



## **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 suffers Post-Traumatic Stress Disorder caused by continuous bullying and harassment in the course of her employment in 2003. After taking 12 years off work the applicant now works for approximately 10 hours per week in what is agreed by the parties to be suitable employment. The Insurer accepted liability and paid weekly compensation for all relevant periods. The applicant was therefore an "existing recipient" immediately prior to 1 October 2012.
2. On 30 June 2016 a Work Capacity Decision (WCD) was made by the Insurer. The Decision informed the applicant that her weekly payments of compensation would cease on 7 October 2016. The basis for the decision was that the formula for calculation of weekly payments under section 38(7) resulted in the sum of \$0.00. Section 38 is the applicable section, since the Insurer has made over 650 weekly payments.
3. The applicant sought internal review, which confirmed the original decision but on different grounds. At internal review the Insurer decided that the applicant did not comply with the special requirements in section 38(3)(b) and (c). Since the applicant currently works for only 10 hours per week, this is unquestionably correct.
4. The applicant sought merit review by the Authority, which received the application on 15 September 2016. The Authority delivered findings and recommendations dated 11 October 2016. The Authority found that the applicant: (i) is able to return to work in suitable employment; (ii) has current work capacity; and (iii) is not entitled to ongoing payments



Level 4, 1 Oxford Street, Darlinghurst NSW 2010  
T: 13 9476  
contact@wiro.nsw.gov.au  
www.wiro.nsw.gov.au

because she does not meet the special requirements under section 38(3).

5. The applicant then made an application to this office for procedural review received on 31 October 2016. 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 *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. The applicant says the following:
  - She has PTSD + 22% whole person impairment (WPI) from bullying and harassment in the workplace in 2003; and
  - Bullying and harassment in the workplace is against the Australian Law.
9. In relation to the submission about the alleged 22% WPI, for reasons cogently expressed by the merit reviewer at paragraphs 71-87 of his customarily thoughtful decision, the applicant will need to get a Medical Assessment Certificate (MAC) from an Approved Medical Specialist (AMS) before she can rely on that ground. She should seek independent legal advice in relation to obtaining a MAC from an AMS.
10. The illegality of the conduct alleged by the employer is something to be determined in a different forum and is irrelevant for present purposes.

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

11. The Insurer made no submissions in response to the application.

#### **Decision**



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12. The Insurer advised the applicant that an assessment had been completed on 30 June 2016, the same day as the decision itself.
13. The notice given complies with section 54(2)(a).
14. Section 59A was explained and the applicant was advised that she is entitled to two years of further medical treatment expenses. This should be seen in the context of a dispute wherein the applicant purports to have 22% WPI, which would entitle her to unlimited future medical cover, however the only "evidence" for this assessment comes from a doctor who is not an AMS. In the circumstances the Insurer is correct to say that the future entitlement is for two years only, since there is no compelling evidence of WPI greater than 10% currently available. As above, the applicant should seek her own independent legal advice about this.
15. The medical evidence used by the Insurer was current and relevant and included the Certificates of Capacity issued by the applicant's own Nominated Treating Doctor.
16. There is no dispute between the parties about the suitability of the work currently undertaken by the applicant.
17. Section 38 was clearly explained by the Insurer. The merit reviewer also explained this provision.
18. The reasoning process of the Insurer was made clear, in compliance with the relevant Guidelines.
19. There are no discernible errors of a procedural nature in the work capacity decision.

### **Finding**

20. The work capacity decision dated 30 June 2016 was validly made in accordance with the legislation and the Guidelines.

### **RECOMMENDATION**



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21. The application for procedural review is dismissed.

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

Wayne Cooper  
Delegate of the Workers Compensation  
Independent Review Officer  
30 November 2016