



## **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 facts and circumstances surrounding the background to this application are set out in recommendation 17515 (#175 of 2015) and need not be repeated.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 29 September 2016. The Decision informed the applicant that her weekly payments of compensation would reduce to \$305.52 by virtue of section 38 of the 1987 Act.
3. More than eight months later, following a belated request for internal review, the Insurer made a new decision on 14 June 2017. On this occasion the applicant was advised that she was not compliant with section 38(3) of the 1987 Act and that accordingly her payments would cease on and from 21 September 2017.
4. The applicant sought Merit Review from the Authority by way of application received on 24 June 2017. The Authority delivered its Findings and Recommendations dated 2 August 2017. The Authority made a finding that the applicant did not meet the special requirements under Section 38 of the *Workers Compensation Act 1987* (1987 Act) for continuation of weekly payments of compensation.
5. More specifically, the Authority made the following findings: (i) the applicant has "current capacity" as defined in section 32A; (ii) the applicant has the ability to return to work in "suitable employment" as defined in section 32A; (iii) the vocational option of "customer service assistant" is suitable employment for the applicant; (iv) the entitlement to weekly payments falls after the second entitlement period under section 38; and (v) the applicant does not meet the special requirements for



continuation of weekly payments of compensation after the second entitlement period (i.e. after week 130) in accordance with section 38(3).

6. The applicant then applied to this office for procedural review by way of application received on 30 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.”*

#### **Submissions by the Applicant**

9. The applicant makes two broadly based submissions:

First, the applicant contends that the suitable employment identified by both the Insurer and the merit review service fails the test set out by Deputy President Roche in *Wollongong Nursing Home v Dewar* (2014) NSWCC. In that case the Deputy President suggested that “suitable employment” had to be in a “real job,” rather than a fanciful position created on paper as a result of piecing together theoretical jobs which might be able to be able to be performed, were they in existence.

Secondly, the applicant is of the view that the decision is focused unfairly on only two of her physical injuries, whereas she has many more injuries and the cumulative effect is that she is unable to work.

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

10. The Insurer has not replied to the submissions made by the applicant.

#### **Decision**

11. The relevant Guidelines came into effect on 1 August 2016.



Level 4, 1 Oxford Street, Darlinghurst NSW 2010  
T: 13 9476  
contact@wiro.nsw.gov.au  
www.wiro.nsw.gov.au

12. Section 43(1)(a) of the 1987 Act allows an Insurer to make a decision about a worker's current work capacity. The decision made on 29 September 2016 reflected the state of the current medical evidence.
13. The evidence relied upon by the Insurer to make a Work Capacity Decision must be recent and up to date. By the time of the internal review, the Insurer was in possession of medical evidence which showed that the applicant could work for 20 hours per week. The applicant was not working at all at the time of the internal review.
14. The Insurer explained section 43(1) clearly and relevantly.
15. The entitlement periods were clearly explained. Given that the applicant had received in excess of 450 weeks of payments, she was clearly within the period following the second entitlement period.
16. Although the Insurer identified three types of employment which the applicant could perform and the merit reviewer only agreed with one of those, this does not affect the validity of the decision.
17. The objection based on *Dewar's case* might form the basis of an application to the Supreme Court of NSW for judicial review, but it is not possible for this office to review or overturn the findings of the merit review service of the Authority.
18. The objection raised about the focus on only two injuries cannot succeed, since the insurer is only liable for such injury loss and damage as was suffered as a direct result of the work-related incidents when the insurer was on risk, and the two identified injuries are the only two which can be considered.
19. The correct notice period was observed.
20. The decision was evidence based and relied upon reports from the applicant's own treating doctor.
21. I can identify no procedural errors.

## **Finding**



Level 4, 1 Oxford Street, Darlinghurst NSW 2010  
T: 13 9476  
contact@wiro.nsw.gov.au  
www.wiro.nsw.gov.au

22. Under the legislation the Insurer can make an assessment of the applicant's work capacity and then a decision about that work capacity, but they must comply with the legislation, the Regulation and the Guidelines in order to produce a procedurally correct result. In the current instance there have been no breaches of the legislation or the Guidelines which are to be treated as delegated legislation. Accordingly the Work Capacity Decision must be found to be validly made.

### **RECOMMENDATION**

23. 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  
9 October 2017