



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 applicant suffered injury to her right knee in the course of her employment on 29 November 2015. The insurer accepted liability and made payments for all relevant periods.
2. On 17 August 2016 the insurer calculated the applicant's PIAWE to be \$366.83, resulting in weekly payments of \$348.49, the latter figure being 95% of the former.
3. The applicant sought internal review and the Internal Review Decision was dated 6 February 2017. The Internal Review Decision varied the original Work Capacity Decision, lowering the PIAWE amount to \$305.86 in the first 52 weeks, thereafter \$287.00. The figure of \$287.00 per week was said to be effective from 13 May 2017. The variation between the two determinations turns on the interpretation given to additional information considered by the insurer.
4. The applicant sought Merit Review from the Authority on or about 7 March 2017. The Authority delivered its Findings and Recommendations on 27 March 2017, consisting of a finding that the applicant's PIAWE was considered to be \$346.31 in the first 52 weeks, thereafter \$283.55.
5. The Authority recommended that the Insurer calculate the weekly benefits payable to the applicant in accordance with the above findings.
6. In the course of the recommendation, the Authority set out the reasons for coming to a decision slightly different from the Insurer's, thus:



The Authority has found that [the applicant's] PIAWE is less than what the Insurer originally decided on 17 August 2016. This is because more specific information about [the applicant's] PIAWE has come to light since the original decision. There are now detailed pay slips for [the applicant's] 52 weeks of employment immediately before the injury. This has led to more accurate finding[s] about [the applicant's] PIAWE.

7. It follows that both the Insurer, in the course of internal review, and the Authority, in the course of merit review, had regard to additional information unavailable to the Insurer at the date of the original decision. Both subsequent decisions reduced the PIAWE of the applicant.
8. An application to this Office for procedural review was received on 21 April 2017. I am satisfied that the application has been made within time and in the proper form.
9. 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

10. 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.*"
11. The applicant submitted the following:
 - It is submitted that the calculations made by the Insurer and by SIRA do not consider the totality of the evidence, namely payslips from the period 28 November 2014 to 27 November 2015, in calculating her PIAWE pursuant to section 44C(1) of the 1987 Act.

Submissions by the Insurer



12. The Insurer made no submissions, but did advise that it had made a new decision on 31 March 2017 in accordance with the Authority's findings and recommendation.

Decision

13. The insurer accepted liability for ongoing payments and in the course of so doing made a decision about PIAWE which, by virtue of section 43(1), is also a work capacity decision. It appears from the original submissions in relation to the internal review and the merit review that the applicant contested the evidence provided by the employer to the Insurer. Those evidentiary shortcomings seem to have been overcome in the course of merit review where, at paragraph 31, the merit reviewer set out the full schedule of the applicant's weekly hours worked between the week ending 5 December 2014 and the week ending 27 November 2015.

14. The merit reviewer added the following commentary at paragraph 37:

The Insurer submits in its reply form that the amount under section 44C(1)(a) is \$283.98. The Insurer's calculation involved more averaging and rounding. My approach involved less averaging and less rounding and is therefore more accurate.

15. Whether or not the method of calculation used by the merit reviewer is "more accurate" cannot be determined by me, and is not a matter for this Office to adjudicate between contending parties. What can be determined, however, is that the information on which the merit reviewer has relied appears to be consonant with that identified by the applicant as most desirable.

16. To the extent that there was any procedural error made by the Insurer in relying on different, inferior information in making the original determination, that error appears to have been now cured by the recommendation of the Authority as a consequence of merit review. Further, in so far as there was any original error, it favoured the applicant by resulting in an inflated PIAWE, which has now been reduced in line with the evidence later adduced.



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Finding

17. The work capacity decision of the Insurer dated 17 August 2017 has been corrected by the Authority in the course of merit review, with no prejudice to the applicant.

RECOMMENDATION

18. The application is dismissed.

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

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