



## **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 bilateral medial wrist pain on or about 20 June 2016 in the course of his employment as a physiotherapist. 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 12 April 2017. The Decision informed the applicant that his weekly payments of compensation would cease, with the last date of receipt of payments being on 21 July 2017. For the sake of clarity it was emphasised that the applicant would receive \$0.00 per week from 22 July 2017 onwards. The decision was said to be based on an application of section 37(3). The Insurer determined that the applicant was capable of working as (alternatively) a Rehabilitation Consultant/Case Manager, or a Clinical Manager, earning up to \$1,400 per week. His PIAWE had been \$1,672.00 per week. Since the applicant does not currently work, the algorithm in section 37(3) applies as follows:

$$\text{PIAWE } \$1,672 \times 80\% = \$1,337.60.$$

$$\$1,337.60 \text{ minus } \$1,400.00 = \$0.00$$

3. The Internal Review Decision was dated 30 May 2017 and confirmed the original Work Capacity Decision.
4. The applicant sought Merit Review from the Authority by way of application received on 26 June 2017. The Authority delivered its Findings and Recommendations dated 28 July 2017. The Authority made finding that the applicant: (i) has current work capacity as defined in section 32A; (ii) has the ability to return to work in suitable



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employment as also defined in section 32A; (iii) has the available vocational options of clinical manager and rehabilitation consultant/case manager; and (iv) has the ability to earn \$1,678.08 per week in suitable employment.<sup>1</sup>

5. The merit reviewer recommended that the Insurer determine the applicant's entitlement to weekly payments in accordance with the above findings.<sup>2</sup>
6. The applicant made an application to this office for procedural review received on 21 August 2017. I am satisfied that the application has been made within time and in the proper form.
7. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the relevant *Guidelines*.

#### **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.*"
9. i. The applicant submits that he is "unsure" what the insurer relied upon when making an "assumption" about his Whole Person Impairment (WPI);  
  
ii. The applicant does not know what relevance this has; and  
  
iii. It is "unclear" how the insurer has assessed his capacity to earn.
10. The submissions were answered by the Insurer in their submissions (see paragraph 10 *infra*). It might be noted in passing that an insurer needs to make an assumption about WPI when a worker has failed to produce evidence quantifying WPI, particularly in circumstances when no claim has ever been made for lump sum compensation for WPI. The onus falls on the worker to show WPI, not the Insurer.

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<sup>1</sup> Note: this figure exceeds the figure calculated by the Insurer by \$278.08 per week.

<sup>2</sup> In light of Note 1 *supra*, the applicant would still receive \$0.00 per week.



## Submissions by the Insurer

11. The Insurer responded thus:

- i. The applicant was advised in the work capacity decision dated 12 April 2017 that his WPI had not been assessed under section 65;
- ii. This was relevant because, there being no assessment of WPI greater than 10%, it followed that his entitlement to ongoing medical and related treatment expenses under section 59A would be for a further two years after the cessation of weekly benefits; and
- iii. The applicant was advised in the work capacity decision that the occupations of Rehabilitation Consultant/Case Manager and Clinical Manger were found to be suitable employment pursuant to section 32A and therefore under section 35(1) his capacity to earn in suitable employment was assessed at \$1,400 per week.

## Decision

12. The applicant was given fair notice prior to the decision being made and was given more than the required notice under section 54(2)(a).
13. The explanation of section 37(3) in the work capacity decision and in the internal review decision by the Insurer was adequate in all respects. The applicant was not misled or any way misinformed.
14. The same can be said for the explanation of the review process, the explanation of section 43(1) and the explanation of section 59A.
15. The Insurer took considerable pains to set out and fully explain the medical evidence it relied upon and to fully explain why it thought the applicant is fit for the types of employment set out at paragraph 2 *supra*.
16. The medical evidence relied upon included the most up-to-date reports from the applicant's nominated treating doctor. In the course of merit review further updated reports were considered. As a result the merit



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reviewer concluded that the applicant had a higher earning capacity than the Insurer had originally assessed.

17. The Guidelines and legislation were fully complied with and there are no procedural errors in the decision-making process.

### **Finding**

18. The Insurer has made no errors of a procedural nature and the work capacity decision of 12 April 2017 was validly made.

### **RECOMMENDATION**

19. The application for procedural review 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  
22 August 2017