel*** held that the worker was not estopped from bringing this claim and that the appellant was liable for the compensation claimed.

Dang

- On appeal, the appellant alleged that the Senior Member erred as follows:
  - in law, as to the nature of an Anshun estoppel;
  - In law, by failing to exercise his discretion to apply the Anshun principles to the case;
  - in fact, by accepting that the worker only decided not to proceed with surgery in 2021; and
  - in law, by taking into account an irrelevant consideration.

Dang

- ***Deputy President Wood*** dismissed the appeal.
- She rejected ground 1.
    - She noted that the appellant argued that the relevant medical report was available to the worker in the earlier proceedings.
    - It relied on the High Court's decision in *Tomlinson v Ramsey Food Processing Pty Limited* [2015] HCA 28 (*Tomlinson*) and argued that the earlier authorities that were relied upon by the worker and cited by the Senior Member, were inconsistent.
    - In *Tomlinson*, the Court considered the concept of abuse of process, and found that this is inherently broader and more flexible than estoppel. This can be available to relieve against injustice to a party or impairment to the system of administration of justice which might otherwise be occasioned in circumstances where a party to a subsequent proceeding is not bound by an estoppel.
    - It has been recognised that making a claim or raising an issue which was made or raised and determined in an earlier proceeding, or which ought reasonably to have been made or raised for determination in that earlier proceeding, can constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel.

Dang

- In its submissions to the Senior Member, the appellant referred to an "*abuse of process*" but it did not actively argue that there was an abuse of process or that the worker's action was unjustly oppressive or had brought the administration of justice into disrepute. Instead, it argued that an *Anshun* estoppel applied.

- Abuse of process and an *Anshun* estoppel are two distinct concepts, although may have overlapping features.

- She rejected ground (2).

  - The critical reasons given for not pursuing the claim in the earlier proceedings were that the worker only had an entitlement to make one claim under s 66 WCA and the surgery, if undertaken, might likely alter the assessment of his WPI and he was yet to make a final decision about the surgery. The evidence supported these matters.

  - The Senior Member addressed the relevant factors that the appellant relied upon to show that the failure to bring the claim was unreasonable.

  - The appellant's case substantially rests on an assertion that because the worker could have brought his case in the earlier proceedings, he should have. That submission falls foul of the observations of Allsop P in *Manojlovski*.

  - The Senior Member did not fail to apply the *Anshun* principles.

Dang

- She rejected ground (3).
    - The Senior Member's conclusion that the worker only decided against surgery in 2021 was consistent with the evidence.
- She rejected ground (4).
    - She noted that the grounds of appeal did not point to any error by the Senior Member in proceeding to determine the s 66 claim.

Racing NSW v Goode

- The worker was a jockey.
- He suffered paraplegia at the T4 level, and multiple other injuries from a fall and was permanently wheelchair-bound. He required ongoing medical care and assistance with ADLs.
- On 21/10/2010, a Complying Agreement was signed, under which he received compensation under s 66 WCA for 85% WPI and $50,000 for pain and suffering.
- In June 2012, the worker and his wife returned to their native UK, after which he submitted numerous claims to the insurer for treatment, medication, rehabilitation, housing modifications and maintenance. Some claims were paid, but some were disputed.
- On 18/02/2020, he filed an ARD claiming s 60 expenses for house repairs and hotel expenses.
- On 22/04/2020, Consent Orders were issued, under which the appellant agreed to pay some claims, it received an award for the respondent for some claims, and the worker discontinued some claims.
- On 10/12/2021, the worker filed a further ARD, which claimed s 60 expenses, but the appellant disputed those claims.

Goode

- ***Member Wynyard*** determined the dispute.
    - The appellant disputed that the claims were "*allowable*" based on definitions in s 59 WCA and/or that they were reasonably necessary under s 60 and sought argue *Anshun* estoppel.
    - As *Anshun* had not been raised, the appellant required leave under s 289A WIMA.
    - He refused to grant leave to rely upon *Anshun* estoppel under s 289A WIMA and awarded the worker compensation under s 60 WCA.
- **On appeal**, the appellant argued that:
    1. The parties were legally represented at all relevant times during the 2020 and 2021 proceedings.
    2. It accepted liability for the worker's injuries;
    3. The WCC and the PIC, are the tribunals of competent jurisdiction to hear and determine both applications; and
    4. The parties to the 2020 and 2021 proceedings are the same and both proceedings involved a dispute regarding s 60 expenses.

Goode

- ***President Judge Phillips*** upheld the appeal.
    - He noted that the Member held that he needed to be satisfied that it was in the interests of justice to allow it to rely on *Anshun* estoppel and he quoted from his decision in *Geary*.
    - The correct authority – *Mateus* – was brought to the Member's attention, but he failed to engage with the parties' arguments and to grapple with the *Mateus* factors. This was a failure to exercise a discretion in accordance with the law.
- Accordingly, he redetermined the application under s 289A WIMA and he decided that:
    1. Anshun applies to statutory compensation schemes.
    2. Consideration of the s 289A application requires an assessment of the relative merits of the proposed Anshun defence in accordance with *Mateus*.
    3. The *Anshun* defence was only proposed to apply to claims that existed, but were not advanced, before the 2021 proceedings. There was no earlier decision on the merits of the matters in dispute that could possibly conflict with any decision in the current proceedings.

Goode

4. *Mateus* set out a number of non-exhaustive factors to be considered when dealing with a leave application and whether it is in the interests of justice to grant leave. The starting point is to undertake a broad review of all the circumstances surrounding the matter.

5. The worker's needs will change from time to time depending upon his condition, the advice given by his treating doctors and possible developments in medical science that may assist in the management of his condition.

6. As Hutley JA said in *Thomas v Ferguson Transformers Pty Ltd*, "*the process of dealing with an incapacitated person may involve a continual war with disease, atrophy of muscles by lack of use, and even psychological decay by reason of lack of something to do*." In *Thomas*, the worker was a paraplegic, and the decision has "*considerable resonance*" with this matter.

Goode

- In relation *Mateus* factors, his Honour held that:
  - The application to rely upon *Anshun* was made at the commencement of the hearing and the appellant did not act promptly in bringing it to the notice of the PIC or the worker;
  - While the appellant's counsel referred to a "*pleading oversight*", there was no explanation of how that occurred;
  - The worker had no opportunity to consider what evidence may be required to answer the defence and it was unreasonable for the appellant to expect him to meet it without notice;
  - The s 60 claim was based on "*poikilothermia*" and the appellant did not properly respond to it; and
  - The defence was not articulated in a compelling manner.
  - A fundamental precept in establishing an *Anshun* defence is that the later claim was so relevant to the subject matter of the earlier dispute that it was unreasonable not to have advanced it in the earlier proceedings.

Goode

- In *Miller No 10*, Brereton JA held that *Anshun* "***is engaged only where the party has unreasonably failed to assert a right or defence in connection with or in the context of the earlier proceeding***." (emphasis in original)
- Other than the fact that both sets of proceedings concerned s 60 WCA, the claims were not such that they had to brought at once. The mere fact that a claim ***could have been brought in earlier proceedings does not automatically mean that it should have been so brought*** (emphasis added).
- What is required is the evaluative exercise spoken about by McColl JA in *Habib* (at [84]).
    - In *Champerslife Pty Ltd v Manojlovski*, the Court of Appeal said that deciding whether the matter in question was so relevant that it can be said to have been unreasonable not to rely upon it in the first proceedings involves a value judgment to be made referrable to the proper conduct of modern litigation.
    - "*Unreasonableness*" is a key feature of Anshun estoppel – namely, was it unreasonable not to have advanced the claims in the earlier proceedings?

Goode

- *Anshun* is not an inflexible principle. As the High Court said, "*there are a variety of circumstances, some referred to in the earlier cases, why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings*". He considered this in *Miller No 5* at [194].

- His Honour declined to infer that the worker had behaved unreasonably.

- He held that the appellant effectively asked him to elevate the *Anshun* principle from "***what could have been brought in the earlier proceedings to a principle which requires that it should have been brought***" (emphasis added).

- The *Anshun* defence had little merit and the discontinuance of claims in the 2020 proceedings did not mean that the appellant was entitled to treat them as abandoned.

Inner West Council v BFZ

- The worker suffered a psychological injury.
- On 27/05/2020, Consent Orders were issued. The appellant agreed to pay:
  - A closed period of weekly benefits (18/03/2020 to 26/05/2020), with an award for the respondent thereafter; and
  - Section 60 expenses up to $2,000, with an award for the respondent thereafter.
- The worker resigned effective from 26/05/2020 and the appellant agreed not seek credit for paid sick leave.
- In 2022, the worker claimed compensation under s 66 WCA, but the appellant disputed the claim.
- The worker argued that the appellant was estopped from denying liability under ss 4(a), 4(b), 9A and 11A WCA because of the 2020 Consent Orders.
- ***Principal Member Bamber*** determined that the appellant was estopped from disputing liability because of the Consent Orders, and she remitted the dispute to the President for referral to a Medical Assessor.

BFZ

- On appeal, the appellant alleged that the Principal Member erred:

  1. In determining that it was estopped from disputing liability; and

  2. In referring the s66 dispute to the President for referral to a MA.

- ***Acting Deputy President Nomchong SC*** granted leave to appeal and allowed it. She remitted the matter to another member for re-determination. Her reasons included:

  - Issue estoppel arises where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to re-open that issue.

  - Estoppel is to be applied strictly.

  - Issue estoppel will apply only to prevent the assertion in later proceedings of the precise matter of fact or law that has already been necessarily and directly decided in the earlier decision.

BFZ

- The 3 conditions that must exist for issue estoppel to apply are:

  1. the first decision was final;

  2. the same question has been decided, and

  3. the same parties, or at least parties with the same legal interest, are the same.

- In this matter, (1) and (3) were established and the issue for the Principal Member to determine was whether the same question or questions were decided in 2020?

- The Principal Member needed to identify precisely what issues were determined in 2020, as the COD did not refer to the nature or extent of the injury.

- There had been no arbitration on liability issues and consent orders were to resolve the dispute.

- The authorities referred to by Roche DP in *Bouchmouni* (including *Habib*) provide that in these circumstances there must be an examination of the evidence to ascertain what matters were in dispute and what matters were necessarily resolved in the actual decision assented to by the parties. The Principal Member recognised this and referred to these authorities.

BFZ

- However, the Principal Member concluded that the only relevant characteristic for determining the nature of the injury was whether it was work-related. This was an error of law.
- "*Injury*" refers to both the event that caused it and the pathology arising from it.
- In *Department of Juvenile Justice v Edmed*, Roche DP held that for the purposes of a determination of a s 66 entitlement, it is the pathology which must be determined.
- Specificity is required for the application of estoppel and the fact that the Principal Member found that there was "*an evolution over time into a different type of psychopathology*" necessarily means that there can be no issue estoppel.
- The injury that is the subject of the s 66 claim is different in kind to that which was the subject of the 2020 Consent Orders, and it is a matter for a merits consideration as to whether there had been other incidents or events (workplace or otherwise) in the worker's life since the 2020 Determination.

Recommendation

- When faced with issues of a possible *Anshun estoppel,* I recommend that the Principal Lawyer refers to ADP Nomchong's decision in ***BFZ***, as this provides an excellent summary of the principles that the PIC will apply in determining whether an *Anshun estoppel* arises from previous litigation between the parties.

QUESTIONS

Independent
Review Office

IRO Priorities 2024 and Closing Remarks

Jeffrey Gabriel

A/Independent Review Officer