



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 injury in the course of his employment as a truck driver and yard hand on 27 April 2017. The insurer accepted liability and made weekly payments for all relevant periods.
2. On 5 July 2017 the insurer purported to calculate the Pre-Injury Average Weekly Earnings (PIAWE) of the applicant, arriving at a figure of \$802.
3. About nine months later the applicant sought internal review of the insurer's decision. As a result of this the Insurer conducted an internal review and advised the applicant by letter dated 4 May 2018 that it had revised the PIAWE figure down to \$721.31. The insurer accepts that the applicant has no current work capacity
4. The applicant sought Merit Review from the Authority by application received on 6 June 2018. The Authority to made the following findings dated 26 June 2018:
 - The applicant's PIAWE for the first 52 weeks of weekly payments of compensation is \$816.30.
 - The PIAWE after the first 52 weeks is \$782.78.
5. The merit reviewer made the following consequential recommendation:
 - The Insurer is to calculate the applicant's weekly payments of compensation on the basis of the findings set out above. The effective date of these recommendations is 27 April 2017.



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

6. An application to this office for procedural review was received on 06 July 2018. 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 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.”* The applicant has provided the following submissions:

- An error was made in the calculation of PIAWE;
- The recommendation of the merit review service was made in the absence of two payslips; and
- He was advised by the insurer that only full weeks are taken into account when calculating PIAWE.

Submissions by the Insurer

8. The Insurer responded in the following terms:

- An error was made in the calculation of PIAWE

The applicant requested an internal review and later a merit review of his PIAWE. PIAWE has therefore been recalculated on two occasions. The insurer considers that the PIAWE calculation completed as part of the internal review is correct, however, is bound by the merit review decision and has issued a new notice accordingly.

- The decision made by the merit review service was made with two payslips missing.

As part of the internal review process the insurer obtained copies of all payslips from the employer. The employer advised that no payslips were provided for weeks 25/11/16-1/12/16 and 2/12/16-8/12/16 as unpaid leave was taken during these weeks. Furthermore, the applicant advised the insurer that he took leave without pay during the period 23/12/16-29/12/16 due to Christmas shut-down by the employer. All payslips held by the insurer were provided to the Authority to complete their merit review, as well as confirmation of the weeks of unpaid leave.



- He was advised by the insurer that only full weeks are taken into account when calculating PIAWE.

The insurer confirms that the applicant was advised of this. The insurer is a scheme agent of icare and refers to the icare **PIAWE Handbook** to calculate PIAWE. Part 3.1 of the Handbook clearly excludes parts of weeks from calculation of PIAWE. Similarly, Part 3.2.1 excludes all periods of unpaid leave, so that if only a few days of unpaid leave are taken, the entire week is disregarded, as a result of a combination of Parts 3.1 and 3.2.1.

Decision

9. It appears to me that the insurer and the applicant may be at cross purposes when talking about missing payslips. The applicant is suggesting that payslips for the weeks commencing 29/12/16 and 05/01/17 are missing and that there was some sort of miscalculation of his entitlements “over the Christmas break,” whereas the employer has advised the insurer that the applicant took unpaid leave over the Christmas break and the “missing payslips” referred to in the insurer’s submissions are for different weeks than those nominated by the applicant.
10. Even accepting that the applicant may have a point which was not addressed correctly by the Authority, which may have been misled in turn by incorrect information given to the insurer by the employer, my role does not extend to reviewing the procedures of the merit review service of the Authority.
11. The insurer advises that it has made a subsequent work capacity decision consequential upon the recommendation of the Authority. Since the Authority’s recommendation is binding on the insurer, the only way the applicant can successfully challenge the insurer’s consequential decision is under section 44BB, unless recourse is had to judicial review in the Supreme Court of NSW. It would appear to me clear that the applicant might be well advised to apply for internal review of the consequential work capacity decision dated 28 June 2018, raising the issues referred to in paragraph 9 *supra* as grounds for review.

Finding



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

12. It is beyond the power of this office to overturn the merit review. It follows that the application must be dismissed.

RECOMMENDATION

13. The application is dismissed.

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
1 August 2018