



Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

RECOMMENDATION FOLLOWING AN APPLICATION FOR REVIEW OF THE INSURER'S WORK CAPACITY DECISION PURSUANT TO SECTION 44BB(1)(c) OF THE *WORKERS COMPENSATION ACT 1987*.

SUMMARY:

a. The application for procedural review is dismissed.

Introduction and background

1. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 12 May 2015. The Decision informed the applicant that his pre-injury average weekly earnings (PIAWE) were calculated at \$533.45 per week. The applicant sought internal review by the Insurer by application dated 5 April 2016 and the Internal Review Decision was dated 5 May 2016. The Internal Review Decision confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 3 June 2016. The Authority delivered its Findings and Recommendations dated 8 July 2016. The Authority made a finding the applicant's PIAWE was \$524.27 per week.
3. The applicant then made an application to this office for procedural review dated 4 August 2016. I am satisfied that the application has been made within time and in the proper form.
4. On 2 June 2014 the applicant sustained injury to his back whilst in the course of his employment as a tow truck driver. The injury was not reported to the Insurer until 16 January 2015.
5. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).

Submissions by the applicant



Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

6. Section 44BB (1) (c) of the Workers Compensation Act 1987 (1987 Act) states that this review is *“only of the insurer’s procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer.”* The applicant has applied for a procedural review.
7. In addition to making an application for procedural review the applicant has made the following submissions:
 - He was employed to be on call for 24 hours, seven days per week;
 - The Work Capacity Decision is based on incorrect, incomplete and false information forwarded to the Insurer and Merit Review by the employer.
 - Requests that his job sheets be reviewed.
8. The applicant has made general submissions about the nature of his employment, the date that his employment commenced and alleged racial abuse he has received.
9. The applicant’s primary submission is that his PIAWE has been calculated incorrectly and that the Insurer has not taken into consideration that he was on standby for 24 hours/7 days per week.
10. I am only able to perform a review of the procedures undertaken by the Insurer in making the Work Capacity Decision which is the subject of this review. I am not able to review the Internal Review Decision or the Merit Review Findings and Recommendations from the Authority.
11. I am also not able to take into account the personal circumstances of the applicant, the treatment he has received nor the evidence which he has attached to his application by way of statements pertaining to the nature of his employment.
12. The submissions which the applicant has made are more relevant to merit review by the Authority. The submissions do not address procedural issues and therefore are not relevant in this review.



Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

Submissions by the Insurer

13. The Insurer has not made any submissions in response to the application.

Decision

14. The Insurer has made a decision as to the applicant's pre-injury average weekly earnings (PIAWE). This is a work capacity decision in accordance with Section 43(1)(d) of the 1987 Act.

15. When calculating the applicant's PIAWE the Insurer has taken into consideration Sections 44C, 44D and 44E. The Insurer noted that the information provided indicated that the applicant had not received any non-pecuniary benefits as defined in Section 44F.

16. The Insurer has explained the information which has been considered when making the calculation of the applicant's PIAWE at pages 1 and 2 of the decision.

17. The submissions by the applicant as to the nature of his employment albeit casual or fulltime, the hours which he worked and the length of employment are issues which can only be considered by the Insurer and reviewed by the Authority at Merit Review. The legislation particularises that this review is of the Insurer's procedures only and not of any judgment or discretion exercised by the Insurer in making the decision.

18. Procedurally the Insurer has calculated the applicant's PIAWE using the correct methods and has cited and explained the legislation as required by Guideline 5.3.2.

19. As for the remainder of the Work Capacity Decision the Insurer has explained the relevant entitlement periods and informed the applicant of the process available for requesting a review of the decision as required by Guideline 5.3.2.

20. The Work Capacity Decision of the Insurer dated 12 May 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation in force at the time.



Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

Finding

21. There are no procedural errors identifiable in the decision. The Insurer has complied with the Guidelines and relevant legislation.

RECOMMENDATION

22. The application for procedural review is dismissed.

A handwritten signature in black ink that reads "T. Emanuel".

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
17 August 2016