



## **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. On 17 January 2004 in the course of his employment as a Bricklayer/Labourer the applicant suffered injury to his lumbar spinal region. He continued to work until leaving that employment in 2005. He currently works approximately 12 hours per week as a Hire Car Driver. The insurer accepted liability and made weekly payments of compensation for all relevant periods.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 22 December 2015. The Decision informed the applicant that his weekly payments would be ceasing from 12 April 2016, due to failure to satisfy section 38(3)(b).
3. For unexplained reasons the applicant did not apply for an internal review until 18 August 2016, nearly eight months after the work capacity decision and more than four months after his weekly payments had ceased. The internal reviewer came to the same conclusion as the original decision-maker, and on the same grounds.
4. The applicant sought Merit Review from the Authority by way of application received 18 October 2016. The Authority delivered its Findings and Recommendations dated 18 November 2016. The Authority made findings that the applicant:
  - (i) has a present inability arising from an injury such that he is unable to return to his pre-injury employment;
  - (ii) is able to and has returned to work in suitable employment as a Hire Car Driver;
  - (iii) has current work capacity; and



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(iv) does not meet the special requirements of section 38(3) of the 1987 Act to be entitled to receive payments after the expiration of the second entitlement period (130 weeks).

5. An application was subsequently made to this Office for procedural review, received on 19 January 2016. While this would normally mean that the application to this Office was made out of time, it appears that the applicant did not actually receive the merit review outcome until 19 December 2016, when it was resent at his request. I am satisfied that the application has been made within time and in the proper form.

#### **Submissions by the applicant**

6. 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.”*

7. The submissions made by the applicant are as follows:

- He wishes that this Office would “advocate on [his] behalf” to overturn the insurer’s decision;
- He does not believe he has the physical capacity to work; and
- He feels he is unfairly treated.

#### **Submissions by the Insurer**

8. The Insurer made only one submission in reply, thus:

- [The Insurer] submits that [the applicant] was provided with an outcome by Merit Review on 18/11/2016, by both email and post. Should this be accepted, then [the applicant] has not lodged a Procedural Application within the timeframe prescribed by section 44BB(3)(a) of the Act.

9. No supporting evidence was provided by the Insurer. This issue is of academic interest only, in light of what appears below.

#### **The relevant Guidelines**



10. On 1 August 2016 a new set of *Guidelines for claiming workers compensation* came into effect, replacing the former *Work Capacity Guidelines* which had been in force from 11 October 2013. This means that for all of the fair notice period and the assessment period, and as at the date of the original decision on 22 December 2015, the former Guidelines applied, but by the time the applicant had applied for internal review, the new Guidelines applied.

### **Decision**

11. The Insurer contacted the applicant on 27 November 2015 giving notice that a work capacity decision might be made in around 22 days, following a work capacity assessment. This complies with the “fair notice” provision in the (now former) *Work Capacity Guideline* 5.2.

12. In the work capacity decision notice the Insurer advised the applicant that the work capacity assessment had commenced on 27 November 2015 and was completed on 22 December 2015.

13. The Insurer explained sections 43(1)(a),(b) & (f).

14. Under section 43(1)(a) the applicant was found to have current work capacity for 5 hours per day, 4 days per week with restrictions.

15. The Insurer found the applicant to be capable of performing the suitable employment of Hire Car Driver, in accordance with section 43(1)(b).

16. The applicant was assessed as currently earning less than \$183 gross per week, which means that the applicant does not satisfy section 38(3)(b). This assessment was said to be made under section 43(1)(f).

17. The Insurer also purported to invoke section 43(1)(f) to say the applicant is not a worker with “high needs.” The Court of Appeal has held that section 43(1)(f) does not confer on insurers powers to make decisions that they do not otherwise already have the power to make. The determination of a medical dispute is an example of such a decision<sup>1</sup>. In the present case the Insurer had the benefit of a Medical

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<sup>1</sup> See *Sabanayagam v St George Bank Ltd* [2016] NSWCA 145.



Assessment Certificate issued by an Approved Medical Specialist dated 17 February 2014 assessing 12% Whole Person Impairment. It is clear that the applicant does not have high needs, but the Insurer should not describe this as a work capacity decision, nor should it invoke section 43(1)(f). Nevertheless, such incorrect labelling of the process is not a procedural error sufficient to set aside the work capacity decision.

18. The Insurer explained the entitlement periods and noted that the applicant had received no less than 542.88 weeks of payments, clearly placing him in that period following the second entitlement period which ends after 130 weeks. Section 38 was clearly set out and explained. The applicant was advised that his weekly earnings of less than \$183 and his weekly hours of work (being less than 15) did not meet the requirements of section 38(3)(b).
19. The merit reviewer agreed with the internal reviewer about the merits of the decision.
20. Section 59A(2) and (3) were fully and clearly explained. The applicant was advised that his entitlement to payment for pre-approved ongoing medical expenses might continue for a further five years until 12 April 2021. This is the correct period for a worker with 12% WPI.
21. The correct notice period was given in accordance with section 54(2)(a).
22. The Insurer relied upon the most recent Certificates of Capacity tendered by the applicant and the most recent medical reports in its possession. The reasoning process was carefully explained, in accordance with the relevant Guidelines.
23. There are no procedural errors in the work capacity decision dated 22 December 2015.

### **Finding**

24. The work capacity decision of the Insurer was validly made.

### **RECOMMENDATION**



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25. The application is dismissed.

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  
23 February 2017