



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 is dismissed.**

#### **Introduction and background**

1. The applicant sustained a lumbar spinal injury while loading a truck in the course of his employment on 2 September 2014. He suffered incapacity for work and the Insurer accepted liability and made weekly payments for all relevant periods.
2. The applicant seeks procedural review of a "work capacity decision" made by the Insurer on 30 June 2016. In the course of that decision, the insurer advised that it was "declining liability." The applicant was advised that his payments would cease from 14 October 2016.
3. On the same date the Insurer also purported to issue a section 74 notice declining liability, apparently as a result of the confusion then existing around the interpretation of a Presidential Decision in the Commission which was only clarified by the Court of Appeal at a later date (see: *Sabanayagam v St George Bank* [2016] NSWCA 145).
4. When the applicant sought internal review, the Insurer had become apprised of the Court of Appeal decision in *Sabanayagam* and accordingly withdrew the "work capacity decision". The Insurer advised the applicant that it relied on the section 74 Notice. The applicant sought internal review of that notice, but did not commence proceedings in the Commission.
5. An application for merit review was received by the Authority on 27 September 2016 and findings and recommendations were issued on 11 November 2016. The Authority found that: (i) the applicant was entitled



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

to a gross total of \$83,254.35 from week 1 to week 89 of weekly payments; and (ii) after week 89 the Insurer has disputed liability and the Authority cannot review that decision because it is not a work capacity decision.

6. The applicant sought procedural review by application received by this Office on 13 December 2016. I find that the application was made within time on in the correct form.
7. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines). The relevant Guidelines are dated 8 October 2013.

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

8. 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.*”
9. The applicant says:

After the merit review [the Insurer] and myself were advised in the review to get a work capacity decision from WIRO. [The Insurer] has not, so that is why I am putting in this review.

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

10. The Insurer made the following observations:
  - The work capacity decision [issued on the same day] as a section 74 notice (issued prior to the Court of Appeal decision of *Sabanayagam v St George*) was withdrawn at internal review as it was deemed void. This was communicated to [the applicant].
  - The Merit review, however, was undertaken on the basis of “the worker’s entitlement to weekly payments” which Merit deemed was within their jurisdiction to review. There was no formal work capacity decision made in respect of this entitlement.

- The worker does not agree with Merit's Recommendations and considers he has been underpaid, despite numerous reassurances that [the Insurer] ha[s] paid him everything that Merit has deemed he is entitled to.
- To further complicate things, there is a section 74 notice also in play, which took effect on 9 August 2016. This has been the subject of review and we have encouraged [the applicant] to seek legal advice and thereon make an Application to the WCC if he does not agree.

## The Decision

11. The "work capacity decision" dated 30 June 2016 was clearly made under the misapprehension that an Insurer was entitled to dispute liability in the course of that process. The Insurer became aware that this was an error and corrected it by withdrawing the purported decision in the course of internal review.
12. The section 74 Notice remains on foot and it is this which should concern the applicant. He should seek his own legal advice.

## Finding

13. There being no work capacity decision extant, this office has no jurisdiction to conduct a review.

## RECOMMENDATION

14. The application is dismissed.



Wayne Cooper



Level 4, 1 Oxford Street, Darlinghurst NSW 2010  
T: 13 9476  
[contact@wiro.nsw.gov.au](mailto:contact@wiro.nsw.gov.au)  
[www.wiro.nsw.gov.au](http://www.wiro.nsw.gov.au)

Delegate of the Workers Compensation  
Independent Review Officer  
12 January 2017