



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 factual background to this application was previously set out in WIRO recommendation 6515 (#65 of 2015) and again referred to in 9016 (#90 of 2016).
2. The applicant now seeks procedural review of a Work Capacity Decision made by the Insurer on 20 September 2016. The Decision informed the applicant that his weekly payments of compensation would cease, effective from 27 December 2016. For the sake of clarity the Insurer specified that the last day of payment would be 26 December 2016, with nil thereafter.
3. The Insurer determined that the applicant had the ability to work for 6 hours per day, 4 days per week in suitable employment as a Delivery Driver/Courier. Since the applicant had received more than 130 weeks of payments and did not currently work, he did not comply with the requirements of section 38(3)(b) (those requirements being that he work for at least 15 hours per week and earn at least \$183 per week) and as a result his payments could not continue.
4. The applicant sought internal review and the Internal Review Decision was dated 10 November 2016. The Internal Review Decision confirmed the original Work Capacity Decision.
5. The applicant sought Merit Review from the Authority on 9 December 2016. The Authority delivered its Findings and Recommendations dated 20 January 2016. The Authority made findings that the applicant: (i) is able to return to work in suitable employment; (ii) has current work



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capacity; and (iii) does not satisfy the special requirements under section 38 for the continuation of weekly payments.

6. The applicant made an application to this office for procedural review received on 17 February 2017. I am satisfied that the application has been made within time and in the proper form.
7. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the Guidelines. The relevant Guidelines came into effect on 1 August 2016.

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 made general submissions, which might be fairly summarised as follows:
 - He has experienced disadvantage and discrimination;
 - He feels like he is being punished;
 - He is now on anti-depressants;
 - He now needs an operation on his left shoulder;
 - He thinks “the people making all the decisions [at the Insurer] have absolutely lost all their marbles”;
 - The insurer should be trying to help him get better and look after his needs, rather than trying to get him to return to work.
10. The anti-depressants are to treat a condition for which the Insurer has declined liability. The Insurer has also declined liability for the left shoulder injury. Neither consideration concerns a work capacity decision. The remainder of the applicant’s submissions are equally irrelevant to procedural review of a work capacity decision.

Submissions by the Insurer

11. The Insurer made no submissions.



Decision

12. The Insurer gave the applicant fair notice of an impending work capacity assessment and decision on 26 August 2016 and 9 September 2016.
13. The insurer advised that the work capacity assessment was completed on 20 September 2016 and that as a result the decision had been made to discontinue payments in accordance with section 38(3).
14. Notice was properly given under section 54(2)(a), with an added four days as required by section 76(1)(b) of the *Interpretation Act* 1987.
15. The applicant was taken through section 43(1)(a),(b),(c),(d) and (f).
16. Section 59A(2) and (3) were clearly explained. The applicant was advised that his entitlement to pre-approved medical expenses could continue for five years after the cessation weekly payments due to his having greater than 10% whole person impairment [WPI], but not greater than 20%. The applicant successfully claimed under section 66 for 11% WPI in 2011.
17. The concept of “current work capacity” as defined in section 32A was fully explained. It was explained that the applicant’s own nominated treating doctor certified him fit for work for 6 hours per day, 4 days per week with modified duties.
18. It was noted that the applicant had received weekly payments for 378 weeks and that he is in the period following the second entitlement period which expires after 130 weeks. Therefore section 38(3) was fully set out and discussed at length.
19. The evidence relied upon by the insurer was set out, totalling no less than 38 documents, including the most up-to-date Certificate of Capacity provided by the applicant.
20. A great deal of attention was paid to explaining how the identified suitable employment was appropriate for the applicant.



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21. In contradistinction to the previous two work capacity decisions made in this case, I can identify no procedural errors made by the Insurer on this occasion.

Finding

22. The work capacity decision dated 20 September 2016 was validly made.

RECOMMENDATION

23. The application for procedural review is dismissed.

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
17 March 2017