



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 Work Capacity Decision by the Insurer dated 14 December 2015 is set aside.**
- b. **Such weekly payments as the applicant is receiving by virtue of the stay pursuant to Section 44BC of the *Workers Compensation Act 1987* are to continue until a new decision is made in accordance with Section 43(1) of the *Workers Compensation Act 1987*.**
- c. **Pursuant to Section 44BB(1)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.**

Introduction and background

1. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 14 December 2015. The Decision informed the applicant that his weekly payments of compensation would cease on 28 March 2016. The applicant sought internal review by the Insurer, but since the internal review was not completed within 30 days, the applicant applied for merit review prior to any internal review outcome being known. It appears that, despite this, the insurer did complete an internal review, although there are various copies of a document purporting to be an internal review notice of outcome, but with differing dates. In any event the document has no force.
2. The applicant sought Merit Review from the Authority by way of application received on 24 February 2016. The Authority delivered its Findings and Recommendations dated 21 March 2016. The Authority made a finding that the applicant did not meet the special requirements under Section 38(3) of the *Workers Compensation Act 1987* (1987 Act) for continuation of weekly payments of compensation.



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3. The applicant made an application to this office for procedural review by way of application dated 20 April 2016. I am satisfied that the application has been made within time and in the proper form.
4. The applicant suffered injury in 2008. Since that time he has variously worked in different occupations, although he presently seems to work 16 hours per week. He received over 280 weekly payments of compensation prior to the date of the insurer's decision.
5. There can be no dispute that the applicant was in receipt of weekly payments immediately prior to 1 October 2012 and that he is was "existing recipient" as that term is defined in the legislation. It follows that his PIAWE is deemed to be the transitional rate set out in the legislation, as amended.
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 making the application for review the applicant has made the broad statement that he seeks "a review of the Insurer's procedures in making the original work capacity decision."

Submissions by the Insurer

9. The Insurer made submissions in response to this application. The most interesting submission made by the Insurer was this:
 - In accordance with 5.3.2 of the *Work Capacity Guidelines*, [the Insurer] did not clearly outline the PIAWE rate. On page 1 of the Notice under section 54(2)(a) of the *Workers Compensation Act 1987 – Work Capacity Decision*, the rate was outlined as \$749.96



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(being 80% of the transitional rate¹) instead of the correct transitional rate applicable at the time of \$993.70 as outlined under 'd. Your *PIAWE*² of the work capacity decision notice.

10. What is particularly interesting about this self-incriminating submission, apart from it being grounds itself to overturn the decision, is that it so precisely identifies the problem. If an internal review had been undertaken in time, it is possible that the insurer could have withdrawn the original decision, made a new one with the correct information in the notice and thus solved what can only be described as a self-inflicted problem.

Decision

11. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.

12. Guideline 5.3.2 requires the Insurer to outline the evidence considered in making the decision, noting the author, the date and key information. All evidence should be referred to, regardless of whether or not it supports the decision. The Insurer is to clearly show the line of reasoning used to arrive at a decision.

13. It is clear that the Insurer must correctly set out the applicant's *PIAWE*. In the present case this was done correctly once (on page 4), and incorrectly once (on page 1). There is no basis upon which the applicant would be able to tell which was the correct figure. While a mathematically adroit reader might ascertain that one figure represents 125% of the other, it is equally true that the latter is 80% of the former. What the significance of this difference is (or these differences are) would be a complete mystery to anyone who was not told that a worker is only entitled to 80% of their *PIAWE* in certain circumstances.

14. The Insurer has on its own admission clearly breached the *Guidelines* and has done so in relation to a crucial consideration, namely the

¹ There was no reference to "80% of the transitional rate" in the Notice.

² 'd. your *PIAWE*' appears on page four of the Notice. This could only add to the confusion.



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calculation of PIAWE. This cannot be regarded as an incidental or trifling matter. It is sufficient to invalidate the decision.

Finding

15. Under the legislation the Insurer can make an assessment of the applicant's work capacity and then a decision about that work capacity, but they must comply with the legislation, the Regulation and the *Guidelines* in order to produce a procedurally correct result. In the current instance the Guidelines which are to be treated as delegated legislation were breached³. Accordingly the Work Capacity Decision must be found to be invalid.

RECOMMENDATION

16. The Work Capacity Decision by the Insurer dated 14 December 2015 is set aside.

17. Such weekly payments as the applicant is receiving by virtue of the stay pursuant to Section 44BC of the *Workers Compensation Act 1987* are to continue until a new decision is made in accordance with Section 43(1) of the *Workers Compensation Act 1987*.

18. Pursuant to Section 44BB(1)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.

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
30 May 2016

³ For an interesting discussion of the status of similarly created Guidelines see *Ali v AAI Limited* [2016] NSWCA 110 [at 74-99 per Leeming, JA].