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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 for procedural review is dismissed.**

##### **Introduction and background**

1. The applicant sustained an injury to the left hand on 10 September 1999 in the course of his employment. Since that time he has received weekly payments of compensation. He currently works as a School Crossing Supervisor for around 11.25 hours per week and purports to have an online business to which he devotes approximately 10.5 hours per week. He is currently certified medically as capable of working for 25 hours per week in suitable employment. On his own calculations he works a maximum of 21.75 hours per week.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 26 August 2016. A problem with this is that there was no decision made on that date. On 26 August 2016 the Insurer posted a "fair notice" letter to the applicant, not a work capacity decision. About one month later, on 28 September 2016, the Insurer made a work capacity decision. The applicant alleged that the Insurer did not have all the relevant information he had forwarded as at that date, and accordingly the Insurer withdrew that decision and made a subsequent decision dated 6 October 2016. The Decision informed the applicant that his weekly payments of compensation would cease on 13 January 2017. The decision was based on non-compliance with section 38(3).
3. The applicant sought internal review and the Internal Review Decision was dated 9 November 2016. The Internal Review Decision confirmed the original Work Capacity Decision.



4. The applicant sought Merit Review from the Authority by way of application received on 2 December 2016. The Authority delivered its Findings and Recommendations dated 19 December 2016. The Authority made a finding that the applicant does not satisfy the special requirements in section 38(3) for the continuation of weekly payments beyond 130 weeks. The Authority did not make any recommendations in this matter, thereby causing considerable doubt to be cast over the purpose of the merit review.
5. The applicant made an application to this office for procedural review received on 4 January 2017. I am satisfied that the application has been made within time and in the proper form.
6. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the Guidelines. The relevant Guidelines came into effect on 1 August 2016.

#### **Submissions by the applicant**

7. 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.”*
8. The applicant made submissions which are predicated on the dual false assumptions that (a) the letter dated 26 August 2016 giving fair notice was a “work capacity decision,” and (b) that the withdrawn work capacity decision made on 28 September 2016, replaced by a new decision made on 6 October 2016, remains on foot.
9. Both assumptions are incorrect. The decision dated 6 October 2016 is the one which was considered by the merit review service.

#### **Submissions by the Insurer**

10. The Insurer set out a chronology of the various correspondence to the applicant, acknowledging that a new decision had been made on 6 October 2016.

#### **Decision**



11. Leaving aside the communications difficulties between the parties, the case turns on whether or not the applicant satisfies the requirements in section 38(3) to continue receiving compensation after 130 weeks. The applicant himself agrees that he has capacity to work for 25 hours per week, but on his own admission he works for no more than 21.75 hours per week, at best.
12. This presents the applicant with an insurmountable problem: namely, that the Insurer has the sole power to decide if the applicant complies with section 38(3)(c). Even if the insurer were to accept that the applicant does work for more than 15 hours per week and earned more than \$183 per week, thereby qualifying under section 38(3)(b), there is a further step. The Insurer must agree under section 38(3)(c) that the applicant is "incapable of undertaking further additional employment or work that would increase [his] current weekly earnings."
13. In the present case the Insurer does not concede that the applicant works 15 hours per week and earns over \$183 per week. They cite his certification for 25 hours per week and note that he does not even comply with that. Accordingly, even if it were the case that the applicant did comply with section 38(3)(b), he certainly does not succeed under section 38(3)(c).
14. The decision made on 6 October 2016 complies with the procedural requirements of the legislation, the Guidelines currently in force and the Regulations.

### **Finding**

15. There are no procedural errors identifiable in the decision dated 6 October 2016.

### **RECOMMENDATION**

16. 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  
7 February 2017