



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 for procedural review is dismissed.

Introduction and background

1. The applicant sustained injury on 13 January 2016 when steel bundles containing items weighing around 180 kg fell on his ankle in the course of his employment as a Truck Driver. Serious injury resulted to both lateral and medial ligament complexes. The insurer accepted liability and made continuous weekly payments of workers compensation.
2. The insurer made a work capacity decision on 06 December 2018, having assessed the applicant as capable of performing suitable employment as a Customer Service Consultant for 8 hours per day, 5 days per week.
3. As a result of the above assessment the insurer went on to find that the applicant was capable of earning \$1,038.46 per week in suitable employment, with a PIAWE of \$1,030.00 per week. Having found that the applicant was therefore entitled to no further weekly payments after a notice period ending on 14 March 2019, the insurer made the further finding that, since the applicant had received over 130 weekly payments, section 38(3)(b) operated to reinforce the decision to cease payments. That is to say, since the applicant does not work at least 15 hours per week and does not earn at least \$190 per week, section 38(3)(b) would cause a cessation of payments even if he did not have capacity to earn more than his PIAWE.
4. The insurer conducted an internal review on 27 February 2019 and maintained the same outcome, but with the slightly more nuanced finding about that PIAWE that it was \$1,119.52 in the first 52 weeks and \$867.91 thereafter. Given that the applicant had already received more than 130 weekly payments, it is difficult to find the relevance of his PIAWE in the



Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

first 52 weeks of incapacity, but it appears that the headline finding is the smaller PIAWE of only \$867.91 after that initial period. Again, given the application of section 38(3)(b), there seems little to be gained by assessing PIAWE at all.

5. The applicant sought merit review by the Authority and was advised of the outcome of merit review by decision dated 20 May 2019. The Authority made the following findings and recommendation:

SIRA Findings:

- (i) The applicant has current work capacity;
- (ii) The role of Customer Service Consultant is suitable employment for the applicant;
- (iii) The applicant has the ability to earn \$969 per week in suitable employment; and
- (iv) The applicant's PIAWE is \$1,130.16 for the first 52 weeks and \$875.88 thereafter.

SIRA Recommendation:

The Insurer is to calculate the applicant's entitlement to weekly payments of compensation for any week in which he was entitled to such payments in accordance with the findings above.

6. It almost seems as though the Authority treated this as a closed period claim for payments in arrears. In so far as the Authority has power to make such findings, they bind the insurer. It is an oddity that the Authority made no finding or recommendation about section 38(3)(b), since that section would have operated to make the calculation of PIAWE after week 130 otiose.
7. The applicant made an application to this Office for procedural review received on 19 June 2019. I am satisfied that the application has been made within time and in the proper form.

Submissions by the applicant



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8. Section 44BB(1)(c) of the Workers Compensation Act 1987 (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.”*
9. In addition to making an application for procedural review the applicant has made the submissions about the way his case has been handled by the insurer and the irrelevance of certain reports relied upon. He calls into question the merits of the insurer’s decision, which has been dealt with by the Authority. He also seeks to revisit decisions made by the insurer concerning rehabilitation and return to work plans. None of this is relevant for the purposes of procedural review of a work capacity decision.

Submissions by the Insurer

10. The Insurer made the foillowing submission:

The Insurer submits that the IDR notice was issued on a Section 78 letter rather than a section 287a letter due to the transition of templates. We note that Icare is aware of these notices.

11. The relevance of icare’s advertence to the use or existence of various notices is hard to see, particularly since the insurer is operating in the guise of icare itself. If the submission had any relevance whatsoever, it would be an outrageous example of self-assessment. Happily, it is completely irrelevant.

Decision

12. The submissions made by the applicant have little if anything to do with the work capacity decision made by this insurer.
13. The insurer gave the correct period of notice for termination of payments.
14. The insurer calculated PIAWE in a clear manner which was properly set out and explained to the applicant.
15. To the extent that the insurer may have erred in calculating a lower PIAWE, that has been remedied in the course of merit review.



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16. The larger problem is that overshadowing the PIAWE dispute is the simple fact that the applicant does not work 15 hours per week and does not earn at least \$190 per week. As such, he fails the test set out in section 38(3)(b). Therefore, whether or not the insurer was correct in the calculation of PIAWE, it is clear that the applicant has no entitlement to ongoing payments after receipt of this recommendation.

Finding

17. There are no procedural errors identifiable in the decision. The Insurer has complied with the Guidelines and relevant legislation.

RECOMMENDATION

18. The application for procedural review is dismissed.

A handwritten signature in blue ink, which appears to read "Wayne Cooper". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
25 July 2019