



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 dated 21 October 2014 is set aside.
- b. The Insurer is to make a new work capacity decision, ensuring that the applicant is given fair notice in accordance with the *Work Capacity Guidelines*.

Introduction and background

1. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 21 October 2014. The Decision informed the applicant that his weekly payments would cease on 28 January 2015.
2. The decision had within it the following two paragraphs:

*On 15 September, 23 September and 24 September I **tried to** contact you to advise our intention to make a decision about your work capacity in 21 days' time and invited¹ you to provide me with additional information you believe I should consider when making this decision. I note that you have not provided any further information for [the Insurer] to assess.² [Emphasis added.]*

*I **tried to** contact you on the 15 October, 17 October and 21 October 2014 to advise of the Work Capacity Assessment and Decision that you will be provided 3 months and 7 days prior to your benefits ceasing on 28 January 2015. [Emphasis added.]*

3. The applicant sought internal review by the Insurer through his legal adviser in mid-2016. The Internal Review Decision confirmed the original

¹ The past perfect tense is not appropriate, given what preceded and what will follow.

² For reasons which will become obvious *infra*.



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Work Capacity Decision, finding that the applicant did not meet the special requirements in section 38(3) for a worker who has received over 130 weekly payments.

4. The applicant sought Merit Review from the Authority by way of application received 16 August 2016. The Authority delivered its Findings and Recommendations dated 14 September 2016. The Authority made a findings that the applicant has current work capacity, can undertake suitable employment, but does not meet the criteria set out in section 38(3)(b) and (c). Despite the findings, the Authority made no recommendations, rendering the outcome of merit review otiose, since only recommendations are binding on the Insurer.
5. The applicant then made an application to this Office for procedural review received on 16 September 2016. I am satisfied that the application has been made within time and in the proper form.
6. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *Work Capacity Guidelines* (Guidelines).

Submissions by the applicant

7. Section 44BB (1) (c) of the Workers Compensation Act 1987 (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.”*
8. In addition to making an application for procedural review the applicant has made various submissions, one of which is devastating for the Insurer:
 - The applicant says he was not advised of the review process. This is incorrect. The Insurer clearly set out the internal review process on pages six (6) and seven (7) of the notice and enclosed the relevant form.
 - The applicant was not contacted and given “fair notice” in accordance with Guideline 5.2 of the relevant Work Capacity Guidelines in force at the time. This appears to be true.



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Submissions by the Insurer

9. The Insurer made no submissions in reply.

Decision

10. In the original work capacity decision notice dated 21 October 2014 the Insurer repeatedly says that attempts were made to contact the applicant prior to making the work capacity decision, but nowhere does the Insurer say that they were successful in these attempts. This is a serious problem for the Insurer, since Guideline 5.2 requires the Insurer to make direct contact with the worker at least two weeks prior to an adverse work capacity decision being made and then goes on to require that any such contact be "confirmed in writing."
11. The applicant says he was never contacted either by telephone or in writing prior to his receipt of the notice dated 21 October 2014. The Insurer says nothing in reply. The only available inference is therefore that the Guideline was breached by the Insurer.

Finding

12. There is a significant procedural error identifiable in the decision. The Insurer has not complied with the Guidelines and it follows that the work capacity decision dated 21 October 2014 was not validly made.

RECOMMENDATION

13. The work capacity decision dated 21 October 2014 is set aside.
14. The Insurer is to make a new work capacity decision, ensuring that the applicant is given fair notice in accordance with the *Work Capacity Guidelines*.



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

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
18 October 2016