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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 10 August 2015. The decision informed the applicant that she was entitled to weekly payments of compensation. The figure of \$497.47 per week was determined to be the applicant's pre-injury average weekly earnings (PIAWE) and was used in calculating her weekly compensation entitlements.
2. The applicant sought Internal Review and then Merit Review from the Authority. The issue in dispute was the calculation of the applicant's PIAWE. The amended Merit Review decision was dated 1 December 2015. The Authority calculated the applicant's PIAWE for the period 10 August 2015 to 1 October 2015 to be \$552.00 per week and from 1 October 2015 to be \$560.00 per week (as indexed).
3. It is noted that the Insurer informed the applicant by letter dated 2 December 2015 that they would be implementing the Authority's recommendations in respect of her PIAWE.
4. The applicant then made an application to this office for procedural review by way of application dated 11 December 2015. I am satisfied that the application has been made within time and in the proper form.
5. On 17 April 2014 the applicant suffered injury in the course of her employment.



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6. 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

7. 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.
8. In addition to requesting a procedural review the applicant has provided five pages of written submissions. The applicant has indicated that she agrees with the Authority’s calculation of her PIAWE.
9. I cannot review any discretion or judgment exercised by the Insurer when they are making a decision in respect of the merits of the calculation of a worker’s PIAWE. I am also unable to review the findings and recommendations of the Authority at Merit Review. I can only review the procedures undertaken by the Insurer in making the actual work capacity decision.
10. The applicant’s main submission for seeking a review is the Authority’s finding that she is not entitled to any reimbursement for the period 23 December 2014 to 29 June 2015.
11. I note in their recommendations and findings the Authority remarked that during the period 23 December 2014 to 29 June 2015 the applicant had work capacity for her pre-injury hours and was working in suitable employment. The applicant had reduced weekly earnings for that period because her employer did not make extra hours of work available to her so that she could work to her maximum capacity. In determining the amount that the applicant can earn during that period her earning capacity must be assessed regardless of the work which was made available to her. In correctly applying the legislation the Authority determined that the applicant was not entitled to reimbursement for this period. As this period was not subject to this work capacity decision I am unable make any recommendations on this issue.



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12. The remaining submission relates to the period 1 July 2015 to 10 August 2015 during which time the applicant submitted the Insurer paid weekly payments of compensation using the incorrect PIAWE. I note that the Authority's recommendations referred to the period 10 August 2015 onwards. The Authority stated that as the period from 1 July 2015 occurred prior to the work capacity decision it fell outside the scope of their review. The Authority did *"encourage the Insurer to adjust the weekly payments of compensation accordingly"* to the applicant *"from 1 July 2015 to 10 August 2015 in the interests of avoiding further unnecessary dispute."*
13. It appears to be an anomaly in the Authority's decision dated 1 December 2015 in that they have backdated their recommendations to 10 August 2015 and not to 1 July 2015 despite the same miscalculation of PIAWE from that date. It is usual for the Authority to make recommendations from the date of their decision onwards. However, on this occasion they considered it appropriate to backdate to the date of the work capacity decision. If it was appropriate on this occasion to backdate to the date of the decision one would hypothesize it would have been more appropriate to backdate to the date when the miscalculation found by the Authority first occurred.
14. In any event I note the Authority's comment that in order to avoid unnecessary dispute the Insurer was encouraged to adjust the weekly payment calculation from 1 July 2015. I note that the Insurer has declined to do so according to their letter dated 2 December 2015. As I am not in a position to review the Merit Review decision I can only reiterate the Authority's recommendation that the applicant's weekly payments of compensation should be recalculated from 1 July 2015.

Submissions by the Insurer

15. The Insurer has not made any submissions in response to this application.

Decision



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16. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
17. The work capacity decision by the Insurer has informed the applicant that she is entitled to weekly payments of compensation.
18. I do note that the findings and recommendations by the Authority at Merit Review increased the applicant's PIAWE from the figure initially calculated by the Insurer. I also note in the submissions that the applicant is satisfied with the amended calculation.
19. I have discussed the applicant's remaining submissions in paragraphs 10 to 14 above in respect of compensation payable for the periods 23 December 2014 to 29 June 2015 and 1 July 2015 to 10 August 2015.
20. In this instance the applicant's payments have not been terminated. The remainder of the decision of the Insurer has displayed an adequate consideration of the procedural requirements of the Guidelines and legislation.

Finding

21. There are no procedural errors identifiable in the decision. The Insurer has complied with the Guidelines and relevant legislation.

RECOMMENDATION

22. The application for procedural review is dismissed.

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
12 January 2016