



**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. Weekly payments to the applicant should continue in accordance with the internal review decision of the Insurer dated 24 August 2018.**
- b. The Insurer may make a new work capacity decision at any time.**

**Introduction and background**

1. The applicant suffered injury to her back on or about 15 June 2014 in the course of her employment as a Customer Service Officer. She did not return to her pre-injury employment. On 8 July 2014 the applicant was made redundant. The insurer accepted liability and made weekly payments of compensation for all relevant periods.
2. The applicant subsequently found alternative, part-time employment for 24 hours per week, earning \$531 per week.
3. The applicant now seeks procedural review of a work capacity decision made by the Insurer on 29 June 2017. The decision informed the applicant that:
  - She was certified fit for suitable employment for 6 hours per day, 4 days per week;
  - She was currently not working;



- Suitable employment was identified in roles as either an Administrative Assistant, or Customer Service Officer<sup>1</sup> or Information Service Officer;
  - Her ability to earn was either \$531 per week (according to recent payslips – see page 2) or \$634 per week (from a report prepared by a labour market analyst – see both page 2 and page 6);
  - PIawe was \$1,099.05 (on page 2);
  - PIawe was \$1,373.81 (on page 6);
  - Having received weekly payments for 157 weeks she was in the period following the second entitlement period and was therefore covered by section 38 (see page 2 and page 6);
  - Since she did not work for 15 hours per week and make at least \$186 per week, she was in breach of section 38(3) (see pages 6-7);
  - Her entitlement to pre-paid medical expenses would continue for two years following the cessation of benefits, due to no Whole Person Impairment assessment of greater than 10%;
  - Weekly payments would cease altogether as of 4 October 2017.
4. The applicant sought internal review and was advised by letter dated 24 August 2017 that:
- She was currently engaged in suitable employment;
  - She currently earned \$531 per week for working 24 hours per week;
  - Her entitlement to weekly payments would reduce to \$568.05 per week;
  - The new payment rate would commence as of 1 December 2017.
5. Perhaps understandably, the applicant applied to the Authority for Merit Review.

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<sup>1</sup> Note – “Customer Service Officer” is the very role in which the applicant suffered injury, so the “suitability” of this employment must be doubted in accordance with the requirement that in order to be assessed as having “current work capacity” a worker must be found to have an **inability to perform pre-injury employment**.



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6. On 6 December 2017 the Authority made findings that the applicant:
- Has a present inability arising from injury such that she is not able to return to her pre-injury employment;
  - Is able to return to work in suitable employment;
  - Has current work capacity;
  - Does not satisfy the special requirements for continuation of weekly payments of compensation after the second entitlement period pursuant to section 38(3).
7. No recommendation was made.<sup>2</sup>
8. An application for procedural review was received in this Office on 3 January 2017. I am satisfied that the application was made within time and in the correct form.

### **Submissions by the applicant**

9. 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.*”
10. The applicant submitted thus:
1. The Insurer stopped paying, with “no warning;”
  2. Neither the rehabilitation provider nor the insurer made it clear that she had to work for 15 hours per week in order to continue receiving payments;
  3. “Both jobs I currently hold do not comply with my work capacity.”

### **Submissions by the Insurer**

11. The Insurer made no submissions in reply.

### **The Decision**

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<sup>2</sup> The effect of the “findings” is not known, in the absence of a binding recommendation from the Authority that they be implemented by the Insurer - see section 44BB(e) and (g).



12. The Insurer made only one error in the original work capacity decision, however it was critical. The applicant was given two differing assessments of PIAWE, being \$1,099.05 on page 2, and \$1,378.81 on page 6. This is misleading and is therefore in breach of the *Guidelines*.
13. The *Guidelines*, which came into effect on 1 August 2016, are very clear in stating that parties must not be ***misled***, disadvantaged or caused to suffer procedural unfairness in the course of the work capacity decision-making process (see *Guidelines* at page 6 – emphasis added).
14. It might have been thought that internal review could correct the confusion, however the internal review advised that weekly payments would continue albeit at a reduced rate from 1 December 2017, whereas the original decision had been to cease payments altogether on 4 October 2017.
15. The Internal review proceeded on the basis that the applicant was currently employed and working for 24 hours per week. Both the original decision and the merit review proceeded on the basis that the applicant was not working as at the date of those decisions.
16. The failure of the Authority to make a recommendation in light of its findings means that the only decision currently in force must be the internal review decision dated 24 August 2017.
17. Despite this, the applicant says in her submissions that payments have ceased. If this is the case, they should be recommenced and back-dated to the date of cessation. If the Insurer wishes to terminate payments, they should issue a further work capacity decision which complies with the *Guidelines* as well as the legislation

### **Finding**

18. The internal review decision dated 24 August 2017 remains in force.

### **RECOMMENDATION**

19. Weekly payments to the applicant should continue in accordance with the internal review decision of the Insurer dated 24 August 2017.



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20. The Insurer may make a new work capacity decision at any time.

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  
01 February 2018