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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 seeks procedural review of a Work Capacity Decision made by the Insurer on 21 September 2015. The Decision informed the applicant that his PIAWE was \$836.64. The applicant sought internal review by the Insurer which varied the original decision and increased the PIAWE to \$1,054.50 by decision dated 24 November 2015. The differing amounts for PIAWE are related to the characterization given to a weekly average of \$217.86 which was initially thought to be overtime but was later not so characterized.
2. The applicant sought Merit Review from the Authority which delivered its Findings and Recommendations dated 22 January 2016. The Authority made a finding that the applicant had a PIAWE of \$836, concurring with the original decision by the Insurer.
3. The applicant then made an application to this office for procedural review dated 16 February 2016. I am satisfied that the application has been made within time and in the proper form.
4. The applicant raises a question about the competency of the merit review and does not specifically seek review of the Insurer's decision.
5. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).

Submissions by the applicant



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6. Section 44(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 applied for a procedural review.

7. The applicant has made the following submissions:

- The review I am seeking is in regards to section 31 of my merit review and refer to the '*Guidelines for Work Capacity Decision Internal Reviews by Insurers and Merit Reviews by the Authority*'
- The review does not explain the process or instrument, contrary to 10.15.3. of the guidelines, that was used to separate the bonus (\$5 or about 6.25%) I was paid on each and every hour of labour sold or each 'code read' sold (\$50 or about 62.5%) from a 'commission'. Instead the reviewer named it as an '**incentive based payment or bonuses**'. A description which generally does not exclude but includes commission and therefore should be included in my ordinary earnings of my PIAWE calculation.
- It especially should have been given particular attention as the wording used by the reviewer “**payments were made as incentive based payments or bonuses**” is so very close to being what 'Fair work uses in their definition of 'commission'. – “*A commission payment can be called a ‘bonus’ or ‘incentive payment’*”. As it was on my payslip and my merit review application.
- Section 31 again. -
- In the review Sec 11 it is stated - “**The information that I have considered in making this decision is the information attached to the application for merit review and the Insurer’s reply and any other information that has been supplied by the parties, which I am satisfied has been exchanged between them.** “
- Section 31 again. The definition of 'commission' should have been explained as to why the reviewer considered it didn't apply in my case, citing the relevant legislation (10.15.3.). I received a percentage of every hour sold and every charge out of a service 'Code Read'. Just like any other type of commission.
- 10.15.3.1 findings on material questions of fact, referring to the documents or other material on which those findings were based;

Yet the reviewer (in sec 31) considers my bonus was paid for “**completing work on time**”. This is based assumption. I clearly stated it was “**paid to me on a per hour sold**” basis.



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- I also mentioned this in my example **“But if it took all day because of problems, I only get that \$5.”** This is contrary to a bonus for finishing a job on time and supportive of what I am claiming.

‘Hours Sold’ v ‘Completion on Time’ v ‘Book Time’

- Hours sold, completing work on time and what's called 'book time' are three different times that can vary considerably from job type to job type. The example I gave (brake repair) is one that clearly shows the difference that these times can be, although I did not feel I had to explain workshop economics in the review. But can be explained if required. As far as I know, no information relating to how long it should take to complete a task was given, suggested or indicated. As mentioned, I was paid a percentage of a per hour sold basis and it should have been considered as such.

Submissions by the Insurer

8. The Insurer has made no submissions but has supplied relevant documents.

Decision

9. The Authority made findings and recommendations that the applicant has a PIAWE of \$836 per week.
10. It is clear from the submissions by the applicant reproduced in full above that he thinks the additional \$217.86 paid on average per week was for a time-related performance bonus, which should not be styled overtime.
11. Whatever view I might have of the merits of the argument, the applicant cannot succeed with a procedural review on those grounds, since the findings and recommendations of the Authority are not susceptible to review by this Office.
12. It follows that, since no other grounds appear to be raised, this Office has no jurisdiction to proceed further.
13. I note that section 43 of the *Workers Compensation Act 1987* refers to either section 44BB review or judicial review by the Supreme Court of



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New South Wales. The applicant might take some independent advice concerning the latter.

Finding

14. I am unable to perform the review requested by the applicant.

RECOMMENDATION

15. The application for procedural review is dismissed.

A handwritten signature in blue ink, appearing to read "Wayne Cooper", with a long horizontal stroke extending to the right.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
30 March 2016