



## **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 a lower back injury on 3 October 2006 in the course of his employment as a storeman. His employment was terminated in January 2007 and he has never returned to full-time work since. He received 482 weekly payments and falls within the period following the second entitlement period, which expires after 130 weeks. Having received payments immediately prior to 1 October 2012, the applicant was an "existing recipient" for all relevant purposes.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 3 May 2016. The Decision informed the applicant that his weekly payments of compensation would cease on 10 August 2016. For clarification, the Insurer advised that the final payment received would cover the applicant up to and including 9 August 2016, but there would be nothing further from 10 August onwards.
3. It was not until 22 August 2016 that the applicant sought internal review by the Insurer, and the Internal Review Decision was dated 13 September 2016. The Internal Review Decision confirmed the original Work Capacity Decision. Because of the delay in seeking internal review, payments had already ceased, the notice period of three months plus postal delivery having by then long expired. The "stay" under section 44BC does not apply in such a case.
4. The applicant sought Merit Review from the Authority by way of application received on 7 October 2016. The Authority delivered its Findings and Recommendations dated 3 November 2016. The Authority made findings that the applicant: (i) has a present inability to perform his



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pre-injury employment; (ii) is able to return to work in suitable employment; (iii) has current work capacity; and (vi) does not satisfy the special requirements in section 38 for the continuation of weekly payments beyond 130 weeks.

5. The applicant made an application to this office for procedural review received on 16 November 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 submits that he is in severe financial straits, unable to afford some or all of rent, medicine or food, despite being presently in receipt of Centrelink payments.
9. This raises no issue concerning the procedures of the insurer. If the applicant wishes to further scrutinize the merit review conducted by the Authority, or the merits of the Insurer’s original decision, he should seek independent legal advice about approaching the Supreme Court for judicial review.

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

10. The Insurer made no submissions in reply.

#### **Decision**

11. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.



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12. Guideline 5.3.2 requires the Insurer to advise the applicant of the date of the work capacity assessment. On this occasion the Insurer informed the applicant that the work capacity assessment was completed on 2 May 2016 and he was notified of the Work Capacity Decision by letter dated 2 May 2016.
13. The same Guideline requires the Insurer to advise the date when the Decision takes effect. Section 54(2)(a) of the 1987 Act requires at least three months and four working days' notice be given if payments are being reduced or ceased. This notice period takes into account Section 76(1)(b) of the *Interpretations Act 1987*. As a result the applicant was advised that his payments would cease on 10 August 2016. This is the appropriate notice period.
14. The Guideline also requires the Insurer to advise the applicant of the impact the decision has on his entitlement to medical and related treatment expenses. The Insurer has referenced and explained Section 59A (2) and (3) of the 1987 Act and advised the applicant that his entitlement to medical expenses will cease on 10 August 2018 as he has not been assessed by an Approved Medical Specialist as having a permanent impairment of greater than 10%.<sup>1</sup> The Insurer has adequately explained this at page 2 of the Decision.
15. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer informed the applicant that he had received 468 weeks of compensation payments as at the date of the decision. Therefore any ongoing entitlement to weekly payments of compensation is subject to Section 38 of the 1987 Act. The Insurer clearly explained the special requirements of Section 38(3)(b) and (c) of the 1987 Act at page 4 of the Work Capacity Decision.
16. Pursuant to Section 43(1)(a) of the 1987 Act the Insurer noted that the applicant has been certified with capacity for 21 hours per week in various Certificates of Capacity from his own Nominated Treating Doctor (NTD). The Insurer determined that the applicant had current work capacity in accordance with that assessment.

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<sup>1</sup> There is a complying agreement from 2006 recognizing a WPI assessment of 6%.



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17. The Insurer determined, pursuant to Section 43(1)(b), the roles of Graphic Designer, Concierge/Inquiry Clerk and sales Assistant to be suitable employment. The Insurer based its determination upon a vocational assessment report, various medical reports and approval from the NTD.
18. In making these determinations pursuant to Section 43 of the 1987 Act the Insurer has displayed an adequate understanding of the relevant Guidelines and legislation.
19. For the reasons set out at paragraphs 69-75 of the merit review, it is clear that the applicant currently does not meet the requirements set out in section 38(3)(b).
20. The Work Capacity Decision of the Insurer has displayed a careful consideration of the requirements of the Guidelines and legislation in force at the time.

### **Finding**

21. There are no procedural errors identifiable in the decision.

### **RECOMMENDATION**

22. The application for procedural review is dismissed.

A handwritten signature in blue ink, appearing to read "Wayne Cooper".

Wayne Cooper  
Delegate of the Workers Compensation  
Independent Review Officer  
13 December 2016