



**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 a very serious left-eye injury on or about 24 July 2003 in the course of his employment as a Machine Operator. The injury was described in some reports as a "ruptured eye." The insurer accepted liability and made weekly payments for all relevant periods.
2. The applicant now works as a Forklift Driver for a different employer. Since he was an existing recipient of weekly compensation payments immediately prior to 1 October 2012, the applicant's PIAWE is determined by statute to be a fixed rate which is indexed twice per annum. There is no dispute that as at 30 June this year the relevant amount was \$1,027.60 per week. At that time the applicant was in fact earning between \$826.05 and \$870.45 per week.
3. The insurer made a work capacity decision on 30 June 2017 acknowledging that the applicant was earning between \$826.05 and \$870.45 per week, but also finding that the applicant had an ability to earn \$950 per week in suitable employment. The suitable employment identified by the insurer was "Forklift Driver." The Insurer identified three employers who would pay, respectively, \$950, \$1,140 and \$1,458.44 per week to a Forklift Driver.
4. The Insurer also found that the applicant was able to work for 38 hours per week. This accords with the opinion of the applicant's Nominated Treating Doctor.
5. The Insurer came to the same conclusions in the course of internal review.



6. The applicant sought Merit Review from the Authority on 7 September 2017 and the Authority delivered its Findings and Recommendations dated 27 September 2017. The Authority made findings that the applicant: (i) is able to work in suitable employment as a Forklift Driver; and (ii) is able to earn \$950 per week in suitable employment.
7. The Authority made the consequential recommendation that the Insurer calculate the applicant's entitlement in accordance with those findings. Since the findings were identical to the Insurer's, this would have been a simple task, with a predictable outcome.
8. An application to this office for procedural review was received by ordinary post on 23 October 2017. I am satisfied that the application has been made within time and in the proper form.

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

9. 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.*" The applicant has provided the following submission:

He believes the decision is "unfair."

10. The submission has the advantage of brevity. It is, nonetheless, quite broad in scope.

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

11. In response the Insurer made the following, perhaps less concise, submissions:

[Insurer] notes that on or around 2 October 2008 there was an agreement via teleconference to pay [applicant] on a voluntary basis under section 40 of the Workers Compensation Act 1987 the amount of \$225.00 per week from 19 May 2007 on a continuing basis. This was outlined in a Certificate of Determination dated 7 October 2008.

In June 2012, legislative changes were introduced to the 1987 Act. [Applicant] was assessed to be an existing recipient which resulted in



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[applicant's] voluntary award being deemed null and void with a transitional work capacity decision being made in line with these changes in August 2013. This Work Capacity Decision determined that applicant had capacity to work in employment for 38 hours per week with the ability to earn \$811.14 per week in employment with [current employer].

[Applicant] then lodged a request for internal review on this work capacity decision in December 2013 and the outcome of this review was that the original work capacity decision remained in place. [Applicant] then lodged a request for Merit review in February 2014, the result from this review handed down in August 2014 that whilst [applicant] had a present inability arising from an injury which as a result he was unable to return to his pre-injury duties, he had in fact returned to work in suitable employment. Merit confirmed that he had the ability to earn \$863.87 per week in suitable employment.

[Insurer] received an application for WIRO review in September 2014 and WIRO determined the work capacity decision issued in August 2013 be set aside and that Insurer to reinstate [applicant's] Weekly benefits at the rate of \$225.00 per week from December 2013 until a new work capacity decision could be made.

[Insurer] completed a new work capacity decision in February 2015 and again determined that applicant had the ability to earn \$863.87 per week and as a result was no longer entitled to receive weekly benefits.

[Insurer] received an application for internal review followed by the Merit review request. At this time Merit determined that applicant was able to and had returned to suitable employment and that he had a capacity for work. Merit at this review determined that he had the ability to earn \$704.52 in suitable employment which resulted in an entitlement for \$83.80 pursuant to section 38(7) of the Workers Compensation Act of 1987.

Merit Review Service handed down their Findings and Recommendations, dated 27 September 2017, confirming that they considered Applicant to have the ability to work in suitable employment as a Forklift Driver with the ability to earn \$950.00 in suitable employment.

[Insurer] confirms that Applicant continues to work with [current employer] and is currently performing the role for Forklift Driver. Insurer have received payslips of which we have determined that Applicant continues to have capacity to work 38 hours per week and that he has consistently demonstrated the ability to earn between \$826.05 and \$870.45 on a weekly basis. There does not appear to be



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a dispute between Applicant and Insurer that his current employment is in fact suitable employment.

Applicant received weekly compensation payments immediately before 1 October 2012 and therefore is considered an "existing recipient" of weekly payments in accordance with Schedule 6 Part 19H, Division 1, Clause 1 of the WC Act.

Therefore, the PIAWE is deemed to be the transitional amount pursuant to Schedule 6, Part 19H, Division 1, Clauses 2 and 9 (3) of the WC Act.

As we know the transition rate is indexed on 1 April and 1 October each year pursuant to Schedule 6, Part 19H, Division 1, Clause 2 (2) of the WC Act and Division 6 (Indexation of certain amounts) of Part 3 of the 1987 Act.

Applicant has been paid in accordance with the above since 2013 when he was transitioned into the new legislation as any past Award that he may have been awarded was superseded by the current legislation.

Insurer confirm that a fair notice call and fair notice letter was made by Insurer on 5 January 2017 with the Work Capacity Decision call made on 31 January 2017 with the Notice under Section 54(2)(a) issued 31 January 2017. Insurer have made a number of work capacity decisions since legislative changes were introduced to the 1987 Act in 2012.

12. The relevance of the final paragraph of the insurer's submissions is unclear, but nothing much turns on the contents in any event, since the decision in question was made in June 2017. It appears that the historical "submissions" are paragraphs which are largely cut and pasted from other documents, including the internal review. Despite this they are helpful to some extent.

### **Decision**

13. In the notice dated 30 June 2017 the Insurer advised that a work capacity assessment was completed on 29 June 2017.
14. The applicant was further advised that the insurer had found he was capable of working for 38 hours per week as a Forklift Driver, was capable of earning \$950 per week in that employment, had a PIAWE of \$1,027.60 per week, was in that period which follows the second entitlement period and would therefore be covered by section 38 (where

relevant), had an ongoing entitlement of \$0.00 per week and the decision would have effect forthwith, since he was not presently in receipt of payments.

15. The insurer set out the relevant parts of section 43 and referenced the *Guidelines*, where required.
16. The medical evidence was current, including a report from the Nominated Treating Doctor (NTD) dated 22 June 2017. In that report the NTD confirmed approval for the applicant to work as a Forklift Driver.
17. Section 59A was correctly explained. In light of the applicant's agreed WPI of 24%, he will continue to be eligible for medical and related expenses for life.
18. The Insurer has correctly applied the transitional rate and correctly calculated the applicant's earning capacity, in line with findings of the Authority in the course of merit review.
19. Section 38(7)(a) was both clearly explained and correctly applied.
20. Whilst I acknowledge that the applicant believes his financial situation to be "unfair" as a result of statutory amendments, those amendments are not subject to review by this office or by the insurer.

### **Finding**

21. The decision by the Insurer dated 30 June 2017 was made in accordance with the stringent requirements set out in the legislation and the *Guidelines* and was therefore validly made.

### **RECOMMENDATION**

22. The application is dismissed.

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

Wayne Cooper



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Delegate of the Workers Compensation  
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20 November 2017