



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 was assaulted by a patient on 10 July 2015 in the course of her employment as a Phlebotomist. She suffered facial and psychological injuries, had facial surgery some months later and was off work for a further 4 to 5 months post-surgery. Psychological symptoms persist. She resumed employment on restricted duties with no patient contact for 30 hours per week and ultimately returned to earning an amount in excess of her PIAWE.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 30 August 2016. The insurer advised that since her current earnings exceeded her pre-injury average weekly earnings she had no ongoing entitlement under section 37.
3. As at the date of the work capacity decision, the applicant was certified by her own Nominated Treating Doctor as capable of working for "full hours" on duties restricted in no way other than by protection from exposure to patients. Despite an aversion to travel on public transport, she was at the time commuting for more than an hour each way every day unaccompanied.
4. An internal review by the insurer confirmed the original decision.
5. The applicant sought Merit Review from the Authority by way of application received 18 October 2016. The Authority delivered its Findings and Recommendations on 14 November 2016. The Authority made findings that the applicant: (i) has current work capacity to work for 6 hours per day, 5 days per week; (ii) is able to return to work in "suitable employment" in the role of technical assistant in a pre-



analytical laboratory; and (iii) is able to earn \$20.61 per hour in suitable employment. This latter finding translates to an ability to earn $\$20.61 \times 30 = \618.30 gross per week, which is considerably less than the applicant's PIAWE which the Insurer had calculated to be \$788.54 gross per week. The merit reviewer therefore recommended that the Insurer should calculate the amount of the applicant's entitlement to weekly compensation under section 37(3) in line with the earlier findings.

6. An application was subsequently made to this Office for procedural review, received on 13 December 2016. 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 applicant made the following submissions:
 - Merit review and Insurer has assessed me for suitable employment for the role offered by employer however it was declined by me due to psychological disorder due to post injury.
 - However employer IME confirms it and employer medically terminated me due to this report/inability so technically it should not be considered as suitable employment while calculating my weekly benefits.
9. The background to this is that the applicant is now certified for no more than 10 minutes of unaccompanied travel on public transport, due to the sequelae of her assault. The "suitable duties" job she was offered is over an hour away, and she accordingly declined the job. Anomalously, she had been performing that or a similar job at exactly the same place (i.e., more than one hour away by public transport) for several months before her rejection of the job, ostensibly on the "excessive travel" grounds. The employer subsequently withdrew the



offer of suitable employment in that position. This might best be described as an industrial dispute between employee and employer, rather than a workers compensation dispute with an insurer. It is irrelevant for present purposes.

Submissions by the Insurer

10. The Insurer made no submissions.

Decision

11. The Insurer advised the applicant on 28 July 2016 that a work capacity decision might be made, following a work capacity assessment. The applicant was invited to provide any new or additional information to the Insurer so that it might be considered prior to the decision being made. The applicant provided nothing further. This complies with the "fair notice" provisions in the relevant *Work Capacity Guidelines*.

12. The Insurer explained sections 43(1)(a),(b),(c), (d) and (e).

13. Under section 43(1)(a) the applicant was found to have current work capacity for "normal hours" of 30 hours per week.

14. The Insurer found the applicant to be capable of performing the "suitable employment" of a Technical Assistant (pre-Analytical Laboratory), in accordance with section 43(1)(b).

15. The Insurer decided under section 43(1)(c) that the applicant could earn \$993.60 gross per week in the specified suitable employment.

16. The Insurer explained the application of PIAWE in section 43(1)(d).

17. The Insurer found that the applicant is unable to return to her pre-injury employment in accordance with section 43(1)(e).

18. The effect of the decision on the applicant's present and future entitlements was set out under the heading "How this decision affects your claim." This complies with the requirements of the Guidelines.



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

19. In the course of merit review the reviewer found that the hourly rate applied by the Insurer to the suitable duties was in excess of what the applicant could realistically earn. This was not a procedural error by the Insurer, since it is clearly an issue going to the merits of the decision, and it was corrected in the appropriate forum.

20. I can identify no procedural errors by the Insurer in the decision-making process.

Finding

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

RECOMMENDATION

22. The application for procedural review is dismissed.

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

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
13 January 2017