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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 is dismissed.

Introduction and background

1. The applicant suffered injury in the course of his employment as a delivery driver on or about 7 January 2018[1]. The insurer accepted liability and made weekly payments for all relevant periods.

2. On 15 January 2018 the insurer made a work capacity decision, which assessed PIAWE at $649.30. Weekly payments continued at a rate of $616.84, being 95% of the PIAWE figure.[2]

3. After the effluxion of thirteen weeks the insurer once again wrote to the applicant on 26 March 2018, this time advising that he would be paid 80% of a higher PIAWE figure ($842.35) resulting in weekly benefits totalling $673.88. Payments continued at the new rate[3].

4. The applicant eventually sought internal review of the decision dated 26 March 2018 by application received by the insurer on 8 January 2019. By letter dated 22 January 2019 the applicant was advised that the insurer had reduced the PIAWE amount from $842.35 to $809.73, resulting in weekly payments of $647.79. The new payment rate was to commence on 29 April 2019. This appears to be the correct notice period as required by legislation and the Guidelines, despite submissions later made by the insurer against interest to the contrary.

[1] In a subsequent merit review the year is wrongly reported as 2017 rather than 2018 (at paragraphs 4 and 5).
[2] In the same merit review (see note 1 *supra*) the figure of $616.84 was wrongly described as the PIAWE, rather than 95% thereof.
[3] There is no reference to this decision in the merit review (see paragraphs 4-6).

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5. An application for merit review was received by the Authority on 7 February 2019. Findings and recommendations were made on 12 April 2019[4] as follows:

   - PIAWE is $669.59 per week[5]

   - The Insurer is to calculate [the applicant's] entitlement to weekly payments of compensation in accordance with the findings set out above.

6. An application for procedural review was received by this Office on 15 May 2019. I am satisfied that the application has been made within time and in the proper form.

Submissions by the applicant

7. 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."* The applicant provided submissions as follows[6]:

   - The insurer has given insufficient notice;
   - The insurer must allow 7 days postage plus 3 months of notice as required by section 54 of the 1987 Act;
   - The insurer has failed to consider section 76 of the *Interpretation Act* 1987 when calculating postage, since s 76 requires that weekends and public holidays are excluded from the calculation.
   - They have failed to make an adjustment for Saturday, Sunday and the Australia Day public holiday, being on 28 January 2019.

Submissions by the Insurer

8. The Insurer responded in the following terms:

[4] Seemingly 64 days after receipt of the application, which appears to be at least 34 days longer than the statutory requirement of 30 days.
[5] An amount neither proposed nor supported by either the insurer or the applicant.
[6] These submissions only concern the internal review, not the original work capacity decision.

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- The insurer concedes that the internal review outcome dated 22 January 2019 did not provide adequate notice prior to the outcome being made effective;

- The insurer agrees with the submissions by the applicant's lawyers that the notice period should have included additional days to account for the Australia Day public holiday and the weekend days that fell within the postage period;

- On review the insurer notes that the correct date the internal review outcome should have been given effect is 2 May 2019 (as opposed to 29 April 2019);
- As a result of the submissions made by the applicant's lawyers, the insurer has made an adjustment payment to the applicant, based on the higher PIAWE of $845.35, which covers 30/4/2019 - 2/5/2019. This was processed to the applicant on 21/5/2019; and
- While the issue of notice period is not insignificant, the insurer respectfully submits that the remainder of the internal review outcome was substantially compliant and that the merits of the decision have been confirmed by way of the Authority's merit review.

Decision

9. The submissions made by the parties seem to be very wide of the mark. There may be some room for the view that the applicant's solicitors have misconstrued the internal review (now styled a 'review decision') as a new work capacity decision. They may have been misled into this construction by the words "The review outcome: New decision" appearing on the front of the letter dated 22 January 2019. The unfortunate wording "New decision" can in reality mean no more than that it is a different outcome to the existing decision. Wrongly calling the different outcome a "new decision" does not change it from an internal review of an existing decision into a new work capacity decision.

10. Since the date of the internal review and the outcome of merit review the Workers Compensation Commission has decided the case of ***John Grima v Bursons Automotive Pty Ltd*** [2019] NSWWCC 184 (24 May 2019). The decision clarified the proposition that a work capacity decision

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made prior to 1 January 2019 is an "existing decision" and any review of that decision will be under section 44BB until the expiration of the transitional period.

11. It follows that the internal review dated 22 January 2019 remains an internal review only and the substantive work capacity decision the subject of review is the one dated 26 March 2018. Oddly, the merit reviewer seems to have reviewed the internal review decision and made no reference to (and demonstrated no advertence to) the substantive decision. Even more unusually, the merit reviewer seems to have arrived at a PIAWE figure of her own concoction which is over $186 lower than the figure arrived at by the insurer. It might be thought that, had the applicant been apprised of this potential outcome, he might have taken the opportunity to withdraw the application for merit review.

12. The "internal review" was undertaken by an employee of ***icare***, not a person employed by the entity which made the original decision. In addition to leading the worker to believe that this was an internal review, ***icare***, issued the decision on letterhead of the other entity and went so far as to quote a contact telephone number and email address of that other entity after the words:

> "If you have any questions about the effect on your claim, please contact (name of the other entity) by email at (email address) or by phone on (phone number)."

The worker would have no way of knowing that the person who signed their name on this letter would not be contactable by either the email address or the phone number quoted. To describe this situation as unsatisfactory is an understatement. In my view workers are being misled into believing that decisions are being made by people who are employed by what they believe to be the original "insurer" which made the existing decision. It is a practice which should cease forthwith.

13. Despite the admissions by the insurer *(**icare*** masquerading as such) in submissions, there does not appear to have been any loss suffered by the applicant following the existing decision dated 26 March 2018. The notice given following "internal review" (by the external body ***icare***) was adequate and, even if it is accepted that the Australia Day public holiday

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was not allowed for, the insurer has subsequently adjusted payments to make up for any shortfall said otherwise to follow.

14. The unfortunate upshot of what appears above is that the merit review outcome remains on foot. Since neither party sought the outcome of that review, it might be in the interests of both parties for the insurer (whoever that is) to make a completely new work capacity decision based on new evidence. Any such new decision will be subject to the recent amendments and reviewable (if required) by the WCC.

Finding

15. I find that the insurer complied with all procedural requirements in the course of making decisions about the applicant's PIAWE. Accordingly, there being no identifiable errors or omissions on the part of the insurer, it is appropriate that this application be dismissed.

RECOMMENDATION

16. The application is dismissed.

Wayne Cooper
General Counsel
Delegate of the Workers Compensation
Independent Review Officer
6 June 2019