



## **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 worked as a Machine Operator between 1994 and 7 July 2012, when he noticed lumbar spinal symptoms of a disease of gradual process. The deemed "date of injury" is agreed to be 7 July 2012. His employment was ultimately terminated on 10 August 2015 and he has not worked in paid employment since that date. The insurer accepted liability and made weekly payments for all relevant periods.
2. The applicant seeks procedural review of a work capacity decision made by the Insurer on 30 September 2016. The applicant was advised that his payments would reduce from \$864 to \$24 per week commencing on 09 January 2017. The decision was made on the basis that the Insurer determined the applicant to be capable of performing suitable employment as a Sales Representative or Dispatch Clerk for 8 hours per day, 5 days per week. Having received 113 weekly payments of compensation, the applicant fell into the second entitlement period, covered by section 37. Applying the relevant formula in section 37(3) (for a worker who has not returned to work), the ongoing entitlement would be \$24.00 per week.
3. The applicant sought internal review and on 24 November 2016 the insurer upheld the original decision.
4. An application for merit review was received by the Authority on 20 December 2016 and findings and recommendations were issued on 1 February 2017. The Authority found that the applicant: (i) has current work capacity as defined by section 32A; and (ii) is capable of working



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

as a Sales Representative and Dispatch Clerk, both of which constitute “suitable employment.”

5. The merit reviewer went on to make no recommendation, on the basis that the findings above had the same effect as the Insurer’s decision.
6. The applicant sought procedural review by application received by this Office on 9 February 2017. I find that the application was made within time in the correct form.
7. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the relevant Guidelines.

#### **Submissions by the applicant**

8. 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.*”
9. The applicant made the following submissions:

On 1 February 2017 a delegate of the State Insurance Regulatory Authority made a decision to arrive at the same decision as that of the insurer. In making the decision the delegate stated that I was suitable for the roles of Dispatch clerk or sales representative

I am writing to state that the decision is wrong. I say so for the following reasons:

The insurer recommended that I am suitable for the role of “Dispatch Clerk” and “sales representative”

It is submitted however that in both roles, there is a formal requirement for a formal education and or work experience.

Relevantly, the Dispatch clerk is under General clerk in the ANZSCO code.

It provides:

**MINOR GROUP 531 GENERAL CLERKS**



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

GENERAL CLERKS perform a range of clerical and administrative tasks.

**Indicative Skill Level:**

Most occupations in this minor group have a level of skill commensurate with the qualifications and experience outlined below.

In Australia:

AQF Certificate II or III (ANZSCO Skill Level 4)

In New Zealand:

NZ Register Level 2 or 3 qualification (ANZSCO Skill Level 4)

At least one year of relevant experience may substitute for the formal qualifications listed above. In some instances relevant experience and/or on-the-job training may be required in addition to the formal qualification.

**Tasks Include:**

- recording, preparing, sorting, classifying and filing information
- sorting, opening and sending mail
- photocopying and faxing documents
- preparing reports of a routine nature
- recording issue of equipment to staff
- receiving letters and telephone messages
- transcribing information onto computers, and proofreading and correcting copy
- may provide customers with information about services
- may perform receptionist duties

The above clearly indicate that the basic criteria for qualification are either Certificate II or Certificate III. Alternatively relevant work experience is required as a substitute for the formal qualification.

In making the decision the delegate stated that no formal qualification was required for the roles. However I state that that is not correct. In fact the legislation makes it clear that a formal qualification of Certificate II or Certificate III is required. Or alternatively one year work experience in the field is required to substitute the formal qualification.



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

I state in my case that I was sent to Penrith Community College for 5 days training only. I state that at the College the trainer made it clear to me that my education level was so low that I was not suited for the course level.

The requirement for the role of "Dispatch clerk" and similarly "sales representative" makes provision for work experience as a substitute for formal education.

However I state that I do not have any experience in "dispatch clerk" or "sales representative" positions. In fact I have worked as a machine operator from 1994 until 2015, a period of 21 years. I am very surprised that I am described by the insurer as suited for the roles of "Dispatch Clerk" and "sales representative".

I believe that the decision is clearly wrong.

I appeal therefore for a different conclusion to that of the Insurer.

10. The evidence quoted in both the work capacity decision and the merit review is that no formal qualifications are "required" by the employers approached to provide information for the purposes of reports prepared in this case. The applicant was advised that a "Year 10" education and on-the-job training would be adequate and there is nothing in what appears above which contradicts those statements. It is true that an ANZSCO Code lists higher qualifications, but if the Insurer and rehabilitation provider are able to find employment for the applicant which does not require such qualifications, it is no answer to argue that they should be required because they are listed in an obscure Code more honoured in the breach than the observance.

### **Submissions by the Insurer**

11. The Insurer made no specific submissions beyond setting out a chronology of events and saying that:

- [The Insurer] contend[s] that the work capacity decision and internal review are procedurally correct and made in accordance with the legislation.

### **The Decision**



12. The applicant was told by telephone on 11 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. Subsequently the applicant submitted a Certificate of Capacity dated 30 August 2016.
13. In the notice dated 30 September 2016, the Insurer advised that a work capacity assessment had commenced on 2 August 2016 and was completed on 20 September 2016.
14. The Insurer set out the relevant legislative provisions with an explanation of how they affected the decision-making process. The various entitlement periods were set out, with a clear explanation of why the applicant was then within the first entitlement period. The applicant was taken through section 37.
15. The various reports relied upon in making the decision were set out, followed by an explanation of section 43(1)(a), (b), (c) and (d).
16. The definitions of "current work capacity" and "suitable employment" were fully set out.
17. The method for calculating ongoing entitlements was correctly and fully explained.
18. The calculation of the applicant's ability to earn was done according to the procedures set out in the legislation.
19. Suitable employment was identified, including Sales Representative and Dispatch Clerk. While a further occupation (Forklift Driver) had been suggested in a Vocational Assessment Report, the Insurer noted that this was not supported by the applicant's Nominated Treating Doctor (NTD) and consequently the Insurer did not find the role of forklift driver to be "suitable employment." All identified suitable employment was certified as suitable by the applicant's NTD.

### **A jurisdictional issue**

20. The merit reviewer (at paragraphs 17-19) made certain observations about the nature of merit review which might have unintended



consequences, if pursued in another forum. At paragraph 17 the reviewer observed, it is submitted correctly, that the nature of merit review is “to consider all the information before [her] substantively on the merits and make findings and recommendations that are most correct and preferable.” This conforms with the classical view of merit review, where the merit reviewer is in the shoes of the original decision-maker and can review the entirety of the claim. However at paragraph 18 the following bizarre sentence appears:

“18. I note that it is only those decisions that [the applicant] chooses to refer for review by the Authority in accordance with section 44BB(1)(b) of the 1987 that the Authority has jurisdiction to review.”

I described this sentence as “bizarre” because it completely misconstrues the purpose of merit review, which is to make a correct or preferable decision as a result of having examined the entirety of the evidence. To try to break up the decision (“the decision” being to reduce payments from \$864 to \$24 per week) into its constituent parts (calculation of PIAWE, identification of suitable employment, current work capacity and so on) and to then distinguish two of those constituent parts (decision about current work capacity and identification of suitable employment) as (a) “decisions” which can stand alone and (b) the only two such “decisions” which are relevant for merit review, betrays a complete want of understanding of the merit review process. The applicant has sought a review of the decision itself (i.e. the decision to reduce his payments) and the merit reviewer has “jurisdiction” to review the merits of that decision, irrespective of whatever grounds the applicant might or might not be able to identify in an application.

21. The difficulty to which this approach by the merit reviewer can lead is easily illustrated. If the Authority chooses to identify the constituent parts of decisions as “decisions” which exist independently of one another, then if a worker only complains specifically about one or two of those constituent parts (or “decisions”) the merit reviewer might well uphold an absurd decision simply because the applicant had not complained about the most absurd element (or “decision”).
22. Further, the procedural review power of this Office can only be exercised when a decision has been subject to merit review. But if a merit reviewer

chooses to only review certain constituent parts of decisions (presumably none based on procedural error) and ignores others, then it would call into question the power of this Office to conduct a review of a constituent part of the decision which had not been reviewed by the Authority, because that constituent part had been wrongly styled as a separate “decision.”

23. The absurd practice of splitting decisions up into constituent parts and claiming to have jurisdiction to review only some of them must cease.

### **Finding**

24. I can identify no errors of a procedural nature in this work capacity decision. The work capacity decision was validly made.

### **RECOMMENDATION**

25. The application is dismissed.



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