



## **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. On 30 January 2013 in the course of her employment as a Meat Processor the applicant suffered injury to her right shoulder. She underwent surgery, returned to work on light duties and was eventually terminated by her employer on 7 July 2015. She has not worked in paid employment since. The insurer accepted liability and made weekly payments of compensation for all relevant periods.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 26 September 2016. The Decision informed the applicant that her weekly payments would be ceasing from 2 January 2017, as a result of the formula in section 37(3) which applies to injured workers in the second entitlement period who have not returned to work. The Insurer had formed the view that the applicant was capable of working in suitable employment for 8 hours per day, 5 days per week with restrictions concerning lifting, carrying, driving and repetitive manual handling.
3. An internal review by the Insurer dated 18 November 2016 confirmed the original decision, but in the course of doing so made a correction to the PIAWE figure, wrongly calculated in the original decision.
4. The applicant sought Merit Review from the Authority by way of application received 7 December 2016. The Authority delivered its Findings and Recommendations dated 19 January 2017. The Authority made findings that the applicant:
  - (i) has a present inability arising from an injury such that she is not able to return to her pre-injury employment;
  - (ii) is able to return to work in suitable employment;



- (iii) has current work capacity;
- (iv) is able to earn \$288.00 per week in suitable employment; and
- (v) has a PIAWE of \$1,086.54.

5. The merit reviewer then made the following recommendation:

*8. In accordance with section 37(3) of the 1987 Act, [the applicant's] entitlement to weekly payments of compensation since 26 September 2016 (subject to any notice period required under section 54 of the 1987 Act) is \$581.23 (subject to indexation pursuant to division 6A of part 3 of the 1987 Act).*

6. An application was subsequently made to this Office for procedural review, received on 15 February 2017. I am satisfied that the application has been made within time and in the proper form.

### **Submissions by the applicant**

7. Section 44BB(1)(c) of the *Workers Compensation Act 1987* (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 submissions made by the applicant are as follows:

- She observes that the “mere possibility” that an employer will offer her limited hours of work does not establish that it definitely or even probably will happen;
- The basis on which her earning capacity has been calculated is “speculative and relies on imprecise estimates”;
- She lives in a small country town with an estimated population of around 5,000 people and jobs are very scarce; and
- [Perhaps most interestingly] she asks the following question:

Why was Dr [name supplied] report used in my review? He stated and without examining me that he feels I could return to



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full-time duties. This is so ridiculous. My past employe[r] [name supplied] put me off because of my injury so really his statement is an insult to me. I have never met or ever spoken to this Doctor so I feel his report is worth nothing.

9. The first three submissions by the applicant are really an attempt to debate the merits of the legislation and have no relevance for present purposes.
  
10. The short answer to the last submission is that the Insurer was not ill-advised enough to rely, when making the work capacity decision, on the report of the doctor who never met the applicant. The report, accurately described by the applicant in my submission as “worth nothing,” was dated 24 December 2016, which actually post-dates the internal review and appears to have been prepared for the purposes of merit review only. The good news for the applicant is that the merit reviewer, while inexplicably claiming to “attribute weight” to this report (see paragraph 42), had the good judgement to prefer the opinion of the applicant’s own nominated treating doctor [NTD], who says that she can only work 4 hours per day, 3 days per week. That assessment has the concurrence of at least two other providers, albeit they are both physiotherapists. It may well be reasonably thought that the opinions of one NTD and two physiotherapists, all of whom have taken the trouble to examine and take a history from the injured worker, do seem to outweigh the opinion of one General Practitioner who has never met the injured worker.

### **Submissions by the Insurer**

11. The Insurer made no submissions.

### **The relevant Guidelines**

12. On 1 August 2016 a new set of *Guidelines for claiming workers compensation* came into effect, replacing the former *Work Capacity Guidelines* which had been in force from 11 October 2013.

### **Decision**



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13. The Insurer contacted the applicant on 1 September 2016 giving notice that a work capacity decision might be made in 21 days, following a work capacity assessment.
14. In the work capacity decision notice the Insurer advised the applicant that the work capacity assessment had commenced on 1 September 2016 and was completed on 26 September 2016.
15. The Insurer explained sections 43(1)(a),(b) & (f).
16. Under section 43(1)(a) the applicant was found to have current work capacity for 5 hours per day, 8 days per week with restrictions. At the time of the decision, this determination was in accordance with the Certificate of Capacity issued by the applicant's NTD.
17. The Insurer found the applicant to be capable of performing the suitable employment of Receptionist/Administrative Assistant and/or Cashier, in accordance with section 43(1)(b).
18. The Insurer determined that the applicant could earn \$960 per week in suitable employment, under section 43(1)(c). PIAWE was calculated to be \$1,177.53. [This was later corrected to \$914.78 in the course of internal review. Given the operation of section 37(3), the error made no difference to the applicant's entitlements.]
19. The Insurer explained the entitlement periods and noted that the applicant was in the second entitlement period, with payments governed by section 37.
20. Section 59A(2) and (3) were fully and clearly explained. The applicant was advised that her entitlement to payment for pre-approved ongoing medical expenses might continue for a further two years on the basis that there was no Medical Assessment Certificate (MAC) in existence certifying whole person impairment (WPI) of greater than 10%.
21. I should say that the applicant has in her possession a report from a prominent medico-legal specialist assessing 21% WPI and the Insurer has a similar report from another practitioner assessing 9% WPI. This issue might be easily resolved by a simple application to the Workers Compensation Commission for referral to an approved medical



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specialist (AMS). The applicant should take her own legal advice on this question.

22. The correct notice period was given in accordance with section 54(2)(a).

23. The Insurer relied upon the most recent Certificates of Capacity tendered by the applicant and the most recent medical reports in its possession. It appears that the condition of the applicant deteriorated considerably and she was downgraded by her NTD during the review process. This explains the appearance of medical reports post-dating internal review as well as the finding by merit review that the applicant could only work for 12 hours per week. The disparity between the findings by the Insurer and those of the Authority are explained by the evolving nature of the evidence in the case.

24. The reasoning process was carefully explained, in accordance with the relevant Guidelines.

25. There are no procedural errors in the work capacity decision dated 26 September 2016.

### **Finding**

26. The work capacity decision of the Insurer was validly made.

### **RECOMMENDATION**

27. The application is dismissed.

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

Wayne Cooper  
Delegate of the Workers Compensation



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Independent Review Officer  
16 March 2017