



## **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 injury to her left knee on 22 November 2013 in the course of her employment as a Primary School Teacher. She has returned to work, but now only works for 3.5 days per week in the role of a Reading Recovery Teacher. The Insurer accepted liability and paid weekly compensation for all relevant periods, including the present time.
2. On 15 July 2016 a Work Capacity Decision (WCD) was made by the Insurer. The Decision informed the applicant that her weekly payments of compensation would reduce to \$159.28 on 24 July 2016. The basis for the decision was that the applicant was approaching 130 weeks of payments, after which she would be entitled to only 80% of her PIAWE under Section 38.
3. Perhaps more specifically, the Insurer referred the applicant to section 38(6). This appeared on page 1 of the decision, and was repeated (with the section partially reproduced) on page 2 and again on page 3. This would have been very helpful, had the applicant been a worker with no current work capacity, being the category of worker to whom section 38(6) applies. The correct section is section 38(7), which refers to workers with current work capacity.
4. The applicant sought internal review, which confirmed the original decision but had the correct section in mind. The internal review refers to section 38(7) and to a worker with current work capacity.
5. The applicant sought merit review by the Authority, which received the application on 3 November 2016. The Authority delivered findings and



recommendations dated 18 November 2016. The Authority found that the applicant is entitled to \$159.28 per week under section 38(7).

6. The applicant made an application to this office for procedural review received on 14 December 2016. 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 *Work Capacity Guidelines* (Guidelines). The Guidelines in force at the relevant time were dated 4 October 2013.

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

8. 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.”*
9. The applicant says the following:
  - She is of the view that she should not be penalised by having her income reduced through “no fault of [her] own;” and
  - She does not understand how a timeframe can be relevant to the amount payable to her, since she remains just as injured and has the same reduced work capacity as she had before the 130 weeks passed.

10. While neither submission goes to the procedures used by the insurer in making the work capacity decision, which means that both are irrelevant for present purposes, I think the applicant should be made aware that the purpose of the reducing weekly payments over time is to “encourage” injured workers to return to fulltime work, an approach which will only be successful in a limited set of cases. It is not the role of this Office to enter into debate with parties about the legislation.

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



11. The Insurer made no submissions in response to the application.

### **Decision**

12. The Insurer advised the applicant that an assessment had been completed on 15 July 2016, the same day as the decision itself.

13. The applicant was then informed that a decision had been made assessing an ongoing entitlement under section 38(6). This was an error of law, for reasons appearing in paragraphs 2-4 *supra*.

14. At the time of the decision, the relevant Guidelines had within them clause 5.3.2 which required an insurer to “reference the legislation.” This would be a clear breach of those Guidelines, however the story is not over yet.

15. On 1 August 2016 new Guidelines came into effect. The new Guidelines were in effect as at the date of internal review. As part of those Guidelines SIRA has inserted the concept of “substantial compliance.” This is to the effect that even where there is a “technical” breach of the Guidelines, the decision will not be invalidated unless the worker is misled, suffers disadvantage or suffers procedural unfairness.

16. In the course of Internal Review the applicant was told that her future entitlement was calculated under section 38(7). In the spirit of the new Guidelines in force as at that date, it might be noted that the outcome for the applicant is the same whether she is assessed under section 38(6) or section 38(7). Therefore, despite the clear error made by the insurer in the course of the original decision, the effect of that erroneous decision was identical to the effect of the correctly decided internal review. It follows that the worker suffered no disadvantage, since in both cases she gets \$159.28 per week.

17. The medical evidence used by the Insurer was current and relevant and included the Certificates of Capacity issued by the applicant’s own Nominated Treating Doctor.



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

18. There is no dispute between the parties about the suitability of the work currently undertaken by the applicant.
19. Section 38(3) was clearly explained by the Insurer. The merit reviewer also explained this provision.
20. The entitlement periods were clearly discussed on page 2 of the decision.
21. The reasoning process of the Insurer was made clear, in compliance with the relevant Guidelines.
22. There are no discernible errors of a procedural nature in the work capacity decision, with the exception of the misapplication of section 38(6) instead of section 38(7). For the reasons set out in paragraph 16 *supra*, that error resulted in no disadvantage to the applicant.

### **Finding**

23. The work capacity decision dated 15 July 2016 was validly made in accordance with the legislation and the Guidelines.

### **RECOMMENDATION**

24. The application for procedural review is dismissed.

A handwritten signature in blue ink, appearing to read "Wayne Cooper".

Wayne Cooper  
Delegate of the Workers Compensation  
Independent Review Officer  
19 January 2017