



## **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 suffered injury to her left lower limb on 22 October 2013 in the course of her employment as a Social Worker at a public hospital. The insurer accepted liability and made weekly payments for all relevant periods. The applicant is unable to return to her pre-injury employment and currently works around seven hours per week in a casual role.
2. The Insurer made a work capacity decision on 31 August 2017 finding the applicant fit for suitable duties 40 hours per week in the roles of either a Medical Admissions Administrator, a Student Support Administrator, or a Customer Services Representative. A consequent decision was made to cease weekly payments, since the applicant did not meet the special requirements in section 38(3). Weekly payments were due to cease on 7 December 2017.
3. Following an internal review conducted on 26 October 2017 the Insurer reached the same decision, but on different grounds. The insurer varied the original determination of PIAWE from \$1,542.20 per week to \$1,640.00 per week and also varied the applicant's ability to earn steeply downwards from \$1,700.00 per week to \$280.00 per week.
4. On this occasion the Insurer found that the applicant was only capable of working for 8 hours per week, but also concluded that the applicant failed to meet the requirements for continued payments as set out in section 38(3), since she did not work for at least 15 hours per week and did not earn at least \$183 per week.
5. Notice for cessation of weekly payments was extended from the original deadline of 7 December 2017 to 1 February 2018, reflecting the reality



that while the same decision had been made for the same reasons, it was based on different findings.

6. The applicant sought Merit Review from the Authority in an application received on 24 November 2017. The Authority found on 22 December 2017 that the applicant:
  - i. Has a present inability arising from an injury such that she is not able to return to her pre-injury employment but is able to return to work in suitable employment;
  - ii. Is able to engage in suitable employment as a Student Support Administrator;
  - iii. Has current work capacity as defined in section 32A; and
  - iv. Does not meet the special requirements under section 38(3) of the 1987 Act for continuation of weekly payments of compensation after the second entitlement period.
  
7. An application to this office for procedural review was received on 30 January 2018. Given that Friday 22 December 2017 was the last business day before Christmas Day, which fell the following Monday, the fourth business day after 22 December 2017 would be Tuesday 2 January 2018, since both Tuesday 26 December 2017 and Monday 1 January 2018 were also public holidays for the purposes of the postal delivery rule. Therefore the applicant would be deemed to have received the merit review findings on Tuesday 2 January 2018. Accordingly the application to this office was made within 30 days of that receipt and was in time.

### **Decision**

8. The applicant received weekly payments for more than 130 weeks (196 weeks). This places her in the period immediately following the second entitlement period and attracts the provisions of section 38. For section 38 to apply it is necessary that a worker be found to have current work capacity – see section 38(2).
  
9. The original work capacity decision was based on evidence of several reports which seem to have been disregarded in the course of internal review. This is a good thing for the Insurer, since the original decision, which included a finding that the applicant would be capable of working for no less than 40 hours per week, was based in part on a “report”



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provided by an Independent Medical Consultant who does not even pretend to have examined the applicant. How an insurer could “prefer” such a report to the report of a treating doctor is not known. The Insurer had the good sense to overturn this finding at the internal review stage.

10. The applicant remains in the odd position that, while the Insurer now agrees that she can only work for 8 hours per week, this very finding also means that she is unlikely to be able to comply with the statutory requirement of at least 15 hours work per week. There is a *lacuna* in the legislation which requires that, on the one hand, a worker who is to be terminated under section 38 must have some current work capacity (s38(2)), and on the other hand, that they must actually work for a minimum of 15 hours per week. Nothing is to be done for a worker who can work, but only for a period of less than 15 hours per week. This might lead law reformers to question whether the ability to work for a period limited to less than 15 hours per week can really constitute “current work capacity.”
11. The applicant suggests that her current role is not a “real job” in the sense that it is an elected position which appears to be contingent on her status as a post-graduate student. It also only requires about 7 hours per week to perform. Neither of these concerns are relevant to the validity of the Insurer’s decision.
12. It appears that the insurer now accepts the medical opinion of the applicant’s doctors, but this cannot help her, since she cannot return to work for the requisite 15 hours per week. The Insurer was unkind enough to suggest that the applicant could do more than she currently does, since her certification is for 8 hours per week and she is only working for 7 hours. This would be relevant only if the applicant were certified to work for more than 15 hours but was working less than the maximum certified. In the current circumstances section 38(3)(b) has no work to do.

### **Finding**

13. I find that the Insurer complied with the legislation, the *Guidelines* and the *Regulation* when making the decision, which was therefore validly made.

### **RECOMMENDATION**



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14. The application is dismissed.

A handwritten signature in blue ink, appearing to read "Wayne Cooper", with a long horizontal stroke extending to the right.

Wayne Cooper  
Delegate of the Workers Compensation  
Independent Review Officer  
27 February 2018