



## **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 sustained an injury to the lumbar spine on 22 January 2013 in the course of his employment. He returned to work on selected duties for a short time but was ultimately made redundant. Since that time he has received weekly payments of compensation due to reduced work capacity. He currently works variable hours, sometimes up to 15 hours per week, sometimes earning as much as \$292.50 per week, other times working fewer hours and earning considerably less.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 6 September 2016. The Decision informed the applicant that his weekly payments of compensation would continue until 12 December 2016, ceasing thereafter. The decision was based on non-compliance with section 38(3). The insurer does not accept that the applicant averages at least 15 hours per week, thereby breaching section 38(3)(b), and goes further to say that, even if the applicant does from time to time meet the requirements of section 38(3)(b), he is not working to his current work capacity and therefore he fails to satisfy section 38(3)(c). It is a requirement of the Act that both sections 38(3)(b) and 38(3)(c) be satisfied.
3. The applicant sought internal review and the Internal Review Decision was dated 18 October 2016. The Internal Review Decision confirmed the original Work Capacity Decision.
4. The applicant sought Merit Review from the Authority by way of application received on 18 November 2016. The Authority delivered its Findings and Recommendations dated 13 December 2016. The



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

Authority made findings that the applicant: (i) has current work capacity; (ii) is unable to return to work in his pre-injury employment; (iii) is able to return to work in suitable employment in the role of Retail Sales Assistant; and (iv) does not satisfy the special requirements in section 38(3) for the continuation of weekly payments beyond 130 weeks. The Authority did not make any recommendations in this matter, thereby causing considerable doubt to be cast over the purpose of the merit review.

5. The applicant made an application to this office for procedural review received on 12 January 2017. 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 Guidelines. The relevant Guidelines came into effect on 1 August 2016.

#### **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 made submissions as follows:
  - He believes the insurer may have breached a protocol in its process;
  - He would like clarification about compliance with section 38; and
  - He is certified to work for 3 days per week for 6 hours per day, but actually works 5 hours per day.

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

9. The Insurer made the following submission:
  - The Insurer acknowledges [the applicant’s] submissions and submits that the Insurer has adhered to the guidelines and legislation.



## Decision

10. The central question is whether or not the applicant satisfies the requirements in section 38(3) to continue receiving compensation after 130 weeks. The applicant himself agrees that he has capacity to work for 18 hours per week, but on his own admission he works for no more than 15 hours per week.
11. This presents the applicant with an insurmountable problem: namely, that the Insurer has the sole power to decide if the applicant complies with section 38(3)(c). Even if the insurer were to accept that the applicant does work for more than 15 hours per week and earned more than \$183 per week, thereby qualifying under section 38(3)(b), there is a further step. The Insurer must agree under section 38(3)(c) that the applicant is "incapable of undertaking further additional employment or work that would increase [his] current weekly earnings."
12. In the present case the Insurer does not concede that the applicant works 15 hours per week and earns over \$183 per week. They cite his certification for 18 hours per week and note that he does not even comply with that. Accordingly, even if it were the case that the applicant did comply with section 38(3)(b), he certainly does not succeed under section 38(3)(c).
13. The applicant might be well advised to approach the Insurer again once he begins working regularly for the hours he is certified to do. Until that time he will be in breach of section 38(3)(c) which is a complete bar to his claim for weekly payments.
14. The decision made on 6 October 2016 complies with the procedural requirements of the legislation, the Guidelines currently in force and the Regulations. The applicant was taken through section 43(1)(a),(b) and (f), section 59A was explained in full, the > 10% and > 20% thresholds of Whole Person Impairment were explained in their respective contexts. For clarification, if the applicant had more than 10% WPI he could have his medical bills pre-approved and paid for five years rather than two, whereas if he had greater than 20% WPI there would be no limit to the time for pre-approval of medical bills. It was clearly explained that section 38 applied, since the applicant had received over 130 weekly



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

payments (actual number 171) and he is not a worker with “high” needs (i.e. not a worker with > 20% WPI) or “highest” needs (i.e. not a worker with > 30% WPI).

15. The correct notice period was observed and all medical and other relevant evidence relied upon was current.

### **Finding**

16. There are no procedural errors identifiable in the decision dated 6 September 2016.

### **RECOMMENDATION**

17. 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  
15 February 2017