



## **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 factual background to this matter was set out in WIRO recommendation 7816 (#78 of 2016) and need not be repeated.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 16 September 2016. The Decision informed the applicant that her weekly payments of compensation would cease from 23 December 2016 due to non-compliance with section 38(3).
3. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 8 November 2016. That review confirmed the original Work Capacity Decision.
4. The applicant sought Merit Review from the Authority by way of application received 7 December 2016. The Authority delivered its ironically named "Findings and Recommendations" document<sup>1</sup> dated 12 January 2017. The Authority made findings that the applicant: (i) is able to perform suitable employment as a Car Park Attendant; (ii) has current work capacity; (iii) is not a worker with high needs<sup>2</sup>; and (iv) does not

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<sup>1</sup> "Recommendations" being an ironic term in the present case, which resulted in four findings [only three of which it was entitled to make] and no recommendations.

<sup>2</sup> While it is certainly open to the Authority to note that the Insurer is not satisfied that a worker has high needs, or that there is no Medical Assessment Certificate extant which shows that a worker has high needs, it is not open to the Authority to determine the question of whether or not a worker has high needs. See section 65(3) of the 1987 Act which gives exclusive jurisdiction to the resolution of medical disputes of this nature to Approved Medical Specialists. See also section 319 of the 1998 Act in relation to the definition of a 'medical dispute.' Both the assessment of WPI and any conclusion drawn from such an assessment are capable of being the subject of a medical dispute, and are therefore excluded from the work capacity process by section 43(2)(b).



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meet the special requirements under Section 38(3) of the *Workers Compensation Act 1987* (1987 Act) for the continuation of weekly payments of compensation beyond the end of the second entitlement period.

5. The applicant made an application to this Office for procedural review by way of application dated 30 January 2017. I am satisfied that the application has been made within time and in the proper form.
6. Section 44A of the *Workers Compensation Act 1987* (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 44(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.*” The applicant has applied for a procedural review. The applicant has provided the following submissions:
  - At two places in the decision the Insurer advises that the worker has, respectively, not more than 10% WPI and not more than 20% WPI.
  - The Insurer cannot advise the worker about section 59A and 60 or draw conclusions about whether the worker has “high needs,” because the evidence relied upon by the Insurer (Terms of Settlement of a section 66 claim dated 17 February 2006) is inadequate, out of date and does not include an assessment of a recent injury sustained in 2015.
  - Compounding the second point, the Insurer has declined liability for the most recent injury, which occurred in the course of a work trial arranged by a rehabilitation provider.
  - The applicant believes it is “procedurally unfair” for the Insurer to “make a determination that she is not a worker with high needs when that issue is still in dispute.”



- The applicant also seeks a “review” of the determination of suitable employment given her limited English language ability.
8. At this point it might be apposite to refer to a Supreme Court decision handed down as recently as yesterday, 2 March 2017. In *Geoffrey Hallmann v The National Mutual Life Association of Australia Ltd* [2017] NSWSC 151 her Honour Wilson, J was confronted with an argument put by a worker that an Insurer needed proof that a worker did not have “serious injury” (the statutory predecessor of “high needs or highest needs”) before being able to make a work capacity decision. Her Honour disposed of this argument shortly at paragraphs 40-41 and 43:

40. The plaintiff asserts that, to make a determination that a worker is not a seriously injured worker, the insurer must be positively satisfied that the worker’s whole person impairment is not more than 30%. This, however, inverts the language of the provision. What is required is a state of satisfaction that the degree of impairment is likely to be more than 30%.

41. The insurer is entitled, and in specific circumstances required, to conduct a work capacity assessment unless “satisfied” that the level “is likely to be more than 30%.”

....

43. It is not necessary for the decision maker to reach a state of satisfaction about the worker’s level of impairment as a prerequisite to the conduct of a work capacity assessment.

9. It is clear enough from her Honour’s comments that the Insurer bears no onus of proof that a worker does not have high or highest needs. Rather, it is for the worker to provide evidence to the satisfaction of the Insurer that this is the case. In the present case, all the applicant has is a medical report from a doctor which, if interpreted in a very favourable light, might be construed in such a way as to give grounds for a referral to an Approved Medical Specialist who might then go on to issue a Medical Assessment Certificate, if there is no breach of section 322A. Until those steps are followed there is no basis for the assertion that



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there is any compelling evidence that the worker has high or highest needs, nor any need for the insurer to be so “satisfied.”

### **Submissions by the Insurer**

10. The Insurer responded to the submissions of the applicant as follows.

- The Insurer submits that the relevant legislation and guidelines have been followed and that [the applicant] is not a worker with high needs or highest needs.
- [In relation to the dispute concerning the most recent injury] I note that the Insurer has responded to this dispute on 6 February 2017 (section 74 dispute notice attached to submissions).
- The Insurer continues to rely on the information outlined in the work capacity decision which supports [the view that the applicant] has the necessary English language ability to perform the identified roles.

### **Decision**

11. The Insurer gave the applicant “fair notice” of the impending work capacity assessment and decision on 25 August 2016.

12. Proper notice was given under section 54(2)(a) including an extra four days for postal delivery.

13. The applicant was taken through sections 43(1)(a),(b) and (f).

14. Given that the applicant was paid by the Insurer for 6% WPI in 2006, the Insurer advised the applicant that her entitlement under section 59A(2) would be for a further 2 years after 23 December 2016, since she does not have more than 10% WPI. Section 59A(3) was also fully explained.

15. The concept of “current work capacity” as defined in section 32A was set out and explained.

16. The Insurer identified the roles of Sales Assistant, Customer Service Officer, Car Park Attendant and Teachers’ Aide as “suitable



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employment.” The merit reviewer agreed with the identification of Car Park Attendant as suitable for the applicant.

17. The relevant entitlement periods were fully explained, together with the operation of section 38(3).
18. The Insurer set out 56 documents relied upon in the decision-making process, including the most recent Certificates of Capacity issued by the applicant’s Nominated Treating Doctor.
19. There do not appear to be any procedural errors made by the Insurer.

### **Finding**

20. The work capacity decision dated 16 September 2016 was validly made.

### **RECOMMENDATION**

21. The application is dismissed.

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

Wayne Cooper  
Delegate of the Workers Compensation  
Independent Review Officer  
3 March 2017