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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 application is dismissed.**

#### **Introduction and background**

1. The applicant sustained bilateral shoulder injuries in the course of her employment as a Medical Receptionist on 26 June 2013. Following surgery on one shoulder she has elected to not have surgery on the other. In the time since the injury occurred she has had reduced work capacity. The Insurer accepted liability and made payments for 165 weeks.
2. The applicant seeks procedural review of a work capacity decision made by the Insurer on 25 August 2016. The applicant was advised that her payments would cease from 4 December 2016, since she does not meet the special requirements of section 38(3) for receipt of weekly payments after the first 130 weeks.
3. The applicant sought internal review and the insurer upheld the original decision. Given that even the Insurer concedes that the applicant can only work for 9 hours per week, it follows that the applicant cannot possibly comply with section 38(3)(b), which requires a minimum of 15 hours work per week.
4. An application for merit review was received by the Authority on 24 October 2016 and findings and recommendations were issued on 22 November 2016. The Authority found that the applicant: (i) is able to return to work in suitable employment; (ii) has current work capacity; and (iii) does not satisfy the special requirements under section 38.



5. The applicant sought procedural review by application received by this Office on 5 December 2016. I find that the application was made within time on in the correct form.
6. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines). The relevant Guidelines are dated 8 October 2013.

#### **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 merely requests that this office “review whether all proper procedures have been met.”

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

9. The Insurer made no submissions.

#### **The Decision**

10. Guideline 5.2 requires the insurer to give the worker fair notice of at least two weeks duration that an adverse work capacity decision may be forthcoming. The applicant was told by telephone on 3 August 2016 that an assessment leading to a decision was underway. This was confirmed in a letter of the same date. The applicant was invited to submit any new evidence which might be thought relevant in accordance with the Fair Notice provision in Guideline 5.2.
11. The Insurer told the applicant that the assessment process had lasted from 1 August 2016 to 25 August 2016, the date of the work capacity decision.
12. In the notice dated 25 August 2016, the Insurer set out the relevant legislative provisions with an explanation of how they affected the decision-making process. The applicant was taken through sections 38,



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54(2)(a) (notice provision) and 59A(1)-(3). The Insurer advised that the applicant's entitlement to pre-approved medical and related expenses will continue for two years beyond 4 December 2016.

13. The various reports relied upon in making the decision were set out, followed by an explanation of section 43(1)(a), (b) and (d).
14. The definitions of "current work capacity" and "suitable employment" were fully set out.
15. The method for calculating ongoing entitlements was correctly and fully explained.
16. The calculation of the applicant's ability to earn was done according to the procedures set out in the legislation.
17. The various entitlement periods were set out, with a clear explanation of why the applicant is then within the period following the second entitlement period, which expires after 130 weeks.
18. Suitable employment was identified, including Medical Receptionist, Receptionist and Concierge. All such work was to be on reduced hours. The merit review service agreed with the assessment of the insurer.
19. I can identify no errors of a procedural nature in this work capacity decision.

### **Finding**

20. The work capacity decision was validly made.

### **RECOMMENDATION**

21. The application is dismissed.



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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  
20 December 2016