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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 for procedural review is dismissed.**
- b. Such weekly payments, if any, the applicant is receiving by virtue of the stay are to continue until receipt of this decision**

### **Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 6 August 2015. The decision informed the applicant her weekly payments of compensation would cease from 13 November 2015<sup>1</sup>. The applicant then sought internal review, which confirmed the work capacity decision.
2. The applicant applied to the Authority for Merit Review on 6 October 2015 and they delivered findings and recommendations dated 2 November 2015. The Authority made a finding that the applicant did not satisfy the special provisions under Section 38(3) of the *Workers Compensation Act 1987* (1987 Act) to be entitled to ongoing weekly payments of compensation.
3. The applicant then made an application to this office dated on 1 December 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 3 June 2003 the applicant suffered injury to her right knee and hip. She returned to work for the same employer until 2007 and has worked

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<sup>1</sup> "Informed" might be an exaggeration – the relevant single sentence appears half-way down page four of a single-spaced, densely written six-page letter, although to be fair I should note that exactly the same information was repeated in a slightly differently worded sentence two paragraphs later on the same page. Once the information was found it was hard to miss, but the finding was not as easy as it might have been.



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in a series of different jobs ever since, none of which involved heavy work. At the time the work capacity decision was made the applicant was working 20 hours per week and was also in receipt of weekly payments of compensation.

5. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).

### **Submissions by the applicant**

6. 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.*” The applicant has applied for a procedural review.
7. In addition to applying for a procedural review the applicant has made the following submissions:
  - The Insurer has disagreed with the view of the applicant’s “qualified surgeon.”
  - An IME (Dr O) made “a bad assessment” and “an error of judgement” when contradicting the applicant’s medical evidence.
  - More stress and depression will result from the escalation of the assessment of the hours of work per week the applicant is capable of performing.
  - Her injury has worsened and is affected by increased hours.
8. The applicant made several other observations which are irrelevant to procedural review. All of the issues listed in the tetralogue above go to the merits of the claim and were the subject of consideration in the course of merit review by the Authority.
9. I am unable to review any discretion or judgment exercised by the Insurer in making decisions in respect of capacity to work or what constitutes suitable duties. I am also unable to have any consideration for the applicant’s personal circumstance. My review is limited to



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ensuring that the Insurer has followed proper procedures in making the work capacity decision.

### **Submissions by the Insurer**

10. The Insurer has not made any submissions in response to the application.

### **The Decision**

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

12. In accordance with the Guidelines the Insurer has informed the applicant that a work capacity assessment commenced on 15 July 2015 and a work capacity decision was made on 6 August 2015. The applicant was advised of the decision by letter of the same date.

13. The Insurer noted that the applicant had current work capacity of 38 hours per week, including working on 5 days per week.

14. At the time of the work capacity decision the applicant was working 20 hours per week and being paid \$25.16 per hour.

15. In accordance with Section 43(1)(a) and (b) the Insurer determined that the applicant had the capacity to work 38 hours per week in the suitable employment of Administrative Assistant. The applicant was at the time employed as an Administrative Assistant.

16. The applicant had received 228 weekly payments of compensation as at the date of decision and the Insurer correctly advised the applicant that her ongoing entitlements were subject to Section 38 of the 1987 Act.

17. The Insurer determined that the applicant had the capacity to work 38 hours per week and was only working 20 hours per week at the time of the work capacity decision. The Insurer informed the applicant that she therefore had not complied with the special requirements of Section 38(3)(c) and as a result she was not entitled to ongoing weekly payments of compensation.



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18. In accordance with Guideline 5.3.2 the Insurer informed the applicant the decision would take effect from 13 November 2015 and has correctly referred to both Section 54(2)(a) of the 1987 Act and Section 76(1)(b) of the *Interpretation Act* 1987.
19. The same Guideline requires the Insurer to state the impact the decision will have on the applicant's entitlement to medical and related treatment expenses. The Insurer has referred to Sections 59A(2) and (3) and provided an adequate explanation of the legislation in force at the time of making the decision.
20. The decision of the Insurer dated 6 August 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation. Despite this it is unfortunate that the applicant had to read through four pages of opaque prose in order to find out the relevant facts that (a) her payments would cease altogether and (b) this would happen on 13 November 2015. It might be appropriate for Insurers to elevate such critical information to a place on page one.

### **Finding**

21. There are no procedural errors identifiable in the decision. The insurer has complied with the Guidelines and relevant legislation.

### **RECOMMENDATION**

22. The application for procedural review is dismissed.
23. Such weekly payments as the applicant is receiving by virtue of the stay are to continue until receipt of this decision and cease thereafter.

Wayne Cooper  
Delegate of the Workers Compensation  
Independent Review Officer  
07 January 2016