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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 is dismissed.**

#### **Introduction and background**

1. The applicant suffered a shoulder injury on 24 November 2014. He continued to receive weekly payments of compensation until the Insurer made a work capacity decision on 29 March 2016 and advised the applicant that his weekly payments would cease on 8 July 2016.
2. The applicant sought internal review and the insurer upheld the original decision.
3. An application for merit review was received by the Authority on 17 August 2016 and the Authority issued findings and recommendations on 16 September 2016. The Authority found that the applicant has current work capacity and has an ability to earn \$608.00 per week in suitable employment. This differs significantly from the ability to earn calculated by the Insurer, which found that the applicant could earn \$1,175.00 per week in suitable employment.
4. The Authority also recommended that the applicant be paid \$165.60 per week pursuant to section 37(3) of the 1987 Act. The decision of the Insurer was relevantly varied.
5. The applicant purported to seek procedural review of the Insurer's work capacity decision by application received by this Office on 14 October 2016.



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6. 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**

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. At paragraph 5 *supra* I said that the applicant “purported” to seek procedural review. Whilst an application was submitted in the correct form, the submissions made in support suggest that the applicant specifically seeks two things: first, a re-run of the merit review conducted by the Authority, revisiting the question of the applicant’s ability to earn in suitable employment; and secondly, it is alleged that the insurer has not approved shoulder surgery which had been scheduled for the second half of this year.
9. My review is limited to ensuring that the Insurer has followed proper procedures in making the work capacity decision. I have no power to revisit issues already determined in the course of merit review or to investigate the way in which the Insurer manages claims. The applicant has made no submissions relevant to procedural review.

### **Submissions by the Insurer**

10. The Insurer observed that the review sought by the applicant “*does not relate to the work capacity decision, but rather to other aspects of his claim, namely a proposed surgery which has not been approved. The surgery does not form part of the procedural aspects in the making of this work capacity decision and has been requested after the Recommendations of the Merit Review Service.*”

### **The Decision**

11. Guideline 5.2 requires the insurer to give the worker fair notice of at least two weeks duration that an adverse work capacity decision may be forthcoming. The applicant was told by telephone on 24 February 2016



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that an assessment leading to a decision was underway. This was confirmed in a letter of the same date.

12. In the notice dated 29 March 2016, the Insurer set out the relevant legislative provisions with an explanation of how they affected the decision-making process. The applicant was taken through sections 37, 54(2)(a), 60, and 59A(1)-(3). The various reports relied upon in making the decision were then set out, followed by an explanation of section 43(1)(a), (b) and (c). The definitions of “current work capacity” and “suitable employment” were fully set out. The method for calculating ongoing entitlements was correctly and fully explained.
13. The calculation of the applicant’s ability to earn was done according to the procedures set out in the legislation, however the merit reviewer took a different view of the evidence in the case and found that the applicant’s ability to earn was lower than assessed by the Insurer. This is not evidence of procedural error by the Insurer and was a decision made by the merit reviewer which favoured the applicant. It is no basis for review by this Office.
14. The various entitlement periods were set out on page 7 of the decision, with a clear explanation of why the applicant is still within the second period.
15. I can identify no errors of a procedural nature in this work capacity decision.

### **Finding**

16. The work capacity decision was validly made.

### **RECOMMENDATION**

17. The application 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  
17 November 2016