



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 is dismissed.

Introduction and background

1. The applicant suffered a shoulder injury in the course of his employment as a Roof Tiler on 27 March 2015. The insurer accepted liability and made weekly payments for all relevant periods. The applicant does not currently work.
2. The Insurer gave notice to the applicant of a work capacity decision on 28 August 2017. The insurer found that the applicant had capacity to work in the "suitable employment" of "Receptionist," earning \$760 per 40 hour week. The applicant was in the second entitlement period, covered by section 37. The applicant's PIAWE was calculated to be \$836.00. The applicant was advised that his weekly payments would therefore cease, with the last day of payments being 6 December 2017. The calculation relevant to section 37(3) was clearly set out and explained.
3. The Insurer came to the same conclusion following internal review.
4. The applicant sought Merit Review from the Authority by application received on 03 November 2017.
5. Given that this was a matter transferred from one scheme agent to another, there appears to have been a delay with making a merit review decision caused by the failure of the first insurer to forward all relevant documents to the second insurer. It appears that the documents are still outstanding. In these unsatisfactory circumstances the Authority was eventually able to make findings and recommendations dated 14 December 2017 in the following terms:



The applicant:

- is able to return to work in suitable employment;
- has current work capacity;
- “suitable employment” would include being a “Team member” at a retail hardware shop [name deleted]; and
- has a PIAWE of \$896.04.

6. The merit reviewer made no consequential recommendation.
7. An application to this office for procedural review was received from the insurer on 20 March 2018. There being no objection from the Insurer, I am satisfied that the application has been made within time and in the proper form.

Submissions by the applicant

8. Section 44BB(1)(c) of the 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.”*
9. The applicant has provided the following submissions:

I disagree with:

- the calculated pre-injury average earnings;
- the decision in relation to what is suitable employment; and
- the decision about how much I can earn in suitable employment.

10. All three issues set out above were canvassed by the merit review service. This was appropriate since all three issues go to the merits of the case and have nothing to do with procedural review.

Submissions by the Insurer

11. The Insurer made no submissions.

Decision

12. The (original) insurer complied fully with the procedural requirements set out in the legislation, the relevant *Guidelines* and the regulation. The applicant was given fair notice both by telephone and correspondence that a work capacity assessment was imminent. The Insurer advised that a work capacity assessment was commenced on 25 May 2017 and completed on 28 August 2017. The correct notice period prior to termination of payments was given under section 54(2)(a).
13. The relevant entitlement periods were clearly set out and explained. The insurer took the applicant through sections 43(1) (a)-(d) in a comprehensive and easily understood way. Sections 59A(2) and (3) were accurately set out and explained. Relevant medical and related evidence was cited and explained in clear terms. The medical evidence relied upon was recent and included evidence from the applicant's nominated treating doctor.
14. One difficulty experienced by the merit reviewer was that the original insurer did not give wage records to the second insurer. While this is not ideal, the merit reviewer made allowances for this and as a result the PIAWE figure calculated by the Insurer was increased by \$60 per week in the worker's interests. It was not explained why the applicant could not get the records directly from the former employer.
15. As stated above, the matters raised by the applicant go to the merits of the case and have already been dealt with by the Authority in the course of merit review. It is not the role of this office to second-guess the merit review service.

Finding

16. I find that the original work capacity decision was validly made.

RECOMMENDATION

17. The application is dismissed.

A handwritten signature in blue ink, appearing to read "Wayne Cook", is written over a horizontal line.



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Wayne Cooper
Delegate of the Workers Compensation
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