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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 work capacity decision of the insurer dated 26 April 2016 is set aside.**
- b. The Insurer is to make a new work capacity decision giving the correct notice under section 54(2)(a) and a consistent and correct explanation of section 59A.**

### **Introduction and background**

1. The applicant injured her knees, shoulders, neck and lower back in the course of her employment as a Room Attendant/Housekeeper on or about 15 July 2011. She worked on restricted duties until her employment was terminated on 7 November 2014. She has not worked since.
2. On 26 April 2016 (relevantly, a Tuesday) the Insurer made a work capacity decision, advising the applicant that her payments would cease by virtue of section 38(7) on 30 July 2016.
3. Following internal review, the insurer upheld the decision to cease payments, but also noted that the applicant did not comply with section 38(3)(b), since she does not currently work for 15 hours per week, or at all.
4. The applicant sought Merit Review from the Authority by way of application received on 7 September 2016. The Authority delivered its Findings and Recommendations dated 30 September 2016. The Authority made findings that the applicant: (i) is able to return to work in "suitable employment" as defined in section 32A; (ii) has current work



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capacity; and (iii) does not comply with section 38(3). 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.”<sup>1</sup>

5. An application was made to this Office for procedural review received via ordinary post on 25 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) The insurer gave inadequate notice; and
- (ii) The insurer gave conflicting information about the effect of section 59A.

8. Specifically, the decision was dated 26 April 2016 and was sent via post. According to the *Work Capacity Guidelines* in force at the time (dated 8 October 2013) Guideline 6 says that delivery to an address for service is taken to have been received “in the case of a postal address, on a day 4 days after the document is posted.” This would mean that the deemed date of delivery would be Saturday 30 April 2016. Since Australia post does not deliver on Saturdays, the next available date would be Monday 2 May 2016.

9. Section 76(1)(b) of the *Interpretation Act* 1987 says that delivery is taken to have occurred on the fourth business day following the day of posting. Again this would be Monday 2 May 2016, since Saturday is not a “business day” as defined in that Act.

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<sup>1</sup> 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.

10. Since section 54(2)(a) requires three months notice to be given prior to the cessation of payments, the insurer should have advised the applicant that her payments would continue until 2 August 2016, not 30 July. It follows that the Act was breached by the Insurer in that inadequate notice was given.
11. The Insurer sent both the decision itself and a covering letter of the same date to the applicant. While the decision itself correctly stated that the applicant would continue to be entitled to claim pre-approved medical and related expenses for a further two years, the covering letter enclosing the decision said: "You will be eligible for reasonably necessary medical costs and rehabilitation services for a further 12 months as detailed below." This is clearly inconsistent with the decision itself, is wrong in law and represents a further procedural error.

### **Finding**

12. The Insurer has breached both the legislation and the Guidelines in relation to the notice period and, due to the conflicting information given about future entitlement to ongoing medical expenses, has not complied with Guideline 5.3.2 which requires the effect of the decision to be clearly explained. The decision must be set aside.

### **RECOMMENDATION**

13. The work capacity decision of the insurer dated 26 April 2016 is set aside.
14. The Insurer is to make a new work capacity decision giving the correct notice under section 54(2)(a) and a consistent and correct explanation of section 59A.

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



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Wayne Cooper  
Delegate of the Workers Compensation  
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25 November 2016