



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 sustained a left shoulder injury in the course of his employment as a truck driver on 2 October 2014. He was diagnosed with a full-thickness tear of the supraspinatus, subacromial bursitis and acromioclavicular osteoarthritis. He underwent left shoulder arthroscopy and rotator cuff repair, following which he returned to work on light duties. He was later upgraded to full pre-injury duties, which included driving a manual truck. This caused aggravation of the injury and caused the applicant to cease work once again. The insurer accepted liability and made weekly payments for all relevant periods.
2. The applicant seeks procedural review of a work capacity decision made by the Insurer on 13 September 2016. The applicant was advised that his payments would reduce to nil per week commencing on 22 December 2016. The decision was made on the basis that the Insurer determined the applicant to be capable of performing suitable employment as a Customer Service Officer, Purchasing and Supply Logistic Clerk or Dispatch and Receiving Clerk for 8 hours per day, 5 days per week. Applying the relevant formula in section 37(3), the ongoing entitlement would therefore be \$0.00 per week.
3. The applicant sought internal review and by a decision dated 04 November 2016 the insurer upheld the original decision.
4. An application for merit review was received by the Authority on 16 November 2016 and findings and recommendations were issued on 14 December 2016. The Authority found that the applicant: (i) has no



current work capacity as defined by section 32A; and (ii) is entitled to weekly payments of compensation under section 37(1) of the 1987 Act.

5. The merit reviewer went on to make a recommendation that the Insurer calculate the applicant's ongoing weekly payments in accordance with the above findings.
6. Despite having won his dispute with the Insurer as a result of the outcome of merit review, the applicant sought procedural review by application received by this Office on 10 January 2016. I find that the application was made within time in the correct form.
7. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the relevant 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 made no submissions, beyond applying for procedural review and advising that he could be contacted if further information were required.

Submissions by the Insurer

10. The Insurer made no specific submissions beyond setting out a chronology of events and saying that:
 - [The Insurer] contend[s] that the work capacity decision and internal review are procedurally correct and made in accordance with the legislation; and
 - [The Insurer] also contend[s] [that] following the merit review the worker's entitlements have continued.

The Decision



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11. The applicant was told by telephone on 15 June 2016 that an assessment leading to a decision was underway. This was confirmed in a letter of the same date. The applicant was invited to submit any new evidence which might be thought relevant. Nothing was received by the Insurer in response.
12. In the notice dated 13 September 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, and 59A(1)-(3). The Insurer advised that the applicant's entitlement to pre-approved medical and related expenses will continue for two years until 21 December 2018.
13. The various reports relied upon in making the decision were set out, followed by an explanation of section 43(1)(a), (b), (c) and (d).
14. The definitions of "current work capacity" and "suitable employment" were fully set out.
15. The method for calculating ongoing entitlements was correctly and fully explained.
16. The calculation of the applicant's ability to earn was done according to the procedures set out in the legislation.
17. The various entitlement periods were set out, with a clear explanation of why the applicant was then within the first entitlement period.
18. Suitable employment was identified, including Customer Service Operator, Purchasing and Supply Logistic Clerk and Dispatch and Receiving Clerk. All identified suitable employment was certified as suitable by the applicant's own Nominated Treating Doctor.
19. The merit review service begged to disagree with the assessment of the Insurer. It was found in the course of merit review that the applicant did not have the full set of skills or qualifications or adequate training to perform the roles identified by the Insurer. The applicant was found to have no current work capacity as that term is defined in section 32A of the Act. On that basis the decision of the Insurer was overturned.



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20. While the merit reviewer disagreed with the Insurer, this is not evidence of a procedural error by the Insurer. On the contrary, the Insurer considered the applicant's previous work experience and education, medical evidence, vocational assessments, rehabilitation provider reports, and sought the concurrence of the applicant's own treating doctor before making a decision. It was entirely proper that they do so. The conclusion drawn was not supported by the merit review service, but it was an available conclusion which the Insurer was entitled to make on the evidence it had at the time and therefore cannot be regarded as a procedural error in the decision-making process. This is a matter going to the judgement or discretion of the insurer, thereby falling squarely within the jurisdiction of the merit review service, and outside the jurisdiction of this Office.¹

21. I can identify no errors of a procedural nature in this work capacity decision.

Finding

22. The work capacity decision was validly made.

RECOMMENDATION

23. The application is dismissed.

A handwritten signature in blue ink, appearing to read "Wayne Cooper", with a long horizontal stroke extending to the right.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
13 February 2017

¹ See paragraph 8 *supra*.