



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.

Introduction and background

1. The facts in this matter were outlined in WIRO recommendation 2914 (#29 of 2014) and require no repetition.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 12 July 2016. The Decision informed the applicant that his weekly payments of compensation would cease on 19 October 2016. For clarification, the Insurer advised that the final payment received would cover the applicant up to and including 18 October, but there would be nothing further from 19 October onwards. The applicant sought internal review and the Internal Review Decision was dated 16 August 2016. The Internal Review Decision confirmed the original Work Capacity Decision.
3. The applicant sought Merit Review from the Authority by way of application received on 13 September 2016. The Authority delivered its Findings and Recommendations dated 7 October 2016. The Authority made findings¹ that the applicant: (i) has the capacity to work 4 hours per day, 5 days per week in suitable employment as a Production Team Assistant; (ii) is able to return to work in suitable employment; and (iii) has current work capacity.
4. The Authority went on to conclude that the applicant does not satisfy the special requirements in section 38 for the continuation of weekly payments beyond 130 weeks.

¹ Despite use of the plural form, and the enumeration of no less than three such "findings," the only real finding made was the one enumerated under "(i)" – the rest being no more than a restatement of the first.



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5. The applicant made an application to this office for procedural review received on 7 November 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 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. The applicant makes two submissions:
 - He does not agree with the decision of the insurer to discontinue his weekly payments; and
 - He believes the Insurer has made this decision incorrectly based on the evidence.
9. Those submissions go to the merits of the case, something which cannot be the subject of procedural review. If the applicant wishes to further scrutinize the merit review conducted by the Authority, or the merits of the Insurer’s original decision, he should seek independent legal advice about approaching the Supreme Court for judicial review.

Submissions by the Insurer

10. The Insurer made the following response to the application:
 - The Insurer acknowledges [the applicant’s] submissions and submits that the Insurer has used the most accurate and current evidence.

Decision

11. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.



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12. 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 27 May 2016 and he was notified of the Work Capacity Decision by letter dated 12 July 2016.
13. The same Guideline 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 his payments would cease on 19 October 2016. This is the appropriate notice period.
14. 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 his entitlement to medical expenses will cease on 18 October 2018 as he has not been assessed by an Approved Medical Specialist as having a permanent impairment of greater than 10%. The Insurer has adequately explained this at page 2 of the Decision.
15. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer informed the applicant that he had received 207 weeks of compensation payments as at the date of the decision. 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 pages 3 - 5 of the Work Capacity Decision.
16. Pursuant to Section 43(1)(a) of the 1987 Act the Insurer has noted that the applicant has been certified with capacity for 5 hours per day, 4 days per week in various Certificates of Capacity from the Nominated Treating Doctor (NTD). The Insurer determined that the applicant had current work capacity in accordance with that assessment, despite being



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in possession of reports from other doctors saying that the applicant could work full-time².

17. The Insurer determined, pursuant to Section 43(1)(b), the roles of Production Team Member, and Maintenance Worker to be suitable employment. The Insurer based its determination upon a vocational assessment report and the approval from the NTD.
18. 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.
19. It is clear that the applicant currently does not meet the requirements set out in section 38(3)(b).
20. The submissions of the applicant raise issues which go primarily to the merits of the case, and therefore cannot be re-determined in procedural review.
21. The Work Capacity Decision of the Insurer has displayed a careful consideration of the requirements of the Guidelines and legislation in force at the time.

Finding

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

RECOMMENDATION

23. The application for procedural review is dismissed.

² I note that one such report is from a well-known doctor who supposedly "attempted to contact" the applicant's NTD with a view to discussing his case, but apparently was "unsuccessful" in that enterprise. We are not told what efforts were made to reach the NTD, nor for how long the putative *rappporteur* persisted. Unsurprisingly, it did not stop him providing his usual report to the effect that the applicant could work "8 hours per day, 5 days per week." This in the absence of either a physical examination of the applicant, any agreement by the applicant, or any communication with the NTD. The Insurer did well to ignore this opinion.



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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
06 December 2016