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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 decision dated 25 September 2018 is set aside.

b. The Insurer should make a new work capacity decision incorporating the findings made by the merit review service.

Introduction and background

1. The applicant sustained a right shoulder injury when a poker machine fell onto her in the course of her employment at licensed premises on or about 9 January 2017. At the time of injury the applicant worked in two jobs for different employers. Because she was unable to perform the duties of her second job due to the injury, she was terminated from that employment. The insurer accepted liability and made continuous weekly payments of workers compensation.

2. At an unstated date in 2018 the original insurer transferred the claim to another insurer. The new insurer made a work capacity decision on 29 September 2018, as a result of which the PIAWE of the applicant was determined to be $883.81. The basis of this assessment was described in the letter giving notice of the decision thus:

> "… your pre-injury average weekly earnings are $883.81 calculated as follows:
>
> "As per transition notes from (original insurer).
>
> "In reaching our decision we have considered all the relevant documents, which are outlined as follows:
>
> | **"Type of Document** | **Author** | **Date** |
> |---|---|---|
> | "PIAWE form | (previous insurer) | 17-1-2017" |

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3. So pleased was the insurer with this explanation, that they went on to add this:

> "The decision maker has satisfied the requirements of the legislation when making this work capacity decision."

4. The insurer conducted an internal review on 01 November 2018 and found a different PIAWE, being $934.34 for the first 52 weeks, thereafter $931.80. In what has to be a ground-breaking decision, the insurer found that the applicant usually earned an average $0.42 per week in overtime and also raked in no less than $2.12 per week in "shift allowances." Such largesse could not continue, hence the reduced figure after 52 weeks, thereby saving the insurer the no doubt handy sum of $2.54 per week.

5. The applicant was working on "light duties" at the time of this decision and therefore could look forward to the difference between her actual earnings and 95% of her PIAWE as a compensation payment from the insurer. This is not reflected in the letter from the insurer, which advised as follows:

> "The review decision will increase your weekly entitlement to $934.34 for the first 52 weeks from 09/01/2017 and $931.80 thereafter. This figure may be subject to indexation if appropriate."

   There is no reference to 95% of PIAWE and it appears that the insurer has conflated PIAWE with actual weekly entitlements. The applicant is entitled to be confused.

6. The applicant sought merit review by the Authority and was advised of the outcome of merit review by decision dated 06 February 2019. The Authority made the following finding and recommendation:

   SIRA Finding:

   (i) In accordance with section 44C(4) of the 1987 Act the amount of the applicant's PIAWE is $977.36

   SIRA Recommendation:

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(i) The Insurer is to determine the applicant's entitlement to weekly payments of compensation in accordance with the above finding from 25 September 2018.

7. The merit reviewer was at pains to set out the full reasoning behind the determination and was careful to acknowledge that, although the applicant worked for 52 hours per week prior to her injury, the legislation only allows a PIAWE calculation to be based on 38 hours of work. Despite the applicant earing around $1337.70 per week for 52 hours of pre-injury work, the best the merit reviewer could do for the applicant is determine the average hourly rate over 52 hours and apply it for 38 hours. This is the reason for the PIAWEE figure being $977.36 rather than $1337.70.

8. The applicant made an application to this Office for procedural review received on 07 March 2019. 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*.

Submissions by the applicant

10. 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."*

11. In addition to making an application for procedural review the applicant has made the following submissions:

- She says that her employer was negligent and she has received "no compensation" for her injuries as a result of the negligence.
- She is a single mother and cannot support her daughter on her current income.
- She takes issue with the outcome of merit review, stating that the figures are wrong. Whereas the merit reviewer said she earned $1337.70 for 52 hours work, she believes that the true figure is $1330.12 for 50 hours work.

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- The law is discriminatory because it is only low paid workers who need to have secondary employment and they cannot have all their pre-injury earnings included in PIAWE due to the 38 hour rule.

Submissions by the Insurer

12. The Insurer made no submissions in response to the application.

Decision

13. While some of the submissions made by the applicant have considerable force, it forms no part of the role of this Office to review the outcome of Merit Review. Nor can this Office overturn what might seem like an unjust provision in the legislation. As far as the submissions about employer negligence are concerned, the applicant should seek her own legal advice.

14. Despite the limitations of the applicant's submissions, she is on considerably stronger ground when I look at the two decisions made by the insurer. First, it is not acceptable to state that your evidence for making a decision is: "As per transition notes from [previous insurer]." The applicant could not possibly know what appears in such a document or documents and, even if they are to be relied upon, the information therein should be set out in a clear and helpful way so as to assist the injured worker to understand the basis for the decision. On this occasion the insurer did not follow this course. Secondly, the internal review stated that the applicant's "weekly entitlement" would be exactly the same as her PIAWE, which cannot be correct.

15. This matter concerns an injured worker who is not a native English speaker. Her school-aged daughter has given the applicant considerable assistance in preparing her application. While it would be difficult for a native English speaker to understand the letters sent by the insurer, particularly given the misleading and, in some cases, incorrect statements made in the letters, the task would be impossible for someone such as the applicant.

Finding

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16. There are sufficient errors of a procedural nature to invalidate the work capacity decision dated 25 September 2018 and the internal review decision dated 1 November 2018.

RECOMMENDATION

17. The decision dated 25 September 2018 is set aside.

18. The Insurer should make a new work capacity decision incorporating the findings made by the merit review service.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
11 March 2019