



## 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. On 12 December 2015 the applicant suffered injury to the left shoulder and upper torso in the course of his employment as a Security Guard. The applicant had concurrent employment as a Truck Driver in which he earned approximately four times his earnings as a Security Guard. The insurer accepted liability and made weekly payments for all relevant periods.
2. The applicant seeks procedural review of a "Work Capacity Decision" made by the insurer on 31 March 2016. The insurer informed the applicant that his claim was accepted and weekly payments would be made at a rate of \$1,168.61 [95% of PIAWE of \$1,230.12] for the first 13 weeks, thereafter at \$984.10 [80% of the PIAWE] if the applicant had not returned to work. This was anomalous, since the applicant had already received 17 weekly payments from the insurer. It follows that no further weekly payments of \$1,168.61 would be forthcoming unless the applicant returned to work.
3. The insurer itself said: "This decision is a **work capacity decision** pursuant to section 43(1)(d) of the 1987 Act." This, despite the letter having the following heading: "Your claim has been accepted."
4. On 26 September 2017 the insurer advised the applicant that his PIAWE had been revised downwards from \$1,230.12 to \$1,140.00.
5. On 5 February 2018 the applicant sought internal review. An Internal Review Decision dated 26 February 2018 advised that PIAWE was now calculated to be \$850 (originally \$824, but increased due to indexation). The insurer further advised that weekly payments would be reduced from 4 June 2018, being 3 months and 7 days notice.



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6. The applicant sought Merit Review from the Authority by way of application made on 27 March 2018. The Authority delivered its Findings and Recommendations dated 20 April 2018. The Authority made finding that:
  - The amount of [the applicant's] PIAWE is \$946.86 for the first 52 weeks of weekly payments of compensation; and
  - The amount of [the applicant's] PIAWE after 52 weeks of weekly payments of compensation is \$840.00.
7. The merit reviewer made the following recommendation:
  - The insurer must apply these findings when calculating [the applicant's] weekly payments of compensation, subject to the relevant increases for indexation.
8. An application was made to this office for procedural review received on 10 May 2018. I am satisfied that the application has been made within time and in the proper form.
9. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the relevant *Guidelines*.

### **Submissions by the applicant**

10. Section 44(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.*"
11. The applicant submits that:

"According to *icare* casual loading is included in ordinary earnings."
12. I can only assume that this is an oblique reference to the calculation of PIAWE. The applicant provided no further information as to whether any such casual loading was applicable to one or both of his former occupations. It seems as though the question is answerable from what appears in the merit review "Findings and Recommendations" document issued on 20 April 2018.



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### Submissions by the Insurer

13. The Insurer made no submissions beyond noting that this claim was subject to a discrete reference to the WIRO Solutions Group.

### Decision

14. The merit reviewer made the following observations at paragraph 6 of the “Findings and Recommendations” issued on 20 April 2018:

“On 5 February 2018, [the applicant] emailed the insurer more information and to ask it to review its decision about the amount of his PIAWE. On 26 February 2018, the insurer conducted an internal review and decided that [the applicant’s] PIAWE was \$824.00. The key reason for this lower figure was that the Insurer had now **correctly applied the law** and excluded ‘base rate of pay exclusions’ from [the applicant’s] PIAWE: see paragraph [31] of the internal review decision notice. It also **correctly excluded overtime and shift allowance amounts** after 52 weeks of weekly payments.” [Emphasis added.]

15. It forms no part of the jurisdiction of this Office to review or second-guess the merit review service. It might be thought a complete answer to the submission made by the applicant that, where *icare* and the merit reviewer might differ, the recommendation of the merit reviewer is binding on *icare*, not the other way around. In other words, it is no answer to a recommendation of the merit review service to say that *icare* has a different view, since section 44BB(3)(g) is in the following unambiguous terms:

44BB(3)(g): recommendations made by the Authority are binding on the insurer and must be given effect to by the insurer.

16. For the purposes of section 44BB(3)(g) *icare* and its various scheme agents from time to time are all interchangeably defined as “the insurer.” It follows that the submission of the applicant has and can have no force.



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17. The explanations of section 37 and the various entitlement periods in the work capacity decisions and in the internal review decision by the Insurer were adequate in all respects. The applicant was not misled or any way misinformed.
18. The same can be said for the explanation of the review process, and the explanation of section 43(1).
19. The applicant was given the correct notice period each time a decision was made to reduce his weekly payments.
20. The Guidelines and legislation were fully complied with and there are no procedural errors in the decision-making process.

### **Finding**

21. The Insurer has made no errors of a procedural nature and the work capacity decisions of 31 March 2016 and 26 September 2017 were validly made.

### **RECOMMENDATION**

22. The application for procedural review is dismissed.

A handwritten signature in blue ink, appearing to read "Wayne Cooper", with a long horizontal flourish extending to the right.

Wayne Cooper  
Delegate of the Workers Compensation  
Independent Review Officer  
28 May 2018