



## **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 work capacity decision of 28/9/2018 is set aside.**
- b. The insurer is to make a new work capacity decision.**

### **Introduction and background**

1. On or about 2 June 2016 the applicant sustained psychological injury in the course of her employment as an Aboriginal caseworker. She has never returned to work. The claim was accepted and the insurer made all relevant weekly payments.
2. The Insurer made a work capacity decision on 28 September 2018, advising that the applicant can work for 8 hours per day, 5 days per week as an "Administrative Officer," as long as it is not in the same office where she sustained injury. The insurer also found the applicant's PIAWE to be \$1,640 and her ability to earn in suitable employment to be \$1,307 per week. The applicant was advised that her weekly payments would reduce to \$4.42 from 9 January 2019.
3. In the course of internal review (dated 30 November 2018) the Insurer revised the PIAWE figure downwards from \$1,640 to \$1,312. Mathematicians might be at once aware that eighty percent (80%) of \$1,640 is \$1,312. But that does not make the PIAWE figure itself \$1,312; it only means that for the purposes of section 37 for so long as the applicant does not return to work the insurer need only have regard to 80% of the PIAWE figure. If the PIAWE figure itself were really only \$1,312, then the relevant figure for section 37 purposes would be \$1,049.60. This is clearly an error of a procedural nature.
4. Further, the internal reviewer described the figure of \$1,312 as representing "your pre injury average weekly earnings (PIAWE) or current weekly earnings" on page one of the decision, but on the final



page correctly referred to the equation as “PIAWE x 80% - E (what you are able to earn in suitable employment)” with seemingly no advertence whatsoever to the distinction required to be drawn between “current weekly earnings” (page one) on the one hand and “ability to earn in suitable employment” (final page) on the other. It is not hard to see why the applicant might have difficulty following all of this, particularly since she does not currently work and therefore has no “current weekly earnings.” If there were any such earnings, the figure of 80% of PIAWE would be irrelevant, since the correct amount would be 95% of PIAWE, or \$1,558.

5. The applicant sought Merit Review from the Authority by way of application received on 18 December 2018. The Authority delivered its Findings and Recommendations dated 1 February 2019. The Authority found and determined as follows:

- The role of Aboriginal caseworker is suitable employment for the applicant;<sup>1</sup>
- The applicant is able to earn \$1,358 per week in suitable employment;<sup>2</sup>
- The insurer is to calculate the applicant’s entitlement to weekly payments of compensation in accordance with the findings above.

6. An application was made to this Office for procedural review received via email on 04 February 2019. I am satisfied that the application was made within time and in the correct 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.*”

8. The applicant seeks no more than a simple procedural review of the insurer’s decision and makes no further submissions.

---

<sup>1</sup> This despite “Aboriginal caseworker” being the very pre-injury employment in the course of which injury was suffered.

<sup>2</sup> See note 1. Also noted that this figure is based on a simple calculation of weekly entitlements at the minimum of a range which stretches from \$70,652 to \$97,616 per annum. Given the applicant had 11 years’ experience in the role, this seems unrealistically low.



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

## **Submissions by the Insurer**

9. The Insurer made no submissions.

## **Decision**

10. The applicant was advised by telephone on 24 August 2018 that a work capacity assessment was imminent. The applicant clearly had fair notice of the work capacity assessment and subsequent decision dated 28 September 2018.
11. The insurer correctly set out the elements of the work capacity decision on page one of the decision and this was repeated consistently throughout the decision.
12. The internal review was not as correct as the original decision. The PIAWE was wrongly stated to be a figure based on a calculation of 80% of PIAWE. The concepts of “current weekly earnings” and “ability to earn in suitable employment” were used seemingly interchangeably, despite the insurer being aware that the applicant does not currently work.
13. The Guidelines state that any procedural errors made by an insurer would need to be of a substantive nature in order for the decision to be adversely affected by them; this presumably being a protection against pettifogging zealotry on the part of reviewers. With this in mind I think it is still a requirement for an insurer to carefully explain decisions to injured workers in a manner which is both clear and legally accurate. While I acknowledge the clarity and accuracy of the original decision, the good work was undone in the course of internal review.
14. There are important errors of a procedural nature evident on the face of the internal review decision in this case.

## **Finding**

15. The Insurer has not complied fully with the legislative requirements and with the guidelines and accordingly the work capacity decision dated 28



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

September 2018 and the consequent internal review decision dated 30 November 2018 must be set aside.

### **RECOMMENDATION**

16. The work capacity of 28/9/2018 decision is set aside.
17. The insurer is to make a new work capacity decision.

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  
12 February 2019