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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.**

Introduction and background

1. The applicant suffered a neck injury in the course of his employment as a Graphic Designer/Sales Assistant on 16 October 2009. He never returned to work, continuing to receive weekly payments of compensation until the Insurer made a work capacity decision on 21 June 2016 and advised the applicant that his weekly payments would cease on 30 September 2016.

2. The applicant sought internal review and the insurer upheld the original decision. Both decisions were based on a failure to satisfy the requirements of section 38(3)(b).

3. An application for merit review was received by the Authority on 29 September 2016 and the Authority issued findings and recommendations on 26 October 2016. The Authority found that the applicant: (i) has a present inability to return to his pre-injury employment; (ii) is able to return to work in suitable employment; (iii) has current work capacity; and (iv) does not satisfy the special requirements in section 38(3)(b) to enable payments to continue after the first 130 weeks.

4. The applicant sought procedural review of the Insurer's work capacity decision by application received by this Office on 16 November 2016.

5. 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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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 the following submission:

   - I believe the Insurer was in error in the original decision in failing to follow the proper procedure. For example I was told that my solicitor could not charge costs pursuant to a repealed section (44(6)).
   - In addition the Insurer has purported to refer to s. 33 which makes this a liability decision (see *St George Bank* case).

8. Although the former section 44(6) is now repealed, the proposed new section 44BF has not yet commenced. This means that Clause 8 of Part 19I of Schedule 6 to the 1987 Act still precludes lawyers charging for assistance with reviews of work capacity decisions. The full wording is in the following terms:

> **8 Review of work capacity decisions—recovery of costs**
>
> A legal practitioner is not entitled to be paid or recover any amount for a legal service provided to a worker or an insurer in connection with a review of a work capacity decision for which an application is made under section 44 of the 1987 Act before the commencement of section 44BF of that Act (as inserted by the 2015 amending Act).

9. While the nominated section is incorrect, the effect is the same and nothing turns on it as an error.

10. The second submission is more complex and will be dealt with in the body of the decision below.

Submissions by the Insurer

11. The Insurer provided a useful chronology of the review process, noting in addition that the applicant "has made numerous statements."

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The Decision

12. 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 on 19 May 2016 that an assessment leading to a decision was underway. This was confirmed in a letter of the same date.

13. In the notice dated 21 June 2016, the Insurer set out the relevant legislative provisions with an explanation of how they affected the decision-making process. The applicant was taken through sections 38, 54(2)(a), 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)(a), (b) and (c). The definitions of "current work capacity" and "suitable employment" were fully set out.

14. The various entitlement periods were set out on pages 9-10 of the decision, with a clear explanation of why the applicant is within the period following the expiry of the second entitlement period.

The St George Bank question

15. There are no errors in any of what is described *supra*. However, coming now to the second of the applicant's submissions, the Insurer did insert at two different stages of the notice a statement that in other circumstances might lead a reader to believe that this was really a section 74 notice *manqué*. On page 5 the Insurer said this:

> "We do not consider that you are suffering from an incapacity for work (either partial or total) associated with the incident of 16/10/2009. We do not consider that you meet the requirements of section 33 of the Workers Compensation act 1987 in order to obtain weekly benefits compensation (section 43(1)(f) of the *Workers Compensation Act* 1987)."

If that were not confusing enough, on page 10 the Insurer came out with this:

> "In addition to this, and based on the overwhelming balance of medical opinion contained within this Notice, we have determined that

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> you are not suffering from an incapacity for work (either partial or total) associated with the incident of 16/92009. Section 33 of the *Workers Compensation Act* 1987 requires that you either be partially or totally incapacitated as a result of the injury in order to obtain weekly benefits compensation."

16. At the time the decision was made, the Court of Appeal had yet to hand down the decision in *Sabanayagam v St George Bank Ltd* [2016] NSWCA 145. That case would become authority for the proposition that in order for a work capacity decision to be correctly styled a "work capacity decision," rather than a decision to decline liability, an Insurer would have to concede that a work has a present inability to perform pre-injury work. This is a requirement for the definition of "current work capacity," which must be the subject of a work capacity decision.

17. On the date when the Insurer made the decision and issued the Notice, there was Presidential authority from the WCC that a work capacity decision could be implied or inferred from a liability dispute. On that basis, while the Insurer was clearly wrong in law to make the statements quoted above, the error cannot be thought fatal. As stated at paragraph 3 *supra*, the reason given for terminating payments was that the applicant did not and does not meet the requirements set out in section 38(3)(b). It follows that while the Insurer erred in law in setting out a test which was irrelevant, the error was itself irrelevant to the reasons given for the decision being reached. An error of law which does not affect the outcome of the decision itself cannot be a procedural error.

18. I can identify no errors of a procedural nature in this work capacity decision.

Finding

19. The work capacity decision was validly made.

RECOMMENDATION

20. The application is dismissed.

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