



**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. **The Insurer is to pay the applicant weekly compensation at the rate applicable immediately preceding the work capacity decision for the period from 14 August 2016 until the date when the applicant receives this recommendation, in accordance with section 44BC(1) of the 1987 Act.**
- c. **This recommendation is binding on the Insurer and the Authority by virtue of 44BB(3)(h) of the 1987 Act.**

**Introduction and background**

1. The applicant makes further application for procedural review of a work capacity decision, having previously done so (successfully) in 2015. The facts and circumstances surrounding the claim are set out in WIRO recommendation 157 of 2015 (15715) and need no repetition here.
2. Following the earlier recommendation from this Office, the Insurer reinstated the applicant's weekly payments before undertaking a further assessment of his work capacity, leading to a new decision made on 26 April 2016, and notified to the applicant in a letter dated 27 April 2016.
3. The new decision informed the applicant that his weekly payments of compensation would cease on 5 August 2016. The applicant sought internal review and the Internal Review Decision was dated 22 June 2016. That decision confirmed the work capacity decision.
4. An application for merit review was received by the Authority on 6 July 2016. On 5 August 2016 the Authority made a finding that the applicant was able to earn \$950.00 per week in suitable employment. Despite this,



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the next two sentences in the merit review document are somewhat enigmatically phrased, thus:

### **RECOMMENATION BASED ON FINDINGS.**

6 The following recommendation made by the Authority is binding on the Insurer and must be given effect to by the Insurer in accordance with section 44BB(3)(g) of the *Workers Compensation Act 1987* (“the 1987 Act”).

7 The Authority does not make any recommendation to the Insurer for the reasons given below.

5. If the “reasons given below” appear in paragraphs 69 and 70, it might have been slightly more economical and considerably less incorrect legally to simply repeat the content of those two paragraphs, which are in these terms:

69 I find [the applicant’s] entitlement to weekly payments of compensation is calculated in the amount of \$0.00.

70 Given the outcome of my review does not differ from the outcome of the Insurer’s decisions,<sup>1</sup> it is not necessary that I make any recommendations to the Insurer.

6. The curious reader might wonder what it is that is said to be binding on the Insurer, since mere “findings” are not binding and no recommendations (which are binding) were made.
7. The applicant sought procedural review by application received by this Office on 6 September 2016. I find that the application was made within time and on the correct form.
8. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).

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<sup>1</sup> Despite the decision (singular) being to cease payments to the applicant, the Authority persists with the view that this is really a series of decisions, each reviewable separately under section 44BB. It might be noted that section 44BB only uses the term “decision” in the singular form.



### **Submissions by the applicant**

9. 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.*”
10. The applicant has provided no less than eight [8] closely typed pages of submissions. A fundamental misunderstanding of the role of this Office is displayed on page one, where the following appears:

As I understand your part in this is to investigate the conduct of the insurance company in relation to my claim ...

11. The submissions then go into great detail about various alleged discrepancies, omissions, errors and outright lies perpetrated by service providers and the Insurer during the management of the claim. None of these allegations are relevant for the purposes of procedural review. Some may have been of interest in the course of merit review.
12. My review is limited to ensuring that the Insurer has followed proper procedures in making the work capacity decision. I have no power to review the conduct of the Insurer generally or in specific instances referred to which did not occur during the making of the work capacity decision.

### **Submissions by the Insurer**

13. The Insurer submits that the applicant’s submissions are not relevant to procedural review.

### **The Decision**

14. Guideline 5.2 requires the insurer to give the worker fair notice of at least two weeks duration that an adverse work capacity decision may be forthcoming. The applicant was told by telephone more than three weeks prior to the decision being made that it was likely to be made. This was confirmed in writing by letter dated the same day as the telephone call. As a result of the notice the applicant was able to submit



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a Certificate of Capacity from his Nominated Treating Doctor (NTD) dated 6 April 2016, which was considered by the Insurer in the course of making the work capacity decision twenty days later.

15. It was principally a failure to provide adequate (or any) fair notice which saw the previous work capacity decision set aside by this Office. That error was not repeated on this occasion.
16. The Insurer then proceeded to set out the relevant legislative provisions with an explanation of how they affected the decision-making process. The applicant was taken through sections 37, 54(2)(a), 60, and 59A(1)-(3). The various reports relied upon in making the decision were then set out, followed by an explanation of section 43(1). The definitions of "current work capacity" and "suitable employment" were fully set out. The method for calculating ongoing entitlements was correctly and fully explained.
17. On this occasion the insurer made no errors concerning the explanation of section 59A or the calculation of entitlements. These were erroneously done in the earlier decision.
18. I can identify no errors of a procedural nature in this work capacity decision.

### **Finding**

19. The work capacity decision dated 26 April 2016 was validly made.

### **RECOMMENDATION**

20. The application is dismissed.
21. The Insurer is to pay the applicant weekly compensation at the rate applicable immediately preceding the work capacity decision for the period from 14 August 2016 until the date when the applicant receives this recommendation, in accordance with section 44BC(1) of the 1987 Act.
22. This recommendation is binding on the Insurer and the Authority by virtue of 44BB(3)(h) of the 1987 Act.



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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  
7 October 2016