



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 suffered injury in a motor vehicle accident on her way to work as an Insurance Claims Consultant on 13 September 2000. Resultant symptoms included pain and restriction of movement in the upper back and neck. After six weeks she returned to work on reduced hours but resigned her employment in October 2002, citing "personal reasons" and being "sick of constant attempts to upgrade [her] hours." The insurer accepted liability for all relevant periods. The applicant was therefore an existing recipient of weekly payments immediately prior to 1 October 2012.
2. A previous work capacity decision by the Insurer resulted in a procedural review which is reported as # 8416 (#84 of 2016). That work capacity decision was set aside.
3. The applicant now seeks procedural review of a subsequent Work Capacity Decision made by the Insurer on 04 October 2016. The Decision informed the applicant that her weekly payments of compensation would cease, effective from 11 January 2017. For the sake of clarity the Insurer specified that the last day of payment would be for 10 January 2017, with nil thereafter.
4. The Insurer determined that the applicant had the ability to work for 12 hours per week. Since the applicant had received more than 130 weeks of payments and did not currently work, she did not comply with the requirements of section 38(3)(b) (those requirements being that she



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work for at least 15 hours per week and earn at least \$183 per week) and as a result her payments could not continue.

5. The applicant sought internal review and the Internal Review Decision was dated 25 November 2016. The Internal Review Decision confirmed the original Work Capacity Decision.
6. The applicant sought Merit Review from the Authority on 29 December 2016. The Authority delivered its Findings and Recommendations dated 10 February 2017. The Authority made findings that the applicant: (i) has current work capacity; and (iv) does not satisfy the special requirements under section 38(3) for the continuation of weekly payments.
7. The applicant made an application to this office for procedural review received on 08 March 2017. 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. The relevant Guidelines came into effect on 1 August 2016.

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 the following:
 - The Insurer decision is very confusing to me;
 - I don’t understand on what grounds they have made the decision;
 - Which doctors reports are they relying on, and how the legislation applies to me;
 - What am I to do to receive ongoing payments; and
 - How can section 38(3) of the Act apply to me when I am certified at 12 hours per week?



11. These submissions are somewhat surprising, coming as they do from a former Insurance Claims Consultant. The Insurer has very clearly and carefully explained the decision and the grounds for the decision. They have also set out thirty documents relied upon in making the decision, specifying of every medical report relied upon, including reports from the applicant's doctors. The applicant is or should be aware from the insurer's letter that in order to receive ongoing payments she needs to return to work for at least 15 hours per week, earning a minimum of \$183 per week (as indexed). Section 38 is an incentive-based section which enables a worker who is otherwise not entitled to ongoing payments to qualify for weekly payments by returning to work for the required period. It follows that a person only able to work for 12 hours per week cannot so qualify. That is not a decision for the Insurer to make, it is part of the legislation.

Submissions by the Insurer

12. The Insurer made the following submission:

The Insurer acknowledges the workers submissions and submits that the Insurer has adhered to the guidelines and legislation.

Decision

13. The insurer advised that the work capacity assessment was completed on 04 October 2016 and that as a result the decision had been made to discontinue payments in accordance with section 38(3).
14. Notice was properly given under section 54(2)(a), with an added four days as required by section 76(1)(b) of the *Interpretation Act 1987*.
15. The applicant was taken through section 43(1)(a),(b) and (f).
16. Section 59A(2) and (3) were clearly explained. The applicant was advised that his entitlement to pre-approved medical expenses could continue for two years after the cessation weekly payments due to her not having greater than 10% whole person impairment [WPI].



17. On the final day of sitting of the Compensation Court of New South Wales in December 2003 the applicant settled claims for lump sum compensation under sections 66/7. She received compensation based on assessments of 12% back impairment, 15% neck impairment and 5% loss of efficient use of the left leg at or above the knee. [The leg injury and lower back symptoms were caused in a different episode with the same employer in 1994.] Because the date of injury was before 1 January 2002, the injuries have never been subject to a formal assessment of WPI. Due to her status as an existing recipient of weekly benefits immediately prior to 1 October 2012, the applicant may benefit from a recent amendment to the *Workers Compensation Regulation* 2016, which inserted Clause 28D in Part 2A of Schedule 8:

28D Further permanent impairment assessments

- (1) This clause applies to an injured worker if the degree of permanent impairment resulting from the worker's injury is or has been assessed for the purposes of the Workers Compensation Acts.
- (2) Section 322A of the 1998 Act does not operate to prevent a further assessment being made of the degree of permanent impairment resulting from the worker's injury for the purposes of Part 3 of the 1987 Act.
- (3) However, only one further assessment may be made of the degree of permanent impairment resulting from the worker's injury.

18. It follows that there may be no impediment to this applicant seeking a further Medical Assessment Certificate with a view to being assessed for the purpose of determining whether or not she meets the "high needs" threshold of > 20% WPI or the threshold in section 59A of > 10% for ongoing medical payments for up to 5 years. She should take her own independent legal advice on this question.

19. The concept of "current work capacity" as defined in section 32A was fully explained.

20. It was noted that the applicant had received weekly payments for 819 weeks and that she is in the period following the second entitlement period which expires after 130 weeks. Therefore section 38(3) was fully set out and discussed at length.



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21. The evidence relied upon by the insurer was set out, totalling 30 documents, including the most up-to-date Certificate of Capacity provided by the applicant. The three types of identified employment were: Receptionist, Accounts Clerk and Call centre Operator. The merit reviewer came to the same conclusion as the Insurer about the suitability of the identified employment.

22. Contrary to the submissions by the applicant, a great deal of attention was paid to explaining how the identified suitable employment was appropriate for the applicant.

23. I can identify no procedural errors made by the Insurer on this occasion.

Finding

24. The work capacity decision dated 04 October 2016 was validly made.

RECOMMENDATION

25. The application for procedural review is dismissed.

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

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
7 April 2017