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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 a psychological injury in the course of his employment. The insurer accepted liability and made weekly payments for all relevant periods. The applicant has not returned to work. The parties appear to have arrived at an agreed position that the relevant date of injury is 20 September 2017, even though the applicant had not attended the workplace in the previous fortnight.

2. The insurer gave notice to the applicant of a liability decision which had within it some elements of a work capacity decision, including an assessment that the applicant had no current work capacity and had a PIAWE of $1,791.36. The insurer advised that the applicant would receive weekly payments in the amount of $1,701.79, that figure representing 95% of his PIAWE.

3. The Insurer came to the same conclusions following internal review.

4. The applicant sought Merit Review from the Authority by application received on 22 December 2017. The Authority made a finding dated 12 February 2018 in the following terms:

    - The amount of the applicant's PIAWE is $1,791.36.

5. An application to this office for procedural review was received on 07 March 2018. I am satisfied that the application has been made within time and in the proper form.

Submissions by the applicant

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6. 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 has provided the following submission:

   - I am seeking WIRO to review the findings and recommendations made by SIRA on the 12.02.18 in relation to my PIAWE as per the information I submitted to SIRA.
   - I believe my PIAWE should be based on $94,368.00 (salary and bonus) + $30,532.49 (termination pay) + $7,980.00 (child care) + $500 (September 2017 performance bonus).

7. These submissions have two short-comings: first, I do not have jurisdiction to "review the findings and recommendations made by SIRA," [the correct forum to challenge a merit review finding or recommendation is the Supreme Court of New South Wales]; and, secondly, PIAWE can never include elements such as termination pay or any similar one-off payments arising from the cessation of employment. The applicant is aware of this, it having been explained by both the insurer and the merit reviewer at some length.

Submissions by the Insurer

8. The Insurer responded in the following terms:

   - The weekly benefit review of the applicant's entitlement to the Child Care Rebate of $7,980.00, as claimed, has been determined by the merit reviewer to be a government incentive payment which was agreed to by him with his employer. The employer was to pay the monies on his behalf to Centrelink whilst he was in their employ. Further, merit did not consider that the child care rebate was a non-pecuniary benefit in accordance with section 44F(2) of the 1987 Act.

   - The merit review decision considered this rebate to be a monetary allowance which is therefore excluded from the calculation. There was no indication that any piecemeal rates or commissions were included in his salary.

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- We maintain that PIAWE was calculated on the applicant's base rate of pay for ordinary hours of work, in line with section 44G(a) of the 1987 Act which outlines incentive based payments or bonuses are excluded.

9. The submissions by the Insurer are unarguably correct.

Decision

10. The original notice dated 04 October 2017 was considered by the insurer to be a letter accepting liability, not notification of a formal work capacity decision. In the course of merit review the insurer repeated the view that it had not made a work capacity decision *per se*. This was not accepted by the merit reviewer and I note that the insurer does not repeat the submission now. In the interests of not re-litigating *Sabanayagam v St George Bank* I will proceed on the basis that both parties now accept that a work capacity decision was in fact made on 4 October 2017, even if done so unintentionally or absent mindedly.

11. The insurer set out the relevant legislative provisions where required and correctly explained them.

12. The relevant entitlement period was applied and correctly explained.

13. The Insurer calculated the applicant's PIAWE in accordance with the relevant parts of the 1987 Act, citing sections 35(1), 36, 42(1) and(2), 44C-44I and 43(1)(d).

14. For the reasons appearing above, no error was made in construing the relevant provisions concerning bonus, termination and allowance payments.

Finding

15. The work capacity decision by the Insurer dated 04 October 2017 was made in accordance with the requirements set out in the legislation and was therefore validly made.

RECOMMENDATION

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16. The application is dismissed.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
06 April 2018