



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 left shoulder injury in the course of his employment as a Motor Mechanic on 9 January 2003. He underwent surgery in 2004, and in 2005 his employment was terminated due to the unavailability of ongoing suitable duties. The Insurer accepted liability and made weekly payments for all relevant periods. In 2012 the applicant commenced work as a Lawn Mower Mechanic and since that time has worked variously between 0 and 42.5 hours per week, with the insurer paying adjusted amounts as required.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 30 June 2016. The Decision informed the applicant that his payments of compensation would cease from 10 October 2016. The Insurer determined that he could work for up to 40 hours per week as a Pick Packer, Forklift Operator and/or Machine Operator.
3. The applicant applied for internal review. The Insurer informed the applicant that his payments would still cease on 10 October 2016, but that they had now determined he could work up to 40 hours per week as either a Machine Operator or Lawn Mower Mechanic.
4. The applicant sought Merit Review from the Authority by way of application received 25 October 2016. The Authority delivered findings and recommendations dated 22 November 2016. It was found that the applicant: (i) has current work capacity as defined in section 32A; and (ii) is able to earn \$528.96 per week in suitable employment.



5. The Authority went further and made two recommendations, based on the findings: (a) the applicant's earnings after the injury [E], which is the greater amount of (i) his ability to earn in suitable employment or (ii) current weekly earnings, is to be determined by the Insurer on a week-to-week basis; and (b) the applicant is entitled to weekly payments of compensation to a maximum amount of \$282.56 pursuant to section 38(7) on a week-to-week basis from 10 October 2016.
6. An application was made to this Office for procedural review received on 19 December 2016. I am satisfied that the application was made within time and in the correct form.

Submissions by the applicant

7. 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."*
8. The applicant submitted that:
 - relevant evidence from his treating specialist was not "submitted" and an injury to his right shoulder was not taken into account; and
 - the same treating specialist did not agree that the applicant could work for 3 days per week as a Machine Operator.

Submissions by the Insurer

9. The Insurer tendered a helpful chronology and addressed the specific submissions of the applicant thus:
 - The most recent medical report of [the treating specialist] is dated 25 November 2016. The Merit Review was completed before this date, on 22 November 2016. The Insurer is currently reviewing the report;
 - The Insurer does not hold any reports which suggest that the treating specialist has stated that the role of Machine Operator is not suitable for the applicant; and



- Taking into account the age, education, skills and work experience of the applicant and the opinion of the Nominated Treating Doctor (different to the treating specialist referred to above) it was considered that the role of Machine Operator was suitable for the applicant. The Authority agreed with this, although it said the applicant could only work 3 days [24 hours] per week as opposed to 5 days [40 hours].

The relevant Guidelines

10. *WorkCover Guidelines for Work Capacity* dated 4 October 2013 were in force as at the date of the work capacity decision. By the time the internal review was conducted on 30 September 2016 the Guidelines had been replaced. Nothing turns on this for present purposes.

Decision

11. The Insurer advised the applicant that the work capacity assessment was completed on 2 June 2016.
12. The applicant was assessed as having the capacity to work for forty hours per week.
13. It was noted that the applicant currently worked for more than 15 hours per week, which was relevant for section 38 purposes.
14. The applicant was found to be capable of earning \$25 per hour for forty hours per week to a total of \$1,000 per week.
15. PIAWE was noted to be the transitional rate of \$1,006.90 applicable to existing recipients of weekly payments immediately prior to 1 October 2012.
16. The applicant was found to be “after the second entitlement period” (post 130 weeks of payments), again relevant for section 38 purposes.
17. The applicant was found to have an ongoing entitlement of “nil” from 10 October 2016, being more than three months and four working days



after the date of the decision. The notice period complies with section 54(2)(a), the Guidelines and section 76(1)(b) of the *Interpretation Act* 1987.

18. The applicant was taken through section 43(1) and clause 5.2.3 of the Guidelines, which were at the time still in force.

19. It was noted that the applicant had a certificate of capacity for 8 hours per day, 5 days per week “with no restrictions specified.”

20. Despite this, at a case conference it the applicant’s NTD had advised the following physical restrictions:

- 15 kg lifting/carrying non-repetitively;
- No above-shoulder lifting; and
- 15 kg pushing/pulling.

21. Medical evidence relied upon included the most recent Certificate of Capacity from the NTD and the Medical Case Conference Report.

22. Suitable employment was identified, described in detail, and aligned with vocational assessments and medical evidence.

23. Ability to earn was assessed in accordance with section 43(1)(c).

24. PIAWE and the transitional rate were clearly explained.

25. The entitlement periods were set out and explained. The applicant was advised that he had received 389 weekly payments and was therefore in the period following the expiration of the second entitlement period.

26. Section 38 (and in particular section 38(3)) was set out and explained in full.

27. Section 38(7) was set out with the algorithm applied to the transitional rate and the applicant’s current ability to earn. This came to a “nil” entitlement. While the merit review overturned this finding, it was open to the Insurer to come to this conclusion, and therefore it was not a procedural error.



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28. Section 59A(2) and (3) were clearly explained. Since the merit review reinstated the applicant's weekly payments, there will be no requirement for this section to feature in any new decision based on the merit review.

29. The Insurer advised the applicant that copies of relevant documents could be provided upon request.

30. There are no procedural errors identifiable in the Insurer's decision.

Finding

31. The decision was validly made.

RECOMMENDATION

32. The application 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
24 January 2017