



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 is dismissed.

Introduction and background

1. The applicant sustained injury to the lumbar spinal region while lifting a box in the course of her employment on 9 October 2006. Having undergone various medical procedures the applicant had a right-sided discectomy at L5/S1 and posterolateral fusion in February 2015. She does not currently work. The Insurer accepted liability and made weekly payments for all relevant periods.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 3 November 2016. The Decision informed the applicant that her weekly payments of compensation would cease from 9 February 2017 due to non-compliance with the special requirements of section 38(3).
3. An internal review conducted on 28 December 2016 resulted in the same outcome. Despite this, the notice period under section 54(2)(a) was extended a further three months, making the effective date for the cessation of payments 5 April 2017.
4. The applicant made an application for Merit Review by the Authority received on 27 January 2017, and the Authority delivered its Findings and Recommendations on 24 February 2017. The Authority made findings that the applicant: (i) has a present inability to perform her pre-injury employment; (ii) has current work capacity; (iii) is able to work as a Receptionist and/or Information Officer; (iv) is currently within the period following the expiration of the second entitlement period after 130 weeks; and (v) does not meet the special requirements for continuation of weekly payments of compensation after the second entitlement period in accordance with section 38(3) of the 1987 Act.



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5. The Authority declined to make a recommendation.
6. An application to this office for procedural review was received on 21 March 2017. I am satisfied that the application has been made within time and in the proper form.

Submissions by the applicant

7. Section 44(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.”* The applicant has provided the following submissions:
 - I have had spinal surgery – discectomy and fusion – in February 2015. No updated WPI has been assessed; and
 - My condition has deteriorated over time since the previous assessment and my GP explained I am only able to do 12 hours per week, not 15 hours.
8. The submission about the out of date WPI assessment might have had more force if the applicant had provided such an assessment for the insurer to consider. The onus lies on the applicant to prove her case, not the employer’s insurer.
9. The very fact that the applicant is certified to work for 12 hours per week only goes to emphasise the impossibility of her compliance with section 38(3), which requires a minimum of 15 hours work per week for payments to continue in circumstances where a worker has “current work capacity” as defined in the Act.
10. Both submissions made by the applicant are against her interests and assist the Insurer’s case.

Submissions by the Insurer

11. The Insurer made no submissions.



Decision

12. Section 44A of the *Workers Compensation Act 1987* (1987 Act) provides that a work capacity assessment must be conducted in accordance with the Guidelines.
13. The relevant Guidelines for the purposes of section 44A are the ***Guidelines for claiming workers compensation*** which came into effect on 1 August 2016. They replaced the previous Guidelines.
14. The Insurer advised the applicant that a work capacity assessment was completed on 2 November 2016 and that in the course of this assessment “all available and relevant information” was considered.
15. The applicant was advised that the Insurer assessed her as capable of working for 15 hours per week as a Call Centre Operator, Data Entry Worker, Sales Assistant, General Clerk, Receptionist and/or Information Officer with an ability to earn \$359.05 gross per week. PIAWE was assessed at \$1,014.80.
16. The merit reviewer did not agree with all of the proposed occupations, but did accept that the applicant was capable of working as either a Receptionist or an Information Officer. The failure of the Insurer to limit its list of suitable employment to those occupations agreed to by the Authority does not constitute procedural error.
17. The applicant was advised that she was in the period following the second entitlement period, meaning that section 38 would apply to her case. Since she had not returned to work, her entitlement would be \$0.00.
18. The Insurer took the applicant through section 43(1), section 32A and section 59A(2) and (3).
19. The history of attempts to provide rehabilitation was set out at some length.
20. All relevant medical evidence relied upon was set out and explained. The Insurer listed no less than nine recent reports, and a Nominated



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Treating Doctor (NTD) “approval for suitable employment options” dated as recently as 21 September 2016.

21. It was explained that since the applicant had a WPI assessment of 11% in 2009 and no subsequent assessment, her medical expenses could be pre-approved for up to five (5) years following cessation of weekly payments. In the event that the applicant has a further WPI assessment which exceeds 20% at some time in the future this element of the decision may then be revisited by the Insurer, but until that time the decision remains correct and in force.
22. The correct notice period was given under section 54, with an additional three months given following internal review. This was unnecessary, but provided a benefit to the applicant and does not invalidate the decision.
23. I can find no procedural errors on the part of the Insurer.

Finding

24. The work capacity decision made by the Insurer on 3 November 2016 was validly made.

RECOMMENDATION

25. The application is dismissed.

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

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