



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 dislocated patella and sequelae in the course of his employment as an Apprenticed Motor Mechanic on 04 February 2015. The insurer accepted liability and made weekly payments for all relevant periods. The applicant returned to work periodically, but is now unable to work.
2. The Insurer gave notice to the applicant of a work capacity decision on 31 January 2017. The insurer found that the applicant had capacity to work for 40 hours per week in the "suitable employment" of "Apprentice - Mobile Plant Machine" earning \$1,000 per week. The applicant was in the second entitlement period, covered by section 37. The applicant's PIAWE was calculated to be \$930.51. He was found to have an ongoing entitlement in the sum of \$0.00 per week, expressed on the front page of the decision as commencing 4 May 2014¹.
3. Four pages later the applicant was advised that "this work capacity decision becomes effective on 4 May 2017." While it is highly undesirable that a worker is given conflicting and confusing information in this careless manner, I have come to the view that nothing turns on it, since it was not possible for the originally nominated date of 4 May 2014 to be correct. It is the sort of error which is now excused by the *Guidelines* which came into effect on 1 August 2016.
4. The applicant did not apply for internal review until January 2018. The Insurer came to the same conclusion following internal review dated 14

¹ Since this pre-dates both the date of injury and the date of the letter, it is clearly an error of fact.



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

February 2018, but on slightly different grounds (capable of working 32 hours per week, not 40, and different medical evidence).

5. The applicant sought Merit Review from the Authority by application received on 12 March 2018. The Authority made findings dated 09 April 2018 in the following terms:

- The applicant had current work capacity between 31 January 2017 and 27 October 2017;
- His role as an apprentice mobile plant mechanic undertaking suitable duties with his pre-injury employer was suitable employment for the same period;
- His ability to earn in suitable employment was his actual earnings with his pre-injury employer for the same period;
- The applicant has no current work capacity from 27 October 2017 and ongoing;
- The applicant's ability to earn in suitable employment is nil.

6. The merit reviewer made the following recommendation:

The Insurer is to calculate [the applicant's] entitlement to weekly payments of compensation in accordance with [the] findings above for the period 31 January 2017 and ongoing.

7. An application to this office for procedural review was received on 03 May 2018. I am satisfied that the application has been made within time and in the proper form.

8. Unbeknownst to the merit reviewer, the insurer had made a further work capacity decision on 19 March 2018, three weeks prior to the Authority issuing the merit review findings and admissions. That decision found that the applicant has no current work capacity and determined that he should receive weekly payments of \$744.41 per week gross from 22 February 2018.

9. In the circumstances it would appear as though the applicant has had a complete victory with his weekly payments to be recalculated from the date of the original work capacity decision (*per* Merit Review) and



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

payments to continue into the future (*per* both (a) Merit Review and (b) the Insurer's new work capacity decision dated 19 March 2018).

Submissions by the applicant

10. 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 submissions:

- He was not provided with a copy of the labour market report;
- He was not provided with a copy of the doctor approval;
- [The insurer] did not discuss the potential impact the work capacity decision would have prior to the fair notice period;
- Typographical errors were contained in the letter sent advising him a work capacity decision would be made causing confusion; and
- His legal representative had to contact [the insurer] to follow up correspondence.

Submissions by the Insurer

11. The Insurer responded in the following terms:

- **"He was not provided with a copy of the labour market report."**
[A]ll documentation referred to in the Work Capacity Decision Reply was attached to the merit REPLY as well as attached to the internal review decision which was forwarded directly to [the applicant] via Registered Post #xxxxxxx014 sent 14/2/18.
- **"He was not provided with a copy of the doctor approval."**
[A] no capacity determination was made prior to the merit determination which has not relied upon the treating doctor approval at that time. [The applicant's] weekly benefits were reinstated based upon the new 'no capacity' certification received.
- **"EML did not discuss the potential impact the work capacity decision would have prior to the fair notice period."**



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

[T]he Case Manager at the time of the original assessment, file noted the following:-

- 5/1/2017 14:47 Fair Notice Call 0447 661 272- Attempt 1 SCM left vmail to call
- 9/1/2017 09:54 Fair notice call 0447 661 272 Attempt 2 SCM left vmail to call as no answer
- 9/1/2017 12:32 Fair notice call PC from wkr returning SCM call

- **“Typographical errors were contained in the letter sent advising him a work capacity decision would be made causing confusion with him.”**

EML apologise for any typographical errors however restate that verbal discussion was held with [the applicant] to confirm his understanding of this process and decision.

- **His legal representative had to contact EML to follow up correspondence.**

[The Insurer] is uncertain what correspondence the lawyers had to chase up.

12. In addition to those submissions specifically replying to the applicant, the Insurer volunteered the following additional observations:

- Fair notice was provided in accordance with the guidelines noting assessment commencing on 9/1/2017 with decision call made and formalised on 31/1/2017. [The Insurer] confirms that telephone call was made on 30/1/2017 on 2 occasions without success leaving voicemail requests for [the applicant] to telephone his case manager to discuss. [The Insurer’s] records support further attempt to telephone and advise outcome of assessment on the 31/1/2017 again without success in contacting him. Formal Work Capacity Decision was posted on 31/1/2017 following 3 unsuccessful attempts over 2 days to discuss with him.
- The Internal Review Application was received on the 22/1/2018 (nearly 12months later). WorkCover NSW certificates of capacity expired 15/11/2017. [The Insurer] made a work capacity decision dated 14/2/2018 - advising [the applicant] that we completed the internal review decision and determined that he has capacity to work in suitable employment for 32 hrs per week as demonstrated by him in the wages summary provided by his Employer prior to his termination in Oct/Nov 2017 (calculated over a 9 month period). [The insurer] advised [the



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

applicant] that as at the date of the last certificate of capacity on our file he had capacity for 40hrs per week and was at work working and earning. As we did not have WorkCover evidence past this point to review we relied upon the evidence at that time (as we cannot take the Centrelink certificate into account).

- [The Insurer] confirms merit review application was received 13/3/2018. [The Insurer] reviewed the information on file at that time and confirm that a new Work Capacity decision was made on the 19/3/2018 based on the latest WorkCover certificate of capacity certifying [the applicant] with no current work capacity.

Decision

13. It is clear that the applicant has already won his dispute with the insurer and will be paid all outstanding monies.
14. In the circumstances there is no utility in conducting a further review of the insurer's original decision. In accordance with section 44BB(3)(c) I decline to conduct a procedural review.

Finding

15. There being no utility in conducting a further review, I decline to proceed further.

RECOMMENDATION

16. The application is dismissed.

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

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
18 May 2018