



**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.**

**Introduction and background**

1. The applicant sustained a left shoulder injury in the course of his employment as a Dock Hand Driver on 06 December 2011. The insurer accepted liability and he was continuously in receipt of weekly payments of workers compensation. The applicant had shoulder surgery, returned to work on restricted duties, and was eventually made redundant in September 2016.
2. The applicant had been in receipt of weekly payments immediately prior to 1 October 2012, making him an "existing recipient" for all relevant purposes.
3. The insurer made a work capacity decision on 16 April 2018, advising that weekly payments would cease altogether on 20 July 2018.
4. The insurer purported to assess the applicant's PIAWE at \$1,035.90, indexed upwards to \$1,049.10 from 1 April 2018. There was no real assessment involved, since the applicant, as an existing recipient, was covered by the statutory amount referred to colloquially as the "transitional rate." The figures quoted above were the correct statutory transitional rates at the relevant times.
5. The insurer went on to find that there were three roles which qualified as "suitable employment": Forklift Operator, Car Park Attendant and Packer. Despite the evidence of the Nominated Treating Doctor that the applicant lacked any work capacity, the Insurer was content to rely on the evidence of a psychologist and a physiotherapist to support the contention that a person with medical certification that they cannot lift more than 2 kg above head-height could be employed as a Packer. Even more risibly, the



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Insurer was content to find that a person who was unfit for the job of Dock Hand Driver was fully capable of working in the vastly more strenuous job of Forklift Operator.

6. As a result of the alleged ability of the applicant to perform the three roles identified by the insurer, it was further found that the applicant had an earning capacity of \$1,104.00 per week. Applying the formula in section 37,  $80\% \times \$1,049.10 = \$839.80$ . Since this amount is less than \$1,104.00, the applicant's entitlement to weekly payments would be \$0.00.
7. The applicant applied for internal review more than 30 days after receipt of the original decision. This would mean that the statutory stay would not apply during internal review. The application seems to have been received on 3 July 2018 and the insurer did not get around to conducting the internal review until 3 August 2018, some 31 days after receipt of the application. This is an abuse of process by the insurer and should not be condoned.
8. The internal review also resulted in a decision to terminate the applicant's weekly payments, based on the same grounds.
9. The applicant sought merit review by the Authority. The application was received on 23 August 2018 and the Authority made Findings and Recommendations on 25 October 2018, some 63 days later.
10. The Authority did not accept that the applicant was capable of working as either a Packer or a Forklift Operator. The Authority also found that the applicant could only work on non-consecutive days for three days per week, five hours per day. The exact findings and recommendations were as follows:

#### Findings:

- The Applicant has current work capacity;
- The vocational option of Car Park Attendant is suitable employment; and
- The applicant is able to earn \$411.75 per week in suitable employment.

#### Recommendations based on Findings



- The insurer is to determine the applicant's entitlement to weekly payments of compensation in accordance with the findings above; and
- This entitlement is to apply from 20 July 2018, the date upon which the insurer's original work capacity decision was to come into effect.

11. The applicant then made an application to this Office for procedural review received on 18 November 2018. I am satisfied that the application has been made within time and in the proper form.

12. 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**

13. 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."*

14. In the course of making an application for procedural review, the applicant made the following seemingly passive submission:

- I am unaware if the Insurer has met the procedural requirements for their decision (work capacity decision).

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

15. The Insurer made short submissions to the effect that they have now accepted current incapacity for work and that the effect of any procedural review would be academic only since the applicant will be compensated for the period covered by the merit review decision and, in light of present sequelae from recent surgery, they will have to wait until the applicant has made more of a recovery before conducting a further assessment and making another work capacity decision.

16. If by what appears in paragraph 15 I am to understand that the insurer now accepts that the applicant has no current work capacity and is being paid accordingly, then it may be the case that any procedural review is only of academic interest, at best. Given that the Authority recommended



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that payments be back-dated to 20 July 2018, it seems likely that the applicant has suffered no economic loss overall.

### **Decision**

17. The submission made by the applicant is really just a request for this office to ensure that the Insurer complied with the relevant statutory instruments. In so far as there were some strange decisions made as part of the process, these seem to have been overcome by the more sensible approach adopted by the Authority in the course of merit review.
18. The insurer gave the correct period of notice, referred to the correct sections of the Act and explained the effect of the decision in the required manner. The transitional rate was correctly set out, as were the relevant entitlement periods. The effect of section 59A was correctly explained.
19. The insurer was aware that the applicant had applied out of time for the stay to apply during internal review and therefore a more expeditious approach to internal review might have been desirable, given the beneficial nature of the legislation.
20. Despite the inappropriate "suitable employment" identified by the Insurer, this was corrected during the course of merit review. To the extent that this required correction, it appears to have already occurred.

### **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.



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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  
17 December 2018