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WorkCover independent review office

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RECOMMENDATION FOLLOWING AN APPLICATION FOR REVIEW OF THE INSURER'S WORK CAPACITY DECISION PURSUANT TO SECTION 44(1)(c) OF THE *WORKERS COMPENSATION ACT* 1987.

SUMMARY:

a. **The decision of the Insurer dated 12 September 2014 is set aside.**

b. **The Insurer should make a new work capacity decision in accordance with the legislation and Guidelines.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 12 September 2014. The insurer advised the applicant that his weekly payments of compensation would be calculated on the basis of a pre-injury average weekly earnings figure ("PIAWE") of $1,232.64. The applicant sought Internal Review by the Insurer and the Internal Review Decision was dated 25 March 2015. It varied the original decision. The Insurer re-calculated the PIAWE figure to be $1,221.50.

2. The applicant then sought Merit Review from the Authority on 30 March 2015 and they delivered a recommendation dated 21 April 2015. The Authority varied the PIAWE to $1,600 based on indexation and the imputed value of a work vehicle.

3. The applicant applied to this office for procedural review on 5 May 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. The applicant sustained injury as a result of a motor vehicle accident in October 1998. He suffered various periods of incapacity and his physical capacity for work has not been at issue in the course of the current proceedings. The sole point of dispute between the parties turns on the calculation of PIAWE. At paragraphs 38 and 39 of the Merit Review

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Recommendation, the delegate mentions two relevant things: first, that the applicant had not applied for his work capacity to be reviewed, and therefore it was only the calculation of PIAWE in dispute, and secondly that the applicant had received 421 weekly payments of compensation. It was found as a fact at paragraphs 48 and 49 of the merit review recommendation that the applicant had not been an "existing recipient" immediately prior to 1 October 2012, meaning that the statutory transitional rate could not be substituted for the PIAWE.

5. In separate but related proceedings the Workers Compensation Commission found as a fact that the applicant's "pre-injury earnings" should be calculated at the hourly rate of $25.96 and the weekly total of $986.80. The Merit Review Service did not regard itself as bound by these findings and at paragraph 65 the Delegate set out the reasons why, including that sections 43, 44C and 44H of the 1987 Act must be applied to a work capacity calculation and that the Delegate had no access to the exhibits tendered in the Commission.

Submissions by the applicant

6. 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 requested a procedural review.

7. The applicant set out the following as grounds for seeking procedural review:

   - He hoped the vehicle allowance would be based on an annual valuation of $15,000, or at least an "average" of $12,000 and $15,000 (nominated as $13,500).[1]

   - There is no reference to any conversations with his former employer about his pre-injury remuneration rate.

[1] The Delegate in the course of Merit Review arrived at the figure of $12,000.

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- I will quote the next item verbatim: “New evidence of how Arbitrator [W] arrived at my $25.96 HR/$986.per week…Not discussed with WorkCover.”

Submissions by the Insurer

8. The Insurer has not made submissions in response to this application.

The Decision

9. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).

10. The relevant version of the Guidelines was dated 4 October 2013 and came into effect on 11 October 2013.

11. In accordance with Guideline 5.3.2 the Insurer advised the applicant that a work capacity assessment was completed on 4 September 2014. The applicant was advised of the work capacity decision by letter dated 12 September 2014.

12. The same Guideline requires the Insurer to explain the relevant *entitlement* periods. This was never done, even in the course of internal review. In the entire process the first mention of the entitlement periods appears at paragraph 40 of the Merit Review Recommendation. Paragraphs 40-43 of the Merit Review Recommendation clearly set out the legislative provisions relating to the entitlement periods, section 38 and the relevance of having received more than 130 weeks of payments. None of this information is contained in the correspondence from the insurer.

13. The insurer informed the applicant that the “relevant period” was the 52 weeks prior to his sustaining injury. This is clearly relevant to the calculation of PIAWE, but it is not the “relevant ***entitlement*** period” into which the applicant falls. While the Insurer continued and correctly set out the method of calculating PIAWE with references to the correct statutory provisions, there is nowhere in the decision any reference to

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section 38. This is despite the irrefutable fact that the applicant has received well in excess of 130 weekly compensation payments.

14. The insurer has not advised the applicant of the weekly amount of compensation he is to receive. This is despite the clear words of Guideline 5.3.2 which require the Insurer to "state the impact of the decision on the worker." While the applicant was told the applicable dates from which the two different rates of PIAWE would apply in the course of both the original work capacity decision and internal review, he was not told the financial impact this would have on him.

15. The Insurer has approached this work capacity decision by focussing only on the calculation of PIAWE. This does not mean that it is not a work capacity decision, susceptible to regulation by the Guidelines. Section 43(1)(d) of the 1987 Act says that "a decision about the amount of an injured worker's pre-injury average weekly earnings or current weekly earnings" is a work capacity decision. There is no exemption from the Guidelines simply on the basis that the decision does not canvas medical or other issues. Accordingly the Insurer is still required to comply with Guideline 5.3.2 to the extent that it is relevant.

16. The submissions by the applicant may be addressed thus:

- Merit Review made a finding about a vehicle allowance, which cannot be reviewed by this Office. To the extent that the Insurer had failed to grant an allowance for the use of a vehicle, that was a matter going to the merits of the case and was remedied in the course of Merit Review.

- While it may well be the case that in exceptional circumstances which do not apply here the parol evidence rule could allow for the admission of a conversational record, the value of any such evidence would be approximately zero in the absence of corroborating documentation. The applicant seems to be labouring under the misapprehension that the insurer or the former employer bear the burden of proving his argument. In the absence of pay-slips, banking records or taxation records produced by the applicant, the calculation of PIAWE can only be done in the manner used variously by the Commission, the Insurer and the Authority.

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- For reasons quoted in the course of Merit Review and cited above at paragraph 5, the findings of the Commission are irrelevant for present purposes.

- The applicant made other allegations concerning misinformation about Australian Bureau of Statistics data, none of which are relevant to the outcome of this review. The Merit Review Service correctly applied the Act and the relevant data.

Finding

17. The Insurer has breached the Guidelines and accordingly the work capacity decision must be set aside.

RECOMMENDATION

18. The decision of the Insurer dated 12 September 2014 is set aside.

19. The Insurer should make a new work capacity decision in accordance with the legislation and Guidelines.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
10 June 2015