



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 sustained injury in the course of his employment as a carpenter's assistant on or about 13 May 2017. The insurer accepted liability and made weekly payments for all relevant periods. The applicant does not currently work.
2. The Insurer made a Work Capacity Decision on 30 May 2017. The Decision informed the applicant that his ongoing weekly payments of compensation would be based on a PIAWE calculated at \$743.66 per week. There were no payslips since the applicant had suffered injury on day 9 of his employment. The applicant had received a payment from the employer of \$2,250.00 which the applicant says reflected his weekly rate for 9 days, whereas the employer alleges part of that amount reflects an advance to assist the applicant with moving or other relocation expenses in addition to ordinary wages. Simply put, the applicant is alleging that he was employed full time as carpenter earning \$1,500 per week for a six-day week (at \$250 per day), whereas the employer insists he was a casual employee working as a carpenter's assistant (being neither a craftsman nor a tradesman nor experienced at anything relevant beyond formwork assembly).
3. The applicant sought internal review by the Insurer and the original decision was varied, with PIAWE calculated at a higher figure of \$833.60 per week. In the absence of payslips or a written contract of employment the Insurer had regard to the *Building and Construction General On-Site Award Pay Guide*. The Insurer accepted that the applicant would be entitled to have his PIAWE re-calculated at \$833.66 on the basis of being classified as a Level 1 (CW/ECW)(level a) worker.



4. The applicant sought Merit Review from the Authority by way of application received 21 July 2017. The Authority delivered its Findings and Recommendations dated 25 August 2017.
5. The Authority made findings that:
 - (a) The amount of the applicant's PIAWE for the first 52 weeks for which weekly payments are payable is \$934.99 (subject to indexation); and
 - (b) The amount of the applicant's PIAWE after the first 52 weeks for which weekly payments are payable is \$850.00 (subject to indexation).
6. The Authority made the following recommendations:
 - (a) Insurer is to determine [the applicant's] entitlement to weekly payments of compensation in accordance with the above findings from 30 May 2017; and
 - (b) The insurer is to pay [the applicant] the difference between the amount of compensation he was paid and the amount of compensation he should have been paid (subject to any notice period required under section 54 of the 1987 Act) based on the above finding.
7. The applicant then made an application to this office for procedural review received on 18 September 2017. I am satisfied that the application has been made within time and in the proper form.
8. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *Guidelines for claiming workers compensation* (Guidelines).

Submissions by the applicant

9. 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.*"
10. The applicant made the following submissions:



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- I do not agree with the Insurer's procedure in making the work capacity decision as I believe they applied the wrong award of level 1 Building and Construction without considering my evidence or the employer's evidence.

11. This is an interesting submission, to say the least, since the applicant has no evidence beyond his own assertions which are unsupported by documents or his own work history. For instance, the idea that an unqualified formworker would be paid at the same rate as a fully qualified carpenter is fanciful, at best. And it was the evidence of the employer to this effect which informed the decision of the Insurer.

Submissions by the Insurer

12. The Insurer made no submissions:

Decision

13. The Insurer made an initial calculation of PIAWE which was varied in the course of internal review in the applicant's favour.

14. The Authority further varied the calculation of PIAWE, once again in the applicant's favour.

15. The only issue at the time of the conclusion of merit review was the calculation of PIAWE. It is clear that this is an issue which goes to the merits of the case. It follows that this office has no jurisdiction to review that element of the insurer's work capacity decision. Further, this office cannot review the Authority's decision.

16. In the event that I am wrong on that question, it seems clear that it was open to the Insurer and to the Authority to decide the issue the way they did. On that basis I would not be minded to interfere with the decision made.

17. It has been drawn to my attention that on a date in late September the Insurer purported to issue a section 74 Notice, terminating payments back-dated to a date in May 2017. This is not only pointless on the basis that payments had already been made for the relevant period, it is also



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not permissible to terminate the worker's weekly payments during the course of section 44BB review (see section 44BC). I can only assume that the person who issued the section 74 Notice was unaware of the pending procedural review.

Finding

18. The work capacity decision was validly made.

RECOMMENDATION

19. 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
18 October 2017