



## **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 left hand, left knee and right wrist (later the left wrist also became symptomatic) in the course of his employment as a Baker. The knee injury occurred when he was running for a bus. The injury dates are various, falling between August 2010 and November 2011. The injuries resulted in discrete claims for compensation, with each being allocated a different claim number.
2. The applicant does not currently work. The Insurer accepted liability and made weekly payments for all relevant periods. As at 16 November 2016, the applicant had received payments for 210 weeks. He was an existing recipient of weekly payments immediately prior to 1 October 2012.
3. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 16 November 2016. The Decision informed the applicant that his weekly payments of compensation would cease from 23 February 2017 due to non-compliance with the special requirements of section 38(3). The Insurer found that the applicant had current work capacity, as required by section 38(2).<sup>1</sup>
4. An internal review conducted on 11 January 2017 resulted in the same outcome and for the same reasons. Despite this, the notice period under section 54(2)(a) was extended, making the effective date for the cessation of payments 17 April 2017.

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<sup>1</sup> Strictly, the insurer found that the applicant did not have "no work capacity" and therefore was not exempted from section 38, but the triple negative is more comprehensibly expressed in the positive, as set out in paragraph 3 *supra*.



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5. The applicant made an application for Merit Review by the Authority received on 25 January 2017, and the Authority delivered its Findings and Recommendations on 7 March 2017. The Authority made findings that the applicant: (i) has a present inability such that he is not able to return to work in either his pre-injury employment or in suitable employment; (ii) has no current work capacity and is likely to continue indefinitely to have no current work capacity; and (iii) does meet the special requirements for continuation of weekly payments of compensation after the second entitlement period in accordance with section 38(2) of the 1987 Act.<sup>2</sup>
6. The Authority make the following recommendation:

In accordance with section 38(6) of the 1987 Act, [the applicant] is entitled to weekly payments of compensation in the amount of \$811.52 from 16 November 2016 (subject to any notice period under section 54 of the 1987 Act).<sup>3</sup>

7. An application to this office for procedural review was received on 6 April 2017. I am satisfied that the application has been made within time and in the proper form.

### **Submissions by the applicant**

8. 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:
  - Again [the Insurer] have sent merit review/doctors wrong dates for my first claim for the outcome of merit review .. the review states that i hurt my left knee as my first claim and this is wrong as i first hurt my left hand working for [the employer] august 2010 not august 2011 ... then my left knee 2010 and then my right hand 2011.

### **Submissions by the Insurer**

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<sup>2</sup> See note 1 and paragraph 3 *supra*.

<sup>3</sup> It can only be assumed that the parenthetical remarks are an attempt to give the insurer credit for payments already made. The compensable amount is 80% of the transitional rate.



9. The Insurer made no submissions beyond giving a correct chronology of injuries, claims and payments.

### **Decision**

10. Section 44A of the *Workers Compensation Act 1987* (1987 Act) provides that a work capacity assessment must be conducted in accordance with the Guidelines.
11. 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.
12. The Insurer advised the applicant that a work capacity assessment was completed on 15 November 2016 and that in the course of this assessment “all available and relevant information” was considered.
13. The applicant was advised that the Insurer assessed him as capable of working for 40 hours per week, either in Customer Service, as a Sales Assistant, or as a Product Assembler with an ability to earn \$1,072.35 gross per week. PIAWE was assessed at \$1,014.80 (being the transitional rate applicable to existing recipients).
14. The merit reviewer did not agree with much of this, coming to the view that the applicant has no current work capacity. Since PIAWE is statutorily prescribed for existing recipients, it was undisputed that \$1,014.80 was the appropriate figure.
15. The applicant was advised that he was in the period following the second entitlement period, meaning that section 38 would apply to his case. Since he had not returned to work, his entitlement would be \$0.00.
16. The Insurer took the applicant through section 43(1), section 32A and section 59A(2) and (3).
17. The history of attempts to provide rehabilitation was set out at some length.



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18. All relevant medical evidence relied upon was set out and explained. The interpretation of this evidence was disputed by the merit reviewer. Even so, this does not prove that there was anything procedurally incorrect in the actions of the insurer.
19. 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.
20. I can find no procedural errors on the part of the Insurer.
21. Given that the applicant had a comprehensive victory at the merit review stage, and that his payments have been restored at 80% of PIAWE, it is difficult to see the motivation for seeking procedural review.

### **Finding**

22. The work capacity decision made by the Insurer on 16 November 2016 was validly made. It has now been set aside by virtue of the merit review process.

### **RECOMMENDATION**

23. 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  
5 May 2017