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## **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 19 May 2016 the applicant sustained injury in the course of his employment with one of his two employers. Prior to sustaining his injury the applicant worked for 34 hours per week in one job and for an average of 25.9 hours per week in the other. He was not regarded as working 'full-time' in either role. The insurer for the relevant employer accepted liability and commenced weekly payments, which continue.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 13 July 2016. The Decision informed the applicant that his weekly payments would be based on a PIAWE figure arrived at using only the pre-injury earnings of one of his two jobs. This was said to be based on an application of item 2 of Schedule 3 to the 1987 Act.
3. Relevantly, item 2 is in the following terms:

The worker's pre-injury average weekly earnings are to be calculated in accordance with Division 2 of Part 3 with reference to the work for the employer for whom the worker works at least the ordinary hours fixed by the fair work instrument.

There is an assumption implicit that the worker must be working "at least the ordinary hours" for one of the two jobs. In the present case, that assumption is incorrect.

4. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 2 September 2016. The Internal Review Decision confirmed the original Decision.



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5. The applicant sought Merit Review from the Authority by way of application received 13 September 2016. The Authority delivered its Findings and Recommendations dated 13 October 2016. The Authority made a finding that the applicant's PIAWE was \$997.45. This differed from the Insurer's finding of \$1,236.12 (for the first 52 weeks following 19 May 2016, after which time it would reduce to \$904.32 due to the deduction of shift-allowance and overtime payments). The merit reviewer also noted that the PIAWE "should be varied by the Insurer on each review date after he became entitled to weekly payments in respect of the injury, in accordance with the indexation provisions under section 82A of the 1987 Act."
6. The applicant made an application to this Office for procedural review received on 25 October 2016. I am satisfied that the application has been made within time and in the proper form.

#### **Submissions by the applicant**

7. 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.*"
8. The submissions made by the applicant are plainly expressed:
  - Not getting any compensation for second job loss of income as it is about 40% per week less; and
  - Review the original work capacity decision.

#### **Submissions by the Insurer**

9. The Insurer made no submissions in response to the application.

#### **Decision**

10. The only decision made by the Insurer concerned the calculation of PIAWE. This was correctly said to be pursuant to section 43(1)(d).



11. Having made a good start, the Insurer got little else correct. The fair work instrument under which the applicant was employed specified that the “ordinary hours” for a working week were 38 hours, whereas the applicant worked only 34 hours per week (wrongly described by the insurer as 36 hours per week) for that employer. It must follow that it is an error for the insurer to apply Class 2 of Schedule 3 to the applicant, since he did not work for the ordinary hours required by the fair work instrument in that employment, and in his other employment he had neither a fair work instrument nor even a written contract.
12. The merit reviewer identified this error and corrected it. The applicant is in class 8, not class 2, of Schedule 3. This requires PIAWE to be calculated using an average of the hours worked and the hourly rates paid for all employment, amortised at 38 hours per week. So in the present case the applicant worked for 59.9 hours per week at an average hourly rate of \$26.2486. According to column 3, Item 8, Schedule 3 of the 1987 Act the average hourly rate must be multiplied by the lesser of (a) average hours worked (here, 59.9 hours), or (b) 38 hours. In this case 38 hours is much the lesser of the two and that must be the basis for the calculation of PIAWE. Since  $\$26.2486 \times 38 = \$997.4468$ , the correct rounded PIAWE is \$997.45. This is the same figure arrived at by the merit reviewer.
13. While there was clearly a serious procedural error made by the Insurer, it has the anomalous quality of being a procedural error correctable in the course of both merit review and procedural review. Since the error has already been identified and corrected by the merit reviewer, there is nothing further for this Office to do.

### **Finding**

14. There is no need for a recommendation to be made, since the Insurer’s errors were corrected at merit review.

### **RECOMMENDATION**

15. The application for procedural review is dismissed.



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A handwritten signature in blue ink, which appears to read "Wayne Cooper". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Wayne Cooper  
Delegate of the Workers Compensation  
Independent Review Officer  
24 November 2016