



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 background to this application was set out in WIRO recommendation 1616 (#16 of 2016) and was also the basis for recommendation 10816 (#108 of 2016).
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 01 September 2016. Specifically, the Insurer informed the applicant that his PIAWE had been calculated to be \$1,005.04. This determination constitutes a "work capacity decision" in accordance with section 43(1).
3. The applicant requested an internal review and on 16 November 2016 the internal reviewer came to the conclusion that the original decision-maker had made a significant procedural error and the decision dated 01 September 2016 was accordingly withdrawn. This left in place the previous determination of PIAWE and meant that the weekly payments made by the Insurer to the applicant were in no way affected.
4. Despite this, the applicant sought Merit Review from the Authority by way of application received 16 December 2016. The Authority conducted a merit review of the withdrawn decision and delivered its Findings and Recommendations dated 24 January 2017. The Authority made findings that the applicant:
 - (i) has a PIAWE for the period after the first 52 weeks for which weekly payments are payable of \$1005.04; and
 - (ii) is entitled to indexation under Division 6A of Part 3 of the 1987 Act.



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5. The Authority made the following recommendation to the Insurer:

“5. The Insurer is to determine [the applicant’s] entitlement to weekly payments of compensation in accordance with my findings.”

6. An application was subsequently made to this Office for procedural review, received on 23 February 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 voluminous, but might be fairly said to revolve around the failure of the Insurer to give him “fair notice” of the decision dated 01 September 2016. Ironically, it was this very failure to provide fair notice which caused the internal reviewer to withdraw the decision on the grounds of a breach of procedural fairness.

9. Other submissions made by the applicant go to the merits of the case, including the calculation of PIAWE. Given the outcome of merit review, these submissions are otiose. The merit reviewer agrees with the calculation of PIAWE in the decision withdrawn by the Insurer, to the cent. This Office has nothing to contribute further to this question.

Submissions by the Insurer

10. The Insurer made no submissions in reply.

The relevant Guidelines

11. On 1 August 2016 a new set of *Guidelines for claiming workers compensation* came into effect, replacing the former *Work Capacity Guidelines* which had been in force from 11 October 2013. While the former Guidelines had (at 5.2) a requirement for an Insurer to give “at

least two weeks” fair notice of an impending work capacity decision, that requirement was not included in the current version of the Guidelines. It is understandable that an Insurer might be thereby misled into thinking that the provision of “fair notice” was no longer a requirement. However, while Guidelines might be seen as an attempt to codify the common law on the question of procedural fairness, the omission from the Guidelines does not exclude fair notice as an essential element in procedural fairness. The Insurer was right to withdraw the work capacity decision.

Decision

12. The Insurer withdrew the decision dated 01 September 2016 and is currently subject to a recommendation by the Authority that a new decision be made in accordance with the recommendation of the Authority. That recommendation is binding on the Insurer.
13. The decision of 01 September 2016 having been withdrawn, there is no decision for this Office to review.

Finding

14. This Office has power to review a decision which no longer exists. The application was misconceived.

RECOMMENDATION

15. The application is dismissed.



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