



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 Work Capacity Decision by the Insurer dated 30 September 2016 is set aside.**
- b. **The Insurer should make a new work capacity decision based on, and making reference to, the correct Guidelines, being the *Guidelines for claiming workers compensation*, which came into effect on 1 August 2016.**
- c. **Pursuant to Section 44BB(1)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.**

Introduction and background

1. The factual background to this matter was set out in recommendation 6916 (# 69 of 2016) and need not be repeated.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 30 September 2016. The Decision informed the applicant that his weekly payments of compensation would cease from 09 January 2017 because he did not meet the special requirements in section 38(3) for the continuation of payments after the expiration of the second entitlement period (post 130 weeks). An internal review reached the same conclusion.
3. The applicant sought Merit Review from the Authority and the Authority delivered its Findings and Recommendations dated 22 December 2016. The Authority made findings that: (i) the applicant is able to work in suitable employment; (ii) the applicant has current work capacity; and (iii) he does not meet the special requirements set out in Section 38(3) of the *Workers Compensation Act 1987* (1987 Act).



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4. An application to this office for procedural review was received on 23 December 2016. I am satisfied that the application has been made within time and in the proper form.

Submissions by the applicant

5. 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 provided the following submissions:

- He has not returned to work for at least 15 hours per week and has not earned \$183 per week;
- He is unable to contact his case manager, or the person who made the work capacity decision;
- No-one has offered him suitable employment;
- The Insurer did not agree to alter their assessment of suitable employment, but did agree to a work trial;
- He does not agree that he could perform the suitable employment assessed in the Work Capacity Decision;

6. I am only able to review the procedures used by the Insurer in making this Work Capacity Decision. The submissions made by the applicant are not relevant to this review since they either go to the merits of the case or concern the general management of his claim by the Insurer.

Submissions by the Insurer

7. The Insurer has provided submissions dated in response to the applicant’s application. The Insurer has submitted that:
 - The applicant has been paid weekly payments of compensation for 630 weeks and therefore any ongoing entitlement is subject to Section 38(3) of the 1987 Act;
 - The applicant does not meet the special requirements in section 38(3) for continuation of weekly payments after the expiration of the second entitlement period; and



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- The Work Capacity Decision has been upheld at Merit Review.

Decision

8. Section 44A of the *Workers Compensation Act 1987* (1987 Act) provides that a work capacity assessment must be conducted in accordance with the Guidelines.
9. The relevant Guidelines for the purposes of section 44A are the ***Guidelines for claiming workers compensation*** which came into effect on 1 August 2016. They replaced the previous Guidelines.
10. The previous Guidelines were dated 4 October 2013 and came into effect on 11 October 2013 and were originally styled the ***WorkCover Work Capacity Guidelines***.
11. The relevance of this at that on page one [1] of the work capacity decision the Insurer said the following:

*The reasons for this work capacity decision and all other important details are provided below **as required under clause 5.3.2 of the WorkCover Work Capacity Guidelines.***
(emphasis added)

12. It is clear that while the decision may well have been conducted in accordance with the previous Guidelines, the wrong Guidelines were applied. It being a statutory requirement in section 44A that the Guidelines be applied, this must be read as a requirement to apply the Guidelines in force as at the date of the work capacity decision. The failure to do this is therefore a breach of the statute as well as a breach of the Guidelines.
13. In *Trustees of the Sisters of Nazareth v Simpson*¹ it was stated by Davies J that “every failure to follow the Guidelines could not result in the setting aside of the insurer’s decision. Such result would be legally unreasonable.”

¹ [2015] NSWSC 1730



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14. With respect, I would submit that the observation by his Honour must be correct. But it would be an odd situation indeed if the total failure to apply the correct Guidelines, which failure went so far as to substitute adherence to Guidelines no longer in force, did not have fatal consequences for the Insurer's decision.

15. I note parenthetically that the Insurer seems to have otherwise overcome all of the procedural errors identified in WIRO recommendation 6916. Despite this, the procedural error of applying the incorrect Guidelines must render the current decision invalid.

Finding

16. 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 force at the relevant time. The failure to apply the correct Guidelines constitutes a significant procedural error. Accordingly the Work Capacity Decision must be found to be invalid.

RECOMMENDATION

17. The Work Capacity Decision by the Insurer dated 30 September 2016 is set aside.

18. The Insurer should make a new work capacity decision based on, and making reference to, the correct Guidelines, being the *Guidelines for claiming workers compensation*, which came into effect on 1 August 2016.

19. Pursuant to Section 44BB(1)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.

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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