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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 for procedural review is dismissed.**

##### **Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 24 August 2015. The decision informed the applicant that her weekly payments of compensation would cease from 2 December 2015. The applicant requested an internal review by the Insurer on 22 September 2015 and the Internal Review Decision was never completed<sup>1</sup>.
2. The applicant applied for Merit Review by the Authority, which may have been received on either of 25 October or 25 November. It is unlikely to have been received on 25 September 2015 (as stated in the Merit Review recommendation) since this was only three days after the application for internal review. The Authority delivered its recommendation on 10 December 2015. The Authority found that the applicant has current work capacity, has returned to suitable employment as a chef and can work 25 hours per week, spread over five days. The Authority then recommended that the Insurer calculate the entitlements of the applicant under section 38 of the 1987 Act. It was further recommended as a preliminary step that the Insurer determine whether or not the applicant is a high needs or highest needs worker (or neither).
3. The applicant sought procedural review by way of application dated 18 December 2015. I am satisfied that this application has been made within time and in the proper form.

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<sup>1</sup> In the course of Merit Review the Insurer stated: “ .. the Internal review application has not been actioned within the timeframe.” The application itself was clearly within time, the response by the Insurer was not.



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4. On 8 April 2001 the applicant suffered a back injury in the course of her employment as a Chef. Following the injury the applicant was in receipt of weekly payments of compensation for total or partial incapacity for various periods. She was an existing recipient of weekly payments immediately before 1 October 2012 and continued to receive payments at the time of the work capacity decision.
5. At the time of the work capacity decision was made the applicant was working between 20-25 hours per week in suitable employment, earning \$438 per week. The insurer alleges a capacity to work longer hours and to earn \$548 per week.
6. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).

#### **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.*” The applicant has applied for a procedural review, making submissions which primarily go to issues of merit rather than procedure. The submissions by the applicant are therefore largely irrelevant for present purposes.
8. One of the few submissions made by the applicant which might be thought relevant to procedure was addressed by the merit review service. The applicant had previously received compensation under section 66 for various sums calculated on the basis of the table of disabilities which appeared in the legislation prior to 1 January 2002. The merit review service therefore recommended that the Insurer determine whether or not the applicant is a high or highest needs worker (or neither). Since that recommendation is binding on the Insurer, the issue need not be revisited here.

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

9. The Insurer made submissions dated 24 December 2015 in response to this application. The submissions largely do no more than respond to



the applicant's submissions, most of which are irrelevant for present purposes. The main issue of whether or not the applicant should be penalised for not working 25 hours per week every week (while averaging between 20-25 hours per week) was dealt with in the course of merit review and is an issue which has therefore already been determined.

### **Decision**

10. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
11. The Guidelines require the Insurer to advise the applicant of the full effect of the decision upon her rights, including the right to ongoing weekly benefits, medical expenses and any other type of compensation the receipt of which might be adversely affected. The decision clearly and concisely did so.
12. The evidence relied upon by the insurer was relevant and current and there was no issue overlooked or ignored by the Insurer.

### **THE STAY**

13. In the course of procedural review there was some discussion about the applicability of the statutory "stay" now provided for in section 44BC of the 1987 Act (formerly found in clause 30 of Schedule 8 to the *Workers Compensation Regulation* 2010). Put shortly, the stay operates as follows: a worker is entitled during the course of section 44BB review to receipt of the same compensation payments to which he/she was entitled immediately prior to the making of the relevant adverse work capacity decision. The entitlement has no time cap or deadline or other limitation on it beyond receipt by the worker of the review decision. This is an entitlement which exists irrespective of the existence or duration of any notice given to the worker under section 54.
14. Payments which continue under the notice provided for in section 54 are subject to the usual requirements of providing updated work capacity certificates and other compliance with the legislation by the worker. There are no such hoops to be jumped through by a worker under section 44BC. The worker was already fully qualified to receive their



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ongoing payments as at the date of the work capacity decision and that right springs up again upon application for review under section 44BB (unless application for *internal review* is made outside the “within 30 days” time limit appearing in section 44BB).

15. It follows that the expiration of any notice given under section 54(2)(a) does not have the effect of diminishing in any way the rights of the worker to have their payments continued during the course of section 44BB review. The payments received by a worker after receipt of a section 54 Notice following a work capacity decision are made on a different basis to the payments made to a worker immediately prior to the work capacity decision. The worker is already fully qualified for the latter and continues to receive those by virtue of section 44BC, even if the worker would otherwise be disentitled by the operation of section 54, including by the exhaustion of the relevant notice period.

## **RECOMMENDATION**

16. The application for procedural review is dismissed.

Wayne Cooper  
Delegate of the Workers Compensation  
Independent Review Officer  
29 January 2016