



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

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 for procedural review 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* these recommendations are binding upon the Insurer and the Authority.**

Introduction and background

1. The applicant suffered lumbar spinal injury in May 2003 and has never returned to work.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 30 May 2016. The Decision informed the applicant that her weekly payments of compensation would cease on 5 September 2016. The applicant sought internal review, which confirmed the original Work Capacity Decision.
3. The applicant sought Merit Review from the Authority by way of application received on 18 August 2016. The Authority delivered its Findings and Recommendations dated 6 September 2016. The Authority made findings that: the applicant has current work capacity; the applicant is able to return to work in suitable employment; the applicant does not satisfy the special requirements in section 38 for the continuation of weekly payments beyond 130 weeks; and the "finding" was also purportedly made that the applicant is not a worker with "high needs." While the Authority might note that there is no evidence that the



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applicant has 'high needs' based on the dearth of findings to that effect by any approved medical specialist, it is not a "finding" open to the Authority to make in its own right. The Authority did not make any recommendations in this matter, thereby causing considerable doubt to be cast over the purpose of the merit review.

4. The applicant then made an application to this office for procedural review received on 28 September 2016. I am satisfied that the application has been made within time and in the proper form.
5. 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

6. 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.*"
7. The applicant made submissions which might accurately and fairly be described as misconceived, illogical, irrelevant and hopeless. Rather than listing a lengthier series of apposite adjectives, it might serve justice best to do no more than give a short sample of the "submissions" in the words of the applicant's amanuensis:

1. Illogicality and irrationality on wrong finding on jurisdictional fact amounts to breach of implied requirement to exercise a statutory power in a reasonable manner and breaches the test laid down by the High Court in *Minister of Immigration and Citizenship v Li* in 2013.

2. The impugned decisions of the authority and insurer are not based upon rational foundation and logical pathway and illogicality and unreasonableness deciding against the decisions of the WCC and *Sabanayangam* case decided by the NSW Court of Appeal in 2016.

3. The impugned decision contravened *Li* case based upon unreasonableness of *Wednesbury* proportion, a requirement mandated by the High Court for all administrative decision makers.

4. The impugned decision lacks evident and intelligible justification and misused the discretion by drawing wrong inferences on the issues to be decided and the error of law is of jurisdictional nature by virtue of *Li* principle.



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5. The misapplication of Li test amounts to arbitrariness and the decision is capricious and must be reviewed for reason of proportionality.
6. The decisions merit review and be revoked restoring my entitlement to weekly payments at least until June 2017.
7. Procedural fairness and reasonability of any administrative decision are implied requirements and hence WIRO has jurisdiction to decide the review.

8. While nothing further is required, it may be no insurmountable inconvenience to quote another paragraph or two (from the submissions earlier made to the Insurer in the course of internal review) to show where the remainder of the submissions lead:

7. I hereby put you on notice should you not resume payments, revoke the reviewable decision of yours, I will complain to the AHRC, you are discriminating against me as an injured worker as against every other non -I am being discriminated.

8. Your action of reviewing my weekly payments also contravenes the Fair Work legislation as being adverse action, since you step in the shoes of the employer. The Fair Work legislation in turn picks up the commonwealth disability legislation referred to the above and contravention of the same can be raised and enforced through filing an application in the Fair Work Commission, and after mediation certificate issued by the Fair Work Commission in the Federal Circuit Court. Your decision must be revoked and reviewed otherwise I reserve the right to file an action in adverse action for which there is no limitation.

9. Clearly the High Court decision in *Li* refers to an exercise of judicial review, something which is beyond the powers of this Office.
10. It is perhaps an irony observed not often enough that those who invoke the words of Green, MR in *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223 are themselves those most likely to be purveyors of the very unreasonableness for the existence of which that case is said to be authority. This is a paradigm case.
11. It is clear that no substantive submissions going to the procedures adopted by the insurer were advanced by the applicant.

Submissions by the Insurer

12. The Insurer made no submissions in response to the application.



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Decision

13. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
14. Guideline 5.3.2 requires the Insurer to advise the applicant of the date of the work capacity assessment. On this occasion the Insurer informed the applicant that the work capacity assessment was completed on 30 May 2016 and she was notified of the Work Capacity Decision by letter of the same date.
15. Guideline 5.3.2 requires the Insurer to advise the date when the Decision takes effect. Section 54(2)(a) of the 1987 Act requires at least three months and four working days' notice be given if payments are being reduced or ceased. This notice period takes into account Section 76(1)(b) of the *Interpretations Act 1987*. As a result the applicant was advised that her payments would cease on 5 September 2016. This is the appropriate notice period.
16. The Guideline also requires the Insurer to advise the applicant of the impact the decision has on his entitlement to medical and related treatment expenses. The Insurer has referenced and explained Section 59A (2) and (3) of the 1987 Act and advised the applicant that her entitlement to medical expenses will cease on 5 September 2018 as she has been assessed by an Approved Medical Specialist as having a permanent impairment of less than 10%. The Insurer has adequately and accurately explained this.
17. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer informed the applicant that she has received no less than 670 weeks of compensation payments. Therefore any ongoing entitlement to weekly payments of compensation is subject to Section 38 of the 1987 Act. The Insurer clearly explained the special requirements of Section 38(3)(b) and (c) of the 1987 Act at page 2 of the Work Capacity Decision.
18. Pursuant to Section 43(1)(a) of the 1987 Act the Insurer noted that the applicant is certified with capacity for 6 hours per day, 5 days per week



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in the Certificate of Capacity from the Nominated Treating Doctor (NTD). The Insurer determined that the applicant had current work capacity in accordance with that assessment.

19. The Insurer determined, pursuant to Section 43(1)(b), the roles of Product Assembly/Process Worker, and Administrative Assistant to be suitable employment. The Insurer based its determination upon a vocational assessment report and the approval from the nominated treating doctor.
20. In making these determinations pursuant to Section 43 of the 1987 Act the Insurer has displayed an adequate understanding of the relevant Guidelines and legislation.
21. It is clear that the applicant currently does not meet the requirements set out in section 38(3)(b).
22. The submissions of the applicant, where they are not referring to Commonwealth legislation, international covenants and other ephemera, raise issues which go exclusively to the merits of the case, and therefore cannot be re-determined in procedural review.
23. If the applicant wishes to persist with the “*Wednesbury* unreasonableness” argument, she will need to pursue judicial review of the insurer’s decision, since *Wednesbury* unreasonableness is a test used exclusively in the course of judicial review.

Finding

24. There are no procedural errors identifiable in the decision.

RECOMMENDATION

25. The application for procedural review is dismissed.
26. 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.



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27. Pursuant to Section 44BB(3)(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", with a long horizontal flourish extending to the right.

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