



## **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 work capacity decision dated 03 October 2018 and the internal review decision dated 26 November 2018 are set aside.**
- b. The insurer is to make a new work capacity decision.**

### **Introduction and background**

1. The applicant sustained bilateral shoulder injuries in the course of his employment as a Warehouse Area Manager on or about 8 September 2015. He underwent several operations which ultimately resulted in replacement of both shoulders. The most recent was a right reverse total shoulder replacement which occurred in July 2018. The insurer accepted liability and made continuous weekly payments of workers compensation.
2. The insurer made a work capacity decision on 03 October 2018, having assessed the applicant as capable of performing suitable employment as a Warehouse Supervisor/Manager for 8 hours per day, 5 days per week with some limitations on lifting (10kg to chest height with left arm) and pushing/pulling ("as tolerated"). No reference was made to any restriction concerning the right arm/shoulder, which seems odd only two months after a total replacement.<sup>1</sup> He was thought capable of driving for 30-60 minutes. It might be thought by some that the so-called "suitable employment" identified by the insurer bears a striking resemblance to the pre-injury employment of the applicant, which would normally disqualify it from being "suitable" post-injury employment, but I note that the physical restrictions listed above would distinguish it from the pre-injury duties undertaken by the applicant.
3. As a result of the above assessment the insurer went on to find that the applicant was capable of earning \$1,600 per week in "suitable employment," with a PIAWE of \$1,788.46 per week. Since the applicant

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<sup>1</sup> See para 10 *et seq, infra*.



was in the post-second entitlement period at the time of the decision (having received no less than 131 weeks of payments), and since the applicant had not returned to work, the insurer need have regard to only 80% of PIAWE, being \$1,430.62.

4. The insurer conducted an internal review on 26 November 2018 and found a similar earning capacity, despite varying the physical restrictions by including a lifting weight limit of 5kg for the right arm/shoulder and finding a reduced driving capacity of only 20-30 minutes. On this occasion the suitable employment identified was described as Gallery or Museum Guide, which was said to have potential earnings of \$1,475.60 per week.
5. On this occasion the insurer found that the applicant breached section 38(3), since he had not returned to work for 15 hours per week and did not earn the minimum statutory weekly amount. Having received 145 weeks of payments by this time, section 38 was said to be applicable. Given that the applicant had current medical certificates of capacity stating that he was capable of working with restrictions for 40 hours per week, the insurer might well have been entitled to ignore the strictures in section 38(2). Since the applicant had already received 131 weeks of payments at the time of the original decision, it seems anomalous that section 38 was not referenced in the course of that decision. This will be revisited in paragraph 12 below.
6. The applicant sought merit review by the Authority and was advised of the outcome of merit review by decision dated 18 January 2019. The Authority made the following findings and recommendation:

SIRA Findings:

- (i) The applicant has current work capacity;
- (ii) The role of Insurance Representative is suitable employment for the applicant; and
- (iii) The applicant does not meet the special requirements for continuation of weekly payments after the second entitlement period in accordance with section 38(3).

SIRA Recommendation:



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Since the findings made by the Authority resulted in the same outcome for the worker, the Authority made “no recommendation” in this matter.

7. The applicant then made an application to this Office for procedural review received on 12 February 2019. I am satisfied that the application has been made within time and in the proper form.
8. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *Guidelines*.

### **Submissions by the applicant**

9. 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.*”
10. In addition to making an application for procedural review the applicant has made the following submissions:
  - The insurer has given no weight, or insufficient weight, to the right shoulder replacement undergone by the applicant as recently as July 2018. The very fact that in the original work capacity decision no allowance was made for restriction of strength or movement in that shoulder might be thought evidence that it was obvious at the time that the applicant had no strength or movement in the joint at the time;
  - There is no evidence that the applicant would be a suitable person to work as a Gallery or Museum Guide, since he has only ever worked in the building industry and part of that experience includes the sale of building materials. He has no training or experience relevant for work in a Gallery or Museum;
  - The work capacity certificate dated 10 August 2018 made no reference to any capacity to use the right arm or shoulder because the shoulder replacement operation was so recent that there was no capacity present (which may explain the failure to quantify any right arm/shoulder restriction, similar to the 10kg lifting restriction placed on the left arm/shoulder in the same certificate). The applicant makes the following observation:



The certificate relied upon has been drafted a short number of weeks post right shoulder replacement surgery. There can be little doubt the [applicant] had no capacity for employment at that stage post-surgery. He cannot therefore be deemed to be capable of any type of employment where the certificate relied upon makes no mention of any capacity for work in respect of the right shoulder injury. This confirms [that] “*the nature of the worker’s incapacity and the details provided in medical information*” have not been considered and as such there has been a failure to comply with section 32A when making the work capacity decision.

- The insurer also relied on reports and questionnaires which pre-date the most recent shoulder replacement surgery. The relevance of any such documents must be questionable, at best.

### **Submissions by the Insurer**

11. The Insurer made no submissions in response to the application.

### **Decision**

12. The submissions made by the applicant have considerable force, in my view. While the legislation does not permit me to challenge the judgement or discretion of the insurer, any decision made by the insurer must be evidence based and made within the reasonable discretion open to an insurer. Under section 38(2) if an insurer finds that a worker has no current work capacity and is likely to continue indefinitely to have no current work capacity, that worker remains entitled to compensation after the second entitlement period. Section 38(3) arises only if a worker is found to have current work capacity. It might be wondered on what possible basis the insurer decided to find that a worker with a very recently replaced shoulder had current work capacity, particularly in circumstances where he had previously undergone total replacement of the other shoulder. The reliance on documents created months or even years prior to the recent surgery does not enhance my view of the insurer’s conduct.

13. If nothing else, the work capacity decision was clearly made too soon following surgery. That a doctor writing in August would make no



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quantification of any restriction caused by a total shoulder replacement which occurred in July can have only one of two possible explanations: (a) complete incompetence, or (b) an understanding that any such quantification was not possible due to the operation having occurred so recently. As explanations go, I would incline towards (b).

14. In the circumstances, this throws up the problem that it is highly likely the applicant had no current work capacity at the time either the original work capacity decision or the internal review decision was made. It follows that section 38(3) must have been incorrectly applied.
15. Further, I also accept the applicant's submission that section 32A was not properly applied.
16. To the extent that the insurer may have erred in finding Gallery or Museum Guide to be suitable employment, this appears to have been remedied in the course of merit review.
17. The merit reviewer also touched on the question of whether or not the applicant is an injured worker with "high needs." At paragraph 68 of the merit review the following appears:

68. I find that at this time, [the applicant] is not a worker with high needs but note that information to the contrary would change this status retrospectively.

18. In the event that the insurer takes a closer look at the medical evidence in this case it might be as well to note that it is open to the insurer to find itself "satisfied" that the applicant has high needs, without the need for a formal assessment.

### **Finding**

19. There are procedural errors identifiable in the decision. The Insurer has not complied with the relevant legislation.

### **RECOMMENDATION**

20. The work capacity decision dated 03 October 2018 and the internal review decision dated 26 November 2018 are set aside.



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21. The insurer is to make a new work capacity decision.

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  
19 February 2019