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## **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 seeks procedural review of a Work Capacity Decision made by the Insurer on 20 October 2015. The Decision informed the applicant that her weekly payments of compensation would cease from 27 January 2015. The applicant sought internal review by the Insurer on 21 January 2016 and the Internal Review Decision was dated 19 February 2016 confirming the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 18 March 2016. The Authority delivered its Findings and Recommendations dated 15 April 2016. The Authority made a finding that the applicant has current work capacity and her entitlement to weekly payments falls after the second entitlement period and is to be determined in accordance with Section 38 of the *Workers Compensation Act 1987* (1987 Act). Since she no longer complies with section 38(3)(b) she has no ongoing entitlement.
3. The applicant made an application to this office for procedural review by way of application dated 31 May 2016. She was aware at the time that this was too late to be accepted and forwarded medical certificates concerning an intervening hospitalisation and serious operative procedures which had occurred between 10 May and 16 May 2016. Given the severity and nature of the condition and the intrusive extent of the ongoing treatment required, I am of the view that the applicant had no opportunity to lodge an application for procedural review before the date on which she did. For the period 10-16 May 2016 she would clearly



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have been under a legal disability, and in the immediately succeeding period she was spending significant parts of most days undergoing intrusive and debilitating treatment. I am satisfied that any Court or other Tribunal before whom the question might be put would decide that the application has been made within time and in the proper form, and accordingly I so find.

4. The applicant made a previous application to this Office which was the subject of recommendation reported and numbered as 0714. The factual background need not be repeated here.
5. Section 44A of the *Workers Compensation Act 1987* (1987 Act) provides that a work capacity assessment must be conducted in accordance with the *WorkCover Guidelines* (Guidelines).

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

6. 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.*” The applicant has made extensive submissions, described as “Notes.” These “Notes” canvas issues going largely to the merits of the claim, with references to certain seeming anomalies, including but not limited to:
  - The Insurer had found in August 2015 that the applicant had “no current work capacity,” as a result of which (i) weekly payments continued and (ii) she reduced her weekly working hours (no explanation is given for the reduction in hours beyond the finding by the Insurer);
  - Two months later, with no changes beyond the altered working hours, the Insurer made another work capacity decision, this time finding that the applicant did have current work capacity;
  - The applicant had reduced her working hours below 15 per week, thus failing the threshold test in section 38(3)(b) for ongoing payments after 130 weeks;



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- The consequences of this had not been explained to the applicant by the Insurer;
  - The insurer continues to apply the “transitional rate” even though the applicant thinks that she would certainly have had a higher earning capacity, based on pre-injury earnings.
7. That the applicant chose to reduce her working hours, without the change being caused by physical limitations, is hardly in dispute. It follows from her continuation in employment that even the applicant herself must concede she has current work capacity. There is nothing in the Act preventing the Insurer making a new work capacity decision at any time.
8. It was explained to the applicant that by the Insurer that, as an “existing recipient” of weekly benefits immediately prior to 1 October 2012, she will always be subject to the “transitional rate” as her PIAWE.

### **Submissions by the Insurer**

9. The Insurer has made the following submission in response to this application:
- The Insurer submits that the applicant had sufficient time to lodge her application within time and failed to do so;
  - WIRO therefore has no jurisdiction to conduct a procedural review.
10. For the reasons given at paragraph 3 *supra*, this submission must fail. I note that the application for internal review was also well out of time for the “stay” to apply, having been made 86 days after the original decision, however there is no time-limit imposed for internal reviews, beyond the sanction that the stay will not apply if the application is made more than 30 days after receipt of the original decision.

### **Submissions generally**



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11. In relation to submissions more generally, a recent Court of Appeal decision<sup>1</sup> casts doubt on the utility, and certainly the primacy, of submissions by parties when the dispute in question concerns the duty of a decision maker to take account of all relevant considerations. The Court held:

*Those factors will be identified by reference to the constituting statute (or any other source of jurisdiction) and not, primarily, by reference to the submissions of a party. Accordingly it is necessary to commence by considering the scope of the statutory functions [...].<sup>2</sup>*

## **Decision**

12. The relevant *Guidelines* are dated 4 October 2013 and came into effect on 11 October 2013.

13. Guideline 5.1 requires the Work Capacity Decision to be logical, rational and reasonable.

14. Guideline 5.3.2 requires the Insurer to explain the relevant entitlement periods, as well as the full effect that the decision will have on the applicant's future entitlements.

15. The Insurer has set out a lengthy but informative document under sequentially logical headings, including an explanation of the relevant entitlement periods, the effect of section 38, the effect of section 59A(1), (2) and (3), a listing of nineteen documents relied upon in coming to the decision, an explanation of section 43(1) and definitions of terms from section 32A including "suitable employment" and "current work capacity."

16. The applicant was clearly advised that if making an application for internal review she should: "... request an internal review of our

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<sup>1</sup> *Insurance Australia Ltd t/a NRMA Insurance v Milton* [2016] NSWCA 156 [at paragraphs 9-10].

<sup>2</sup> At 10. See also the High Court decision in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; [2001] HCA 30 at paragraphs 73-74.



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decision pursuant to section 44(1)(a)<sup>3</sup> of the *Workers Compensation Act* 1987 by completing the attached *Application for review of a work capacity decision by insurer* form and returning it to me **as soon as possible.**” (Emphasis added.)

17. The 86 day delay in seeking internal review can scarcely be attributed to any failure by the Insurer to specify “within 30 days,” particularly when there is no requirement in the Act for an application to be made within that time. The only consequence is that the applicant does not get the benefit of the statutory stay under section 44BC. If 86 days was “as soon as practicable” for the applicant, then she would have missed out on the stay in any event, and if she could have lodged the application sooner, but chose not to do so, she cannot complain that she was somehow led astray by the Insurer. Either alternative is a losing position for the applicant.
18. Such errors, omissions and anomalies as appeared in the work capacity decision the subject of recommendation 0714 have not reappeared in the current iteration.

### **Finding**

19. 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 and/or the *Guidelines* which are to be treated as delegated legislation. Accordingly the Work Capacity Decision was validly made.

### **RECOMMENDATION**

20. The application is dismissed.

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<sup>3</sup> As section 44BB(1)(a) then was.



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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  
11 July 2016