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 is dismissed.**

**Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 24 June 2016. The decision was later amended in relation to the question of the calculation of PIAWE. Nonetheless, it is the decision of 24 June 2016 which was the subject of merit review.

2. As a result of the merit review, and the subsequent decision by the Insurer, the parties appear to agree that the original decision was in error, since the Insurer calculated the applicant's PIAWE based on his net wages, rather than his gross wages. That decision has now been corrected, the applicant has been reimbursed for the relevant amount, and there remains no live dispute between the parties, with the exception of a futile argument concerning an amount which the applicant concedes he was never paid.

3. The applicant insists that he is "owed" an extra $100 net per week, due to an oral agreement he alleges between himself and the employer. He admits that he never received this sum from the employer at any stage, but maintains that it should be included in the calculation of PIAWE. This is based on an alleged conversation in which it is claimed that the employer promised to increase his payments by $100 per week following a review which would take place one month after commencement.

4. The applicant made a claim through the Fair Work Ombudsman which led the Commonwealth Employment Department to make a Fair Employment Guarantee [FEG] determination that his correct earnings were $1,000 per week, net. This formed part of the basis for the Insurer's revised decision. Interestingly it was noted at the time that there was "no evidence to

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

substantiate the claim" that there had been any verbal agreement to increase payments from $1,000 per week net to $1,100 per week net.

5. The merit reviewer made the following comments at paragraph 51:

> *51. Doing the best I can on the information before me, I am satisfied that the amount of [the applicant's] ordinary earnings was the actual earnings paid or payable each week of $1,000. In this respect, I agree with the findings of FEG that there is no information before me to substantiate that [the applicant] was paid a higher rate than $1,000. That is the amount consistently paid into his account. There is no information other than [the applicant's] statement that is was agreed that he would be paid at a higher rate. Even on [the applicant's] own statement of May 2013, there would only have been an increase based on the employer's assessment of his work.*

6. Since the merit reviewer referred to the statement by the worker, it might be useful to reproduce in part, the relevant paragraphs being these (emphasis added):

> 84. [The employer] indicated when I started that he would pay me $1,000 a week for the first month and increase it to $1,100 after that time, **but he never did**.
> 85. He apologized and said he would increase my pay **but he never did so**.
> 91. My last day with the company was 12 April 2013.
> 92. **I knew [the employer] was never going to pay me what we had agreed and I have had enough**.
> 93. I also spoke to [named colleague] on my last day at work.
> 94. **I told him that he knew I had injured my back** when I was using the slide hammer.
> 95. I decided at that time that I would proceed with the workers compensation claim **because up until that time I was going to deal with it myself, and I also had concerns about my job.**
> 96. **When it was clear that [the employer] was not going to pay me what we had agreed upon and I was going to leave I decided to proceed with the claim.**

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

7. The **highlighted** words in paragraphs 84 and 85 are a clear admission that the applicant at no time ever received $1,100 net per week while working for this employer. Paragraph 92 merely underlines the point.

8. It was interesting that the applicant made the admissions in paragraphs 94-96 and even more so that he apparently thought they might assist his case.

9. Section 44BB(3)(c) is in the following terms:

> *(c) the reviewer may decline to review a decision because the application for review is frivolous or vexatious or because the worker has failed to provide information requested by the reviewer.*

10. I am satisfied that the application does not disclose a reasonable cause of action. The applicant has been told by the Insurer, FEG and merit review that there are no grounds on which he can succeed with the claim for a further $100 per week net. This is not a situation where amendment of the application could ameliorate the applicant's position, since the Insurer has already paid every dollar to which the applicant is entitled.

11. It follows that, in the words of Barwick, CJ in *General Steel Industries Inc v Commissioner for Railways (NSW)* [1964] HCA 69:

> The [applicant's] claim is "manifestly groundless" and [] to allow it to proceed "would involve useless expense." In my opinion the proper course is to dismiss [the application], which I now do.[1]

**RECOMMENDATION**

12. The application is dismissed

[1] At paragraph 35.

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

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
23 September 2016