



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.**
- b. **Such weekly payments as the applicant is receiving by virtue of the stay pursuant to Section 44BC of the *Workers Compensation Act 1987* are to continue until receipt by the applicant of this recommendation.**
- c. **Pursuant to Section 44BB(3)(h) of the *Workers Compensation Act 1987* this recommendation is binding upon the Insurer and the Authority.**

Introduction and background

1. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 31 March 2016. The Decision informed the applicant that his weekly payments of compensation would reduce from \$794.96 to Nil on 9 July 2016. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 19 May 2016 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 16 June 2016. The Authority issued its Findings and Recommendations on 19 July 2016. Despite this, the applicant says he did not receive the outcome from merit review until 30 July 2016. The Insurer appears to accept this. The Authority made a finding that the applicant has current work capacity, but does not meet the requirements of section 38 for weekly benefits to continue beyond 130 weeks.
3. The applicant then applied to this office for procedural review by way of application dated 19 August 2016 August 2016, received by this Office on 29 August 2016. I am satisfied that the application has been made within time and in the proper form.



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

4. On 20 March 2008 the applicant suffered lumbar spinal injury when he fell while unloading a truck. He has never worked since, apart from a work trial arranged by the Insurer. Since he was in receipt of weekly payments immediately prior to 1 October 2012 the applicant is an “existing recipient” as defined in the Act, for the purpose of calculating pre-injury average weekly earnings.
5. Section 44A of the *Workers Compensation Act 1987* (1987 Act) provides that a work capacity assessment must be conducted in accordance with the *Work Capacity 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.*”
7. In addition to making the application for review the applicant has made the following submissions:
 - He does not believe he is as fit for work as the Insurer thinks he is;
 - His doctor disagrees with the decision;
 - He asserts that he is “not stable psychiatrically,” despite not having a psychiatric assessment;
 - An unnamed psychiatrist was allegedly “unprofessional” and “did not assist [the applicant] as she claims. She left out several key points in her reports including PTSD diagnosis and how it wouldn’t matter what she reports anyway”;
 - The applicant is still unable to travel and the jobs identified by the insurer and merit review as suitable are remotely located and require him to drive for prolonged periods, which he cannot do;
 - The work capacity decision was completed prior to completion of the work trial arranged by the Insurer. Had the decision been delayed until the (unsuccessful) completion of the work trial, it would have been obvious that he was not capable of working to the extent found by the Insurer and merit review;
 - A work placement program was declined with no explanation;



- The Insurer advised he could access disability benefits, but as he is not an Australian citizen and is from New Zealand he cannot;
 - He has not heard any further from the insurer about “what happens from here”;
 - He cannot support his family;
 - He has not received adequate support for retraining;
 - Several employers have told him they would not employ anyone with a back injury;
 - A work placement program “would have provided adequate opportunity for him to secure a position”;
 - He has heard “from many employers and research that the wage bracket is unlikely for the industry”;
 - Several reports relied on by the Insurer were “incorrect,” including one which said that he completed year 11 English “at year 11 capacity,” whereas he in fact completed English as a second language in an equivalent of year 11; and
 - His failure to complete the work trial without taking off several sick days was not noted by the Insurer.
8. Pursuant to Section 44BB of the 1987 Act I am only able to review the Insurer’s procedures in making the Work Capacity Decision. I am not able to consider the applicant’s personal circumstances or the Insurer’s conduct in managing the claim. The applicant’s submissions are not relevant to procedural review.

Submissions by the Insurer

9. The Insurer has provided short submissions in response to the application, as follows:
- [The Insurer] contends that all the issues raised by [the applicant] are not procedural in nature and were addressed with Merit Review.
10. The Insurer has accurately identified the problem with the applicant’s submissions, namely, that they are either submissions which go to the merits of the case, or they do not concern the work capacity decision-making process at all.



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

Decision

11. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
12. The Fair Notice requirement in Guideline 5.2 was met, over a considerable period of time. Several unsuccessful attempts at getting the applicant on the telephone in December 2015 were followed up by a letter dated 5 January 2016 stating that an assessment was underway and that a work capacity decision might be made on or about 27 January 2016. The applicant was advised that it was “likely” his weekly payments would cease as a result of the ensuing decision, and he was invited to forward any additional information which he may wish to have considered “by 26/01/2016.” Given that it is unlikely the Insurer would have been open for business on Australia Day, the effective date for the deadline would be the next business day, being Wednesday 27 January 2016. Since this is the day the decision was due to be made and also greatly exceeds the minimum of “at least two weeks” Fair Notice required by the Guidelines, it is more than adequate Notice.
13. Despite the Fair Notice given in January, it appears that, as a result of additional information provided by the applicant, a further assessment process was commenced on 19 March 2016 and the Insurer did not actually make a work capacity decision until 31 March 2016. It follows that the applicant had more than two months’ notice of the impending decision and took the opportunity offered by the Insurer to forward additional information.
14. Guideline 5.3.2 requires the Insurer to state the decision and give brief reasons for making the decision. The decision-making process should be explained, including the reasoning process which led to the final determination. Legislation should be referenced and explained, where relevant.
15. Guideline 5.1 requires a Work Capacity Decision to be logical, rational and reasonable.



16. The Insurer has clearly set out the decision-making process, from the assessment to the final determination. Appropriate reference was made to section 44A in relation to the assessment.
17. The full effect of the decision was clearly set out, both in a covering letter and the first page of the notice containing the full decision. Proper reference was made to section 54(2)(a) when giving three months' notice, which correctly included an extra four days for delivery.
18. A correct explanation of the ongoing entitlement to medical expenses under section 59A(2) and (3) was given. The applicant was made aware that such entitlements continue for two years after cessation of weekly payments and that he will therefore continue to be able to seek payment of medical expenses until 9 July 2018.
19. The medical evidence relied upon by the Insurer was certainly current. It included Certificates of Capacity provided by the applicant's Nominated Treating Doctor [NTD] dated 28 January 2016 and 25 February 2016. The insurer listed over 40 documents in addition to the various reports and certificates from the NTD. Included in the list are two Return to Work Plans dated 23 February 2016 and 7 March 2016. The Insurer has certainly complied with the requirement to rely on up-to-date evidence.
20. On page 6 of the Notice the Insurer clearly set out the steps involved in making the decision, going through each part of section 43(1)(a)-(f) separately and comprehensively. The Insurer also explained the concept of a 'high needs' worker and explained why the applicant did not meet the relevant criteria.
21. In this instance I can find no fault with the decision-making procedures of the Insurer; nor can I identify any shortcoming of a procedural nature in the Notice issued to the applicant.

Finding

22. I find that the submissions made by the applicant are irrelevant to the process of procedural review. 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 and the Guidelines in order to produce a procedurally correct result. In the



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

current instance there are no breaches of the legislation or the Guidelines, which are to be treated as delegated legislation. Accordingly the Work Capacity Decision must be found to be validly made.

RECOMMENDATION

23. The application is dismissed.
24. Such weekly payments as the applicant is receiving by virtue of the stay pursuant to Section 44BC of the *Workers Compensation Act 1987* are to continue until receipt by the applicant of this recommendation.
25. Pursuant to Section 44BB(3)(h) of the *Workers Compensation Act 1987* this recommendations is binding upon the Insurer and the Authority.

A handwritten signature in blue ink, appearing to read "Wayne Cooper", with a long horizontal stroke extending to the right.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
22 September 2016