



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 sustained an injury on 29 February 2016 in the course of his employment as a Taxi Driver. Since that time he has received weekly payments of compensation due to reduced work capacity. He currently works between 30 and 35 hours per week, having worked for about 60 hours per week pre-injury. A complicating factor is that the taxi he drives must be rented for a full shift, paid in advance, whereas he can usually only work half the shift. His overheads are therefore as they were prior to the injury, but his earning capacity is significantly reduced.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 23 August 2016. The Decision informed the applicant that his weekly payments of compensation would reduce in accordance with a re-calculated PIAWE, effective from 30 November 2016. The change in PIAWE reflected a reduction from the previously agreed figure of \$2,274.00 gross per week to the new figure of \$729.67 per week. A significant reduction was caused by the Insurer no longer including the cost of hiring the taxi for shifts.
3. The applicant sought internal review and the Internal Review Decision was dated 11 October 2016. The Internal Review Decision confirmed the original Work Capacity Decision, although it reflected an "indexation" of the PIAWE and increased it to the slightly larger figure of \$736.72, "rounded" by the Insurer to \$737 per week. The applicant was advised that this amount would be used as the PIAWE in the calculation of his entitlements from 30 November 2016 and following.



4. The applicant sought Merit Review from the Authority on 23 November 2016. This was only two days after the applicant received the outcome of internal review by the Insurer, therefore it was within time. The Authority delivered its Findings and Recommendations dated 22 December 2016. The Authority made a finding that the applicant's PIAWE was \$855.87. The Authority also recommended that the Insurer calculate the applicant's entitlement to weekly payments of compensation in accordance with that finding, from 30 November 2016.
5. The applicant made an application to this office for procedural review received on 12 January 2017. I am satisfied that the application has been made within time and in the proper form.
6. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the Guidelines. The relevant Guidelines came into effect on 1 August 2016.

### **Submissions by the applicant**

7. 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.*"
8. The applicant made submissions thus:
  - Firstly, I don't agree with the decision made on my income. It should be calculated on the last six months income according to the *Workers Compensation Act 1987* (section 37);
  - They downgraded my income showing \$47,786 on my Notice of Assessment year ended 30 June 2016 to \$44,505<sup>1</sup>;
  - The review was to get the taxi-hiring expenses from [the Insurer] until I get to my pre-injury duties. Nothing is mentioned in the review reply. How will I cope with the expenses if I can't work full hours?
9. The applicant has misconceived the concept of PIAWE – as was correctly explained by both the Insurer and the merit reviewer, the relevant period is 52

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<sup>1</sup> "They" in this instance refers to the Merit Review Service of SIRA, not the Insurer.



weeks prior to the date of injury. While the Insurer incorrectly discounted the applicant's entitlements by relying on his 2014-2015 tax assessment, this error was corrected in the course of merit review, where only four months of that year were included and the other 8 months were based on the tax records for the year 2015-2016, which therefore resulted in a higher PIAWE.

10. The reason for the so-called "downgrade" from \$47,786 to \$44,505 is that four months of the previous year, which had a significantly lower taxable income of some \$37,000 odd, had to be included.
11. The question of meeting his overheads is a problem for the applicant, not the Insurer. The identification of suitable employment cannot take into account individual personal circumstances. It may well be possible for the applicant to find an employer who will allow him to hire a taxi for half a shift at a time, or he may be able to find a co-worker willing to share shifts with him. Or he may find alternative employment with no overheads at all. The Insurer is not required to subsidise the business of a taxi owner by paying the overheads of employees.

### **Submissions by the Insurer**

12. The Insurer made no submissions in reply.

### **Decision**

13. The only issue in this case was the calculation of PIAWE. The Insurer calculated PIAWE based on the wrong figures, but this error was corrected by the merit reviewer, and the Insurer was directed to back-pay the corrected amount from 30 November 2016. Accordingly the applicant is currently in the same position he would have been in if the Insurer had made the correct calculation from the beginning.

### **Finding**

14. There are no consequential procedural errors identifiable in the decision dated 23 August 2016 and there is therefore no utility in setting that decision aside.

### **RECOMMENDATION**

15. The application for procedural review is dismissed.



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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  
16 February 2017