



## **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 his wrists and right elbow as a result of the nature and conditions of his employment as a Process Worker. The agreed date of injury is 22 July 2015, being the date on which the applicant reported the injuries to his employer. The insurer accepted liability and made weekly payments for all relevant periods. Subsequently the applicant has alleged bilateral shoulder injuries arising out of the same employment, but the Insurer declined liability for those injuries.
2. The applicant seeks procedural review of a work capacity decision made by the Insurer on 14 December 2016. The applicant was advised that his payments would reduce from \$678.40 per week to Nil per week commencing on 21 March 2017. The decision was made on the basis that the Insurer determined the applicant to be capable of performing suitable employment as an Inquiry Clerk/Customer Service Officer, General Clerk/Administrator, Light Courier Driver or Sales Assistant. Specifically, it was determined that the applicant could earn \$1,038.66 per week as a Light Courier Driver. The applicant fell into the second entitlement period, covered by section 37. Applying the relevant formula in section 37(3) (for a worker who has not returned to work), the ongoing entitlement would be \$Nil per week.
3. The applicant sought internal review and on 08 February 2017 the insurer upheld the original decision.
4. An application for merit review was received by the Authority on 08 March 2017 and findings and recommendations were issued on 07 April



2017. The Authority found that the applicant: (i) is able to return to work in suitable employment; (ii) has current work capacity; (iii) can work as an Administrator or General Clerk; and (iv) is able to earn \$874.00 per week in suitable employment.

5. The applicant sought procedural review by application received by this Office on 27 April 2017. I find that the application was made within time in the correct form.
6. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the relevant Guidelines. The relevant Guidelines came into effect on 1 August 2016.

#### **Submissions by the applicant**

7. 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.*”
8. The applicant made the following submissions:
  - He has applied repeatedly for suitable employment, but not successfully; and
  - He will have no access to Centrelink benefits until he has survived a lengthy qualifying period, which seems impossible.
9. The first submission is a sign that the applicant himself agrees that he can do some work, but remains unemployed despite efforts to remedy that situation. The second submission has no relevance for present purposes.

#### **Submissions by the Insurer**

10. The Insurer made no submissions.

#### **The Decision**

11. The applicant was told by telephone on 29 September 2016 that an assessment leading to a decision was underway. This was confirmed in



a letter of the same date. The applicant was invited to submit any new evidence which might be thought relevant. The applicant provided additional information to the Insurer in response.

12. In the notice dated 14 December 2016, the Insurer advised that a work capacity assessment had commenced on 27 July 2016 and was completed on 13 December 2016.
13. The Insurer set out the relevant legislative provisions with an explanation of how they affected the decision-making process. The various entitlement periods were set out, with a clear explanation of why the applicant was then within the second entitlement period. The applicant was taken through section 37.
14. The various reports relied upon in making the decision were set out, followed by an explanation of section 43(1)(a), (b), (c) and (d).
15. The definitions of “current work capacity” and “suitable employment” were fully set out.
16. The method for calculating ongoing entitlements was correctly and fully explained.
17. The calculation of the applicant’s ability to earn was done according to the procedures set out in the legislation.
18. Suitable employment was identified, although the merit reviewer disagreed with the suitability of some identified roles. The merit reviewer agreed with the submission of the applicant that the existence of a job involving “light” courier duties was unlikely and had not been successfully identified by the Insurer.
19. This does not amount to a procedural error, since it is a question going to the merits of the decision. The Insurer quite properly consulted experts in the field and consulted with prospective employers. All identified suitable employment was certified as suitable by the applicant’s NTD. In so far as an error was made, it was corrected in the course of merit review with no prejudice to the applicant.



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20. Section 59A was correctly explained, including both ss 59A(2) and 59A(3).

21. The Insurer gave more than the statutorily required period of notice.

### **Finding**

22. I can identify no errors of a procedural nature in this work capacity decision. The work capacity decision was validly made.

### **RECOMMENDATION**

23. The application is dismissed.

A handwritten signature in blue ink, which appears to read "Wayne Cooper". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Wayne Cooper  
Delegate of the Workers Compensation  
Independent Review Officer  
24 May 2017