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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 sustained injury in the course of his employment as a Winery Representative on 20 July 2017. The injury resulted in incapacity. The Insurer accepted liability for weekly payments and for medical and related expenses. A letter was sent to the applicant to this effect dated 8 November 2017. It is reasonably obvious that the Insurer regarded this letter as a simple 'acceptance of liability' letter, which included a proposed injury management and return to work plan. It also included an assessment of PIAWE. The latter was said to be $654.74 per week, thereby entitling the applicant to receive $622.00 per week, being 95% of the former figure.

2. The applicant sought internal review, presumably on the basis that the applicant assumed this was a work capacity decision. The Insurer, perhaps understandably, did not conduct an "internal review," presumably for the opposite reason.

3. More than 30 days having elapsed from the date of asking for internal review, the applicant sought merit review by the Authority by way of an application received on 31 January 2018. Without at any stage considering the threshold question of whether or not there was in existence a "work capacity decision" to review, the Authority issued findings and recommendations on 26 February 2018. The Authority found as follows:

> The amount of [the applicant's] PIAWE for the first 52 weeks for which weekly payments are payable is $673.87 (subject to indexation). [The applicant's] PIAWE after the first 52 weeks for

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which weekly payments are payable is $666.61 (subject to indexation).

4. Consequential upon that finding, the Authority went on to make the following recommendations:

> The Insurer is to determine [the applicant's] entitlement to weekly payments of compensation in accordance with the above finding from 8 November 2017.
>
> [The applicant's] PIAWE should be varied by the insurer on each review date after he became entitled to weekly payments of compensation in respect of the injury, in accordance with the indexation provisions under section 82A of the 1987 Act.

5. The applicant sought procedural review of the Insurer's "work capacity decision" by application received by this Office on 15 March 2018. I find that the application was made within time and in the correct form.

Submissions by the applicant

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."*

7. The submissions made by the applicant might fairly be said to challenge the calculation of PIAWE and to cast doubt on the validity of the "work capacity decision" due to certain procedural shortcomings which would apply to the making of a work capacity decision.

8. An example of a procedural breach cited by the applicant was a lack of 'fair notice' which deprived the applicant of the ability to make submissions prior to the issuing of a PIAWE finding. The relevant *Guidelines* stipulate that a worker should be given fair notice of an impending work capacity decision which might adversely impact their weekly payments.

9. A further example of a procedural breach is said to be that the Insurer "clearly and misleadingly" titled the letters sent to the applicant "the new

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liability letters." Another view might be to say that the very title of the letters shows that the Insurer was not proposing to make a "work capacity decision," but was in fact simply communicating the acceptance of liability and the benefits to be paid to the applicant.

10. I have strong reservations about styling the decision made by the Insurer on 8 November 2017 a 'work capacity decision' for the reasons set out by the Court of Appeal in *Sabanayagam v St George Bank Ltd* [2016] NSWCA 145. Despite this, I am somewhat surprised to find that the insurer did not take this seemingly obvious point in the course of either merit review or procedural review. As a result the applicant has had the benefit of the Authority scrutinizing the calculation of PIAWE and a consequential positive variation.

Submissions by the Insurer

11. The Insurer provided submissions to the Authority in the course of merit review and simply forwarded those to this office in the course of procedural review. As noted above, the Insurer at no stage denied making a work capacity decision.

The Decision

12. The relevant *Guidelines* for making work capacity decisions came into effect on 1 August 2016. Those *Guidelines* introduced the concept of 'substantial compliance.' Under this doctrine, it is permissible to breach some of the *Guidelines* as long as the breach is "technical only" and does not result in the worker suffering procedural unfairness or being misled.

13. The applicant has certainly not been misled. Further, and more importantly, any procedural unfairness suffered by the applicant was overcome completely by the comprehensive review of his PIAWE conducted by the Authority. The recommendation of the Authority even backdated the variation of PIAWE to the date of the original decision by the Insurer. The applicant has, therefore, suffered no detriment.

14. The role of this Office is not to second-guess the findings and recommendations of the Authority. On that basis, the calculation of PIAWE undertaken by the Authority cannot be overridden by me. Even if

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I had the power to vary the Authority's findings, it seems to me that they are correct and no further action would follow.

15. The applicant suggested that the Insurer had an obligation to explain section 59A. Given that the insurer was accepting liability for both medical expenses *and* weekly payments, section 59A would not arise for consideration and I find that the insurer had no obligation to explain or refer to section 59A at the relevant time.

16. For the reasons set out above I find that any procedural errors committed by the insurer were of a purely technical nature and did not result in an unjust outcome for the applicant.

Finding

17. The Insurer's decision was validly made.

RECOMMENDATION

18. The application is dismissed.

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