



## 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 seeks procedural review of a Work Capacity Decision made by the Insurer on 15 April 2016. The Decision informed the applicant that her weekly payments of compensation would be reduced from \$625.52 per week to "\$Nil"<sup>1</sup> per week, effective from 24 July 2016. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 6 June 2016 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 4 July 2016.<sup>2</sup> The Authority delivered its Findings and Recommendations dated 3 August 2016. The Authority found that the applicant did not comply with section 38(3)(c). At paragraphs 81-83 the merit reviewer made the following findings:

*81. With respect to sub-section 38(3)(b), I accept [the applicant] is currently working 15 hours per week as per the statutory declaration dated 1 August 2016. [The applicant] satisfies the first statutory test in sub-section 38(3)(b), in that she is currently working 15 hours per week. In relation to the second statutory test, the amount of weekly earnings in the sub-section is subject to indexation on 1 July each year. On 1 July 2016, that amount was increased to \$183.00. [The applicant] has stated that she is currently in receipt of weekly earnings of \$180.00. That amount of weekly earnings fails to meet the second statutory test of being "in receipt of current weekly*

<sup>1</sup> A neologism not unique to this insurer, alas.

<sup>2</sup> On 1 July 2016 the amount referred to in section 38(3)(b) had been indexed up from \$176 to \$183.



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*earnings (or earnings together with a deductible amount) of at least \$183.00 per week.”*

*82. [The applicant] does not satisfy the requirement of being currently in receipt of weekly earnings of \$183.00 as required by sub-section 38(3)(b).*

*83. [The applicant] does not meet the special requirements for continuation of weekly payments after the second entitlement period as required by section 38(3)(b) of the 1987 Act.*

3. The applicant was not told what relevance this figure of \$183 per week could possibly have to the work capacity decision dated 15 April 2016, a date on which the statutory requirement was only \$176 per week, which she easily exceeded. Further, given that the applicant is currently self-employed and provides services to customers who pay rates set by herself, it is odd that she was never told by either the Insurer nor the merit reviewer that by the simple device of “indexing” her own hourly rate by 50 cents she could increase her weekly earnings to \$187.50, clearly exceeding the newly indexed amount.
4. An application to this office for procedural review was made on 4 August 2016. I am satisfied that the application has been made within time and in the proper form.
5. One effect of the applications for internal review, merit review and procedural review all being made within 30 days of receipt of the earlier decisions is that the stay under section 44BC must continue to operate until the receipt by the applicant of this recommendation.
6. The applicant suffered a left ankle injury in the course of her employment on 22 December 2008. She was an existing recipient of weekly payments immediately prior to 1 October 2012. As at the time of the Work Capacity Decision the applicant was working 15 hours per week in self-employment and was in receipt of weekly payments of compensation.
7. 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**

8. 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.”*
9. The applicant relies on medical opinion that she can only work 15 hours per week. She is correct to do so, since this was also the finding of the merit reviewer, and cannot be in serious contest. That battle has been already fought and won. However, this is not a matter going to procedural propriety.

### **Submissions by the Insurer**

10. The Insurer submitted that the applicant had only raised an issue going to the merits of her case and this is not appropriate for procedural review. This submission is correct and must be accepted.

### **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 advise the applicant of the date of the work capacity assessment. On this occasion the Insurer informed the applicant that the work capacity assessment commenced on 1 November 2015 and was completed on 15 April 2016. The applicant was notified of the Work Capacity Decision by letter dated the same day.
13. The same Guideline requires the Insurer to advise the date when the Decision takes effect. Section 54(2)(a) of the 1987 Act requires at least three months and four working days notice be given if payments are being reduced. This notice period takes into account Section 76(1)(b) of the *Interpretations Act 1987*. As a result the applicant was advised that her payments would be reduced from 24 July 2016. This is the appropriate notice period.



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14. The Guideline requires the Insurer to advise the applicant of the impact the decision has on her entitlement to medical and related treatment expenses. The Insurer complied with this requirement, including a lucid explanation of section 59A(2) and (3).
15. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer set out the relevant provisions with a coherent explanation on page 8 of the decision. The applicant was informed that she had received as at 15 April 2016 some 366 weekly payments, placing her after the second entitlement period which ends at 130 weeks. Therefore any ongoing entitlement to weekly payments of compensation is subject to Section 38 of the 1987 Act. The Insurer has explained the special requirements of Section 38(3) of the 1987 Act at pages 8 and 9 of the Work Capacity Decision.
16. The merit reviewer has overturned the part of the work capacity decision dealing with suitable employment, and since this is a matter for the discretion or judgement of the Insurer, it is not relevant for the purposes of procedural review in any event.
17. In making the various determinations required by Section 43 of the 1987 Act the Insurer has displayed an adequate understanding of the relevant Guidelines and legislation, despite being overturned by the merit review service.
18. The Work Capacity Decision of the Insurer dated 15 April 2016 has displayed a careful consideration of the requirements of the Guidelines and legislation in force at the time.

### **Finding**

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

### **RECOMMENDATION**

20. The application for procedural review is dismissed.



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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  
19 August 2016