



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 injured her right shoulder in the course of her employment as a Commercial Cleaner on 14 August 2014. After two operations on the shoulder, in January 2015 and August 2015, the applicant now works for the same employer for 38 hours per week, but on "suitable" duties. This is subject to (and in conformity with) a plan monitored by a rehabilitation provider.
2. On 28 June 2016 the Insurer made a work capacity decision, finding that the applicant had an ability to earn \$915.85 per week, and a PIAWE of \$887.31. The Decision informed the applicant that her entitlement to weekly payments of compensation would reduce to \$0 on 27 June 2016¹. Critically this does not seem to be an "adverse" decision, since the applicant only gets wages from the employer and rehabilitation assistance from the Insurer. There does not appear to be a current payment of weekly compensation. Accordingly the usual notice period in section 54(2)(a) cannot apply, there being no date of cessation of payments.
3. Following internal review, the insurer upheld the decision.
4. The applicant sought Merit Review from the Authority by way of application received within 30 days of receipt of the internal review decision. The Authority delivered its Findings and Recommendations dated 28 September 2016. The Authority made findings that the applicant: (i) has current work capacity as defined in section 32A; (ii) is

¹ This was corrected to 28 June 2016 in the course of internal review.



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able to return to work in “suitable employment” as defined in section 32A; (iii) is able to earn \$862 per week in suitable employment; (iv) has a PIAWE of \$881.81 per week; and (v) has an entitlement of “nil” under section 37(2). Despite making these findings, the merit reviewer saw no reason to make a recommendation of any kind, thus rendering the status of the document issued “non-binding.”²

5. An application was made to this Office for procedural review received via ordinary post on 11 October 2016. I am satisfied 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 applicant makes these submissions:
 - (i) she does not believe the suitable duties are appropriate; and
 - (ii) she does not believe that the Insurer and the Authority have applied the law correctly.

8. I can only conduct a procedural review of the work capacity decision made by the Insurer. Whether or not the Authority has correctly applied the law is a question for the Supreme Court to answer in the course of judicial review.
9. The question of whether or not the suitable duties identified are appropriate is a question going to the merits of the case and cannot be reviewed by this Office.

Submissions by the Insurer

10. The Insurer made no submissions in reply.

² Section 44BB(3)(g) says that recommendations are binding on the Insurer, whereas there is no similar statement in section 44BB(3)(e) and (f) concerning the findings on which recommendations are based.



Decision

11. The Insurer advised the applicant that a work capacity assessment was completed on 27 June 2016. The applicant was advised that she had been found fit to work for 40 hours per week.
12. The applicant was advised that she had received 43 weeks of payments [as at 24 June 2016]. This clearly places the applicant in the second entitlement period, which ends after 130 weeks. The entitlement periods were explained and the effect of section 37 was also set out and explained.
13. There being no known assessment of Whole Person Impairment, the applicant was advised that she would continue to be able to receive medical treatment for a further two years after the cessation of weekly payments. Section 59A(2) and (3) were clearly explained.
14. The medical evidence relied upon in the decision-making process was current and included work capacity certificates from the NTD.
15. Relying on reports from external providers the Insurer found that the applicant could work as a Medical Receptionist for 40 hours per week. The merit reviewer agreed with this assessment.
16. The PIAWE calculations in the decision comply with the legislation and were clearly set out and explained.
17. The applicant was advised that the Insurer would continue to monitor her work capacity and might do further work capacity assessments in the future, based on updated evidence.
18. There appear to be no procedural errors committed by the Insurer in this case.

Finding

19. The Insurer has complied fully with the legislative requirements and with the guidelines and accordingly the application should be dismissed.



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RECOMMENDATION

20. 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
11 November 2016