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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 work capacity decision dated 02 September 2016 is set aside.

b. The Insurer is to calculate the PIAWE of the applicant "as a weekly sum" in accordance with section 44C(2).

Introduction and background

1. The applicant suffered injury to his right shoulder on the first day of his employment as a Truck Driver, being 15 June 2016. More accurately it might be called his only day of employment, since there was no contract for ongoing employment and the terms of the unwritten agreement between the applicant and the employer appear to imply only one day of employment was within contemplation. The insurer accepted liability for all relevant periods.

2. The insurer calculated the applicant's PIAWE to be $357.12, consisting of 8 hours at $25.60 per hour plus $152.32 in overtime. This was the precise amount earned on 15 June 2016. The Insurer made payments based on this figure for the 13 week period covered by section 36. Following the expiry of the section 36 period, the Insurer advised the applicant that he would be receiving 80% of the PIAWE figure in accordance with section 37, as opposed to the former 95% which had applied under section 36. The Insurer had assessed the work capacity of the applicant at the same time and the decision to maintain the PIAWE figure itself constituted a work capacity decision under section 43(1).

3. The applicant sought internal review and the Internal Review Decision was dated 16 December 2016. The Internal Review Decision confirmed the original Work Capacity Decision.

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4. The applicant sought Merit Review from the Authority on or about 3 February 2017. There was some dispute about receipt of the internal review decision and ultimately the merit reviewer accepted that the application was within time, so finding in what might be conveniently styled an interlocutory recommendation dated 6 March 2017.

5. The Authority delivered its substantive Findings and Recommendations dated 17 March 2017, consisting primarily of a finding that the applicant's PIAWE was correctly calculated at $357.12.

6. The applicant made an application to this Office for procedural review received on 12 April 2017. I am satisfied that the application has been made within time and in the proper form.

7. 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

8. 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."*

9. The applicant submitted the following:

- Procedural irregularities as identified in Merit Review Interlocutory decision of 6 March 2017, including failure to provide documents and failure to documents in proper form.

10. The Authority was at pains to emphasize that it was not conducting a procedural review in the document dated 17 March 2017. In the earlier recommendation dated 6 March 2017 the merit reviewer considered that incorrect, inadequate or illegitimate service of the internal review decision vitiated any argument by the Insurer about the application for merit review being out of time. To that extent the applicant has already had the benefit of the Insurer's procedural irregularities as a consequence of the Authority allowing a merit review to proceed.

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Submissions by the Insurer

11. The Insurer made the following submission:

> The Insurer submits that we have complied with the 1987 Act and guidelines in making our decision.

Decision

12. The insurer advised the applicant that PIAWE had been calculated solely on the basis of the one day of work performed by the applicant. This is despite the provisions of section 44C(2)(a) and (b), worded thus:

> 44C Definition—pre-injury average weekly earnings
>
> (2) If a worker has been continuously employed by the same employer for less than 4 weeks before the injury, pre-injury average weekly earnings, in relation to that worker, may be calculated having regard to:
>
> (a) the average of the worker's ordinary earnings that the worker could
> reasonably have been expected to have earned in that employment, but for the injury, during the period of 52 weeks after the injury ***expressed as a weekly sum***, and
>
> (b) any overtime and shift allowance payment that is permitted to be included under this section (but only for the purposes of the calculation of weekly payments payable in the first 52 weeks for which weekly payments are payable).

13. The ***highlighted*** words present a difficulty for the Insurer, since a daily rate is in no sense of the words equivalent to "**a weekly sum**." The latter phrase connotes a calculation based on a working week, typically consisting of five days for a fulltime employee. If this had been the correct approach, the right PIAWE figure would be the *per diem* rate multiplied by five, expressed in numbers so:

> $357.12 x 5 = **$1,785.60**.

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14. The Insurer actually claimed to be relying on section 44C(2). On that basis it is hard to see how they escape the conclusion that the correct figure for PIAWE is $1,785.60.

15. Section 44C(3) is in the following terms:

> (3) If a worker:
>
> (a) was not a full time worker immediately before the injury, and
>
> (b) the time of the injury was seeking full time employment, and
>
> (c) had been predominantly a full time worker during the period of 78 weeks immediately before the injury,
>
> pre-injury average weekly earnings, in relation to that worker, means the sum of:
>
> (d) the average of the worker's ordinary earnings while employed during the period of 78 weeks immediately before the injury (excluding any week during which the worker did not actually work and was not on paid leave) (the qualifying period), whether or not the employer is the same employer as at the time of the injury expressed as a weekly sum, and
>
> (e) any overtime and shift allowance payment that is permitted to be included under this section (but only for the purposes of the calculation of weekly payments payable in the first 52 weeks for which weekly payments are payable).

16. The argument for the position adopted by the Insurer was summarised (and accepted) by the merit reviewer at paragraphs 20-22, 30-39, relevantly reproduced here:

> 20. It is noted that [the applicant] was "predominantly a full time worker between 1 July 2014 and 3 November 2015 and over such period averaged $1,066 per week."[1] Given that section 44C(3)(d) of the 1987 Act excludes any week during which [the applicant] did not actually work and was not on paid leave, the correct PIAWE is the amount of $1,066 and not the amount as calculated by the Insurer.

[1] The quotation marks indicate that the merit reviewer is quoiting from the submissions on behalf of the applicant.

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21. In reply, the Insurer in responding to the above submissions, state that [the applicant] was predominantly a full-time worker between 1 July 2014 and 3 November 2015. However, this timeframe is not "immediately before the injury" as required under section 44C(3) of the 1987 Act, but over 7 months prior to the applicant's date of injury.

22. Further in absence of any evidence in the form of resume, application letters, confirmation of receipt of application letters which could demonstrate that [the applicant] was job-seeking, the Insurer is unable to determine whether or not [the applicant] meets the requirements stipulated in section 44C(3)(a),(b) and (c) of the 1987 Act. Therefore, the Insurer relied on section 44C(2) of the 1987 Act to determine [the applicant's] PIAWE.

……

30. On the information before me it is accepted fact by the parties that [the applicant] was not a full time worker immediately before the injury on 15 June 2016. The information supports that [the applicant] was in fact not employed between 4 November [2015] and 14 June 2016. On that basis ***I accept that [the applicant] satisfies the requirement as provided in section 44C(3)(a) of the 1987 Act***.

31. However, on the information before me, I am not satisfied that [the applicant] at the time of injury was seeking fulltime employment as required under section 44C(3)(b) of the 1987 Act. ***I acknowledge [the applicant's] submissions that he was and that there is no information to the contrary***. However there must be adequate information to support that he was seeking full time employment at the time of injury. [The applicant's] statement without further supporting information does not persuade me that he was.[2]

[2] No hint is given as to exactly what evidence persuades the merit reviewer to the contrary position. She may well believe that there is a statutory presumption against seeking fulltime work, which must be rebutted by the worker. If so, I am unaware of it and it is nowhere identified in the recommendation. Given that the only evidence on the issue is the testimony of the applicant, it is hard to justify the conclusion drawn in the absence of an adverse credit finding.

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> 33. Further, I am also not satisfied that [the applicant] was predominantly a full time worker during the period of 78 weeks immediately before injury which he sustained on 15 June 2016. The information before me indicates that [the applicant] was not in full time employment from 4 November 2015 to 14 June 2016. That is a period of almost 32 weeks immediately before the injury which [the applicant] was not employed in any capacity. Given the lengthy and constant period of unemployment immediately prior to injury, I am not satisfied that [the applicant] meets the requirement under section 44C(3)(c) of the 1987 Act.
>
> 34. Accordingly I do not accept that his PIAWE should be calculated pursuant to section 44C(3) of the 1987 Act.

17. It has to be said that there are several anomalous qualities to the excerpted paragraphs, not the least of which is the argument appearing in paragraph 33, which appears to cavil with the legislation. The Act specifies a period of 78 weeks during which income is to be averaged, excluding weeks when the worker does not work and is not paid. There is nothing to say that such unpaid non-work periods cannot extend to 32 weeks, nor is there anything to prohibit such periods being uninterrupted. It is obvious that this applicant did work full time prior to his period of unemployment, which is common ground between the parties. This fact, together with the submissions made on behalf of the applicant, is further evidence that he would have been likely to be looking for full time work immediately prior to his injury.

18. This Office does not presume to conduct reviews of merit reviews. The commentary in paragraph 17 above is therefore just that, commentary. The substantive finding of the merit reviewer was that section 44C(2) is applicable and the parties are bound by that finding.

19. However, while section 44C(2) may well apply, it must be interpreted correctly. The interpretation currently given by the Insurer and the merit reviewer is erroneous, in that it ignores the critical words in section 44C(2)(a) – "***expressed as a weekly sum***." The insurer is aware that

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the amount relied upon is a *per diem* rate, whereas the legislation requires PIAWE to reflect weekly earnings, not daily earnings.

20. This being an error of law (for the reasons set out at paragraphs 13-14 supra), it is clearly a procedural error, since the Guidelines require the Insurer to make work capacity decisions in accordance with the legislation. It also effects a significant injustice to the applicant, and therefore must be set aside.

Finding

21. The work capacity decision dated 02 September 2016 was invalidly made.

RECOMMENDATION

22. The work capacity decision dated 02 September 2016 is set aside.

23. The Insurer is to calculate the PIAWE of the applicant "as a weekly sum" in accordance with section 44C(2).

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
15 May 2017