



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. On 24 August 2004 the applicant sustained injury to his neck while shackling a bull in the course of his employment as a Slaughterman. After working for three months on restricted duties he returned to full duties before his employment was terminated in 2007. The insurer accepted liability and commenced weekly payments.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 15 July 2016. The Decision informed the applicant that his weekly payments would be ceasing from 22 October 2016. An internal review by the insurer confirmed the original decision.
3. As at the date of the work capacity decision, the applicant worked as an Owner/Restaurant Manager for 38 hours per week at a rate of \$17 per hour. This would yield a gross weekly income of \$646.00.
4. The applicant sought Merit Review from the Authority by way of application received 20 September 2016. The Authority delivered its Findings and Recommendations dated 12 October 2016. The Authority made findings that the applicant: (i) has the ability to return to work in "suitable employment"; (ii) has current work capacity; and (iii) is entitled to weekly payments in the sum of \$Nil per week by virtue of section 38(7).
5. An application was subsequently made to this Office for procedural review, received on 07 November 2016. I am satisfied that the application has been made within time and in the proper form.

Submissions by the applicant



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6. Section 44BB(1)(c) of the *Workers Compensation Act 1987* (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 submissions made by the applicant are as follows:
 - He believes the decision is unfair;
 - He can only work in his own business for 37.5 hours per week “with conditions”;
 - He does not understand the merit review by the Authority;
 - The insurer should pay him until he finds another job; and
 - He was ‘totally disappointed’ in the previous decision.

Submissions by the Insurer

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

Decision

9. The Insurer contacted the applicant on 24 June 2016 giving notice that a work capacity decision might be made in around 21 days, following a work capacity assessment. As a result, the applicant forwarded a further Certificate of Capacity for the Insurer’s consideration. This complies with the “fair notice” provision in *Work Capacity Guideline 5.2*.
10. In the work capacity decision notice the Insurer advised the applicant that the work capacity assessment had commenced on 24 June 2016 and was completed on 15 July 2016.
11. The Insurer explained sections 43(1)(a),(b),(c) & (f).
12. Under section 43(1)(a) the applicant was found to have current work capacity for 7.5 hours per day, 5 days per week with restrictions of lifting/carrying, standing and repetitive pushing/pulling or use of the arms above head height. These appear to be the very “conditions” to which the applicant refers in his second submission. By making the submission, the applicant seems to be accepting the Insurer’s finding.



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13. The Insurer found the applicant to be capable of performing the “suitable employment” of a Restaurant Manager, in accordance with section 43(1)(b).
14. The applicant was assessed as capable of earning \$975.00 gross per week pursuant to section 43(1)(c). This equates to 37.5 hours per week at \$26 per hour. It is half an hour per week less than the applicant currently works, but with an hourly rate 53% higher than he is currently paid. It is clearly the view of the Insurer, the merit review service and the authors of the Labour Market Research Report they relied upon that the applicant, as the owner of his current employer, should give himself a raise.
15. The Insurer explained the entitlement periods and noted that the applicant had received no less than 439 weeks of payments, clearly placing him in that period following the second entitlement period which ends after 130 weeks. Section 38 was clearly set out and explained. The Insurer found that the applicant could earn more in suitable employment than he is currently earning, thus he fails the test in section 38(3)(c). I note, however, that this was overturned in the course of internal review (at paragraph 32 of that review). Despite this, in the course of internal review the Insurer went on to find that he had a \$Nil entitlement by virtue of the algorithm in section 38(7).
16. The merit reviewer agreed with the internal reviewer.
17. The Insurer found no evidence that the applicant was a worker with ‘high needs,’ there being no Medical Assessment Certificate issued by an Approved Medical Specialist assessing more than 20% Whole Person Impairment (WPI). Having been paid compensation in 2006 for 5% WPI the applicant has made no further claim for compensation for non-economic loss.
18. Section 59A(2) and (3) were fully and clearly explained. The applicant was advised that his entitlement to payment for pre-approved ongoing medical expenses might continue for a further two years until 22 October 2018. This is the correct period for a worker with less than 10% WPI.
19. The correct notice period was given in accordance with section 54(2)(a).



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20. I can identify no procedural errors in the decision-making process.
21. While the applicant complains of an unspecified "unfairness," there is certainly no identifiable procedural unfairness.

Finding

22. The work capacity decision of the Insurer was validly made.

RECOMMENDATION

23. 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
8 December 2016