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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. The applicant fractured his left hip on 10 March 2015 in the course of his employment as a Storeman. He was hospitalised and underwent surgery. He has not returned to work. The Insurer accepted liability and made weekly payments of compensation for all relevant periods.

2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 14 October 2016. The Decision informed the applicant that his weekly payments of compensation would cease, effective from 21 January 2017. For the sake of clarity the Insurer specified that the last day of payment would be 20 January 2017, with nil thereafter.

3. The Insurer advised that the applicant had the ability to work for 8 hours per day, 5 days per week in suitable employment as a Purchasing Officer, Dispatch Clerk and/or Warehouse Administrator with a capacity to earn $1,367.00 per week in the role of Purchasing Officer. Since the applicant was in the second entitlement period and had not returned to work, the formula in section 37(3) resulted in no weekly entitlement. The formula in section 37(3) requires the applicant's pre-injury average weekly earnings [PIAWE] to be considered and 80% of that figure to be used as the base from which post-injury earnings [E] and non-pecuniary benefits [D] are to be deducted. It is therefore critical that the correct PIAWE figure be used.

4. The applicant sought internal review and the Internal Review Decision was dated 29 November 2016. The Internal Review Decision confirmed the original Work Capacity Decision. In the course of internal review, the Insurer made the following somewhat elliptical remarks:

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> 51. On the information before me, [the applicant's] PIAWE (AWE) has been previously assessed to be $817. I note that there is no information before me to suggest that [the applicant] does not agree with this figure; therefore, I accept this rate as [the applicant's] AWE.
>
> 52. Accordingly [the applicant's] AWE is $817.

5. To say that the applicant's lack of expertise in the calculation of PIAWE, which would clearly lead him to making no suggestion that "he does not agree with this figure," and to then go on to say that "therefore" the figure should be accepted is a complete abrogation of the Insurer's responsibility to review the decision. The above quoted statements appear to be made in complete innocence of any understanding of how PIAWE is to be calculated. That it was "previously" thought to be a particular figure is no evidence that it either ever was that figure or remains that figure. The purpose of internal review is to correct any errors which may have arisen in the course of the original decision, something unlikely to occur if the contents of the previous decision are relied on as evidence of their correctness.

6. Further, the indexation of a worker's pre-injury average weekly earnings is allowed for in the legislation and is of itself an indication that PIAWE is not and cannot be a static figure, fixed for all time. This applicant was not an "existing recipient" and his PIAWE is not fixed in the same way as the "transitional rate" which applies to that class of workers; but if it were so fixed, even that transitional rate would be indexed periodically.

7. The applicant sought Merit Review from the Authority on 23 December 2016. The Authority delivered its Findings and Recommendations dated 31 January 2016. The Authority made findings that the applicant: (i) is able to return to work in suitable employment as a Warehouse Supervisor and Dispatch Clerk; (ii) has current work capacity; (iii) is able to earn $1,160 per week in suitable employment; and (iv) has an entitlement under section 37 to weekly compensation of nil.

8. Despite disagreeing with the Insurer about (a) the applicant's ability to earn in suitable employment ($1,160 per week, as opposed to the Insurer's figure of $1,367) and (b) the type of work suitable for the

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applicant to perform (the merit reviewer did not regard the applicant as capable of performing the work of a Purchasing Officer), the merit reviewer declined to make a recommendation. This is sought to be excused on the grounds that since the applicant has a "nil" entitlement in either case, nothing turns on the differences in coming to that conclusion.

9. The applicant made an application to this office for procedural review received on 14 February 2017. I am satisfied that the application has been made within time and in the proper form.

10. 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

11. 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."*

12. Submissions were made on behalf of the applicant by his legal advisers thus:

- A number of issues raised in submissions to the Authority were not specifically raised by the worker when he requested internal review and the Authority has advised that it "cannot" review any part of the work capacity decision that was not the subject of the internal review;
- The indexation of PIAWE is not explained in detail and is erroneous. It is requested that the indexed PIAWE rate of $814.06[1] be reviewed;
- The worker seeks a procedural review of the whole of the WCD. In particular it is submitted that the worker was incorrectly advised about the indexation of his PIAWE.

13. First, the merit reviewer did not refer to "any part of the work capacity decision." Rather, they referred to individual "decisions," as though the constituent parts of the WCD were themselves stand-alone decisions capable

[1] Note that PIAWE was found to be $817 in the course of internal review, not $814.06. The latter figure was determined in the original work capacity decision.

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of being reviewed in isolation. If this approach were correct it would lead to the awkward situation where an insurer could escape scrutiny in the course of merit review by the simple step of failing to conduct an internal review of a particular aspect of a decision. It also fails to address the question of what it is a merit reviewer can review in cases where the Insurer fails to conduct internal review at all – see section 44B(3)(b) in the following terms:

> (b) an application for review by the Authority may be made **without an internal review by the insurer** if the insurer has failed to conduct an internal review and notify the worker of the decision on the internal review within 30 days after the application for internal review is made.

In addition to this obvious absurdity, the argument ignores the purpose of merit review, which is to arrive at the "correct or preferable" decision. Any such review must include a review of the entire decision, not just nominated constituent parts wrongly styled as stand-alone "decisions."

14. Secondly, while the applicant raises an interesting a point about the explanation of PIAWE indexation, the alleged error must be looked at in light of the Guidelines currently in place. The doctrine of "substantial compliance" (which appears at page 6 of the *Guidelines for claiming workers compensation* in force from 1 August 2016) says that if an insurer makes a "technical" error which does not of itself result in a worker being misled or disadvantaged, it can be determined that any resulting decision still stands. Here it is the case that whether or not the Insurer had correctly explained the indexation of PIAWE, the result of the decision would be identical. Even though it would be a clear error, it would not be sufficient to set aside the decision.
15. Thirdly, procedural review is always a review of the whole work capacity decision.

Submissions by the Insurer

16. The Insurer in reply said only this:

- The Insurer acknowledges [the applicant's] submissions and submits that the Insurer has adhered to the guidelines and legislation; and

- Further the Insurer submits that [the applicant] did not request a review of the indexation of his PIAWE in his Internal Review Application.

17. It has to be said that the second of these submissions would be breathtaking, if I were not aware that it is informed by the attitude of the

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Authority. The indexation of a worker's PIAWE is a statutory requirement, not something a worker has to ask for. If it is not done or is done erroneously, that is a procedural error and an error of law.

Decision

18. The Insurer gave the applicant fair notice of an impending work capacity assessment and decision on 21 September 2016.

19. The insurer advised that the work capacity assessment was completed on 13 October 2016 and that as a result the decision had been made to discontinue payments in accordance with section 37(3).

20. Notice was properly given under section 54(2)(a), with an added four days as required by section 76(1)(b) of the *Interpretation Act* 1987.

21. The applicant was taken through section 43(1)(a),(b),(c),(d) and (f).

22. Section 59A(2) and (3) were clearly explained. The applicant was advised that his entitlement to pre-approved medical expenses could continue for two years after the cessation weekly payments due to his not having greater than 10% whole person impairment [WPI]. To clarify the last point, the insurer notes that the applicant has never had any assessment made of WPI.

23. The concept of "current work capacity" as defined in section 32A was fully explained. It was explained that the applicant's own nominated treating doctor certified him fit for work for 8 hours per day, 5 days per week with modified duties (see *Certificate of Capacity* dated 4 September 2016).

24. Section 37(3) was fully set out and discussed at length.

25. The indexation of PIAWE was certainly referred to, at page 5. Although the Insurer referred to an amount ($814.06) applicable only when applying the indexation from the 1 April 2015 scale, it appears this was corrected in the course of internal review to $817, based on the 2016 scale. For the reasons set out at paragraph 14 *supra*, nothing turns on this.

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26. The evidence relied upon by the insurer was set out, totalling no less than 46 documents, including the most up-to-date Certificate of Capacity provided by the applicant.

27. Four pages were dedicated to showing why the three identified roles would be suitable for the applicant. While the merit reviewer disagreed with the conclusions drawn, the process itself was properly done.

28. I can identify no procedural errors made by the Insurer.

Finding

29. The work capacity decision dated 14 October 2016 was validly made.

RECOMMENDATION

30. The application for procedural review is dismissed.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
14 March 2017