



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 work capacity decision dated 26 October 2016 is set aside.**
- b. The Insurer is to make a new work capacity decision in accordance with the Guidelines.**
- c. Payments to the worker should resume from the date of termination until the date on which any notice given is a new decision has expired.**

Introduction and background

1. On 11 March 2014 the applicant suffered injuries to his left hand and wrist (including partial amputation of two fingers) in the course of his employment as a Machine Operator. Despite four operations, the applicant still has symptoms of pain, numbness and "pins and needles" in the two partially amputated fingers and pain in the left wrist. He has not worked since suffering the injuries. 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 26 October 2016. The applicant was advised that his payments would reduce from \$657.00 to Nil per week commencing on 05 February 2017. The decision was made on the basis that the applicant does not qualify for continued payments after the expiration of the second entitlement period by virtue of section 38(3)(b) of the 1987 Act.
3. The applicant sought internal review and on 13 December 2016 the insurer upheld the original decision.



4. An application for merit review was received by the Authority on 16 December 2016 and findings and recommendations were issued on 25 January 2017. The Authority found that the applicant: (i) is able to return to work in suitable employment; (ii) has current work capacity as defined by section 32A; and (iii) does not satisfy the special requirements under section 38 for the continuation of weekly payments of compensation.
5. The applicant sought procedural review by application received by this Office on 24 February 2017. I find that the application was made within time in the correct form.
6. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the relevant Guidelines. The relevant Guidelines came into effect on 1 August 2016.

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 made the following submissions through his solicitor:
 - On page 9 of the work capacity decision, the insurer advised the worker that he was to pay for his own legal costs in relation to seeking a review of the decision. The insurer stated that: “This means that each party is to bear their own legal costs in relation to this decision.” Given the possible sums that legal costs may involve that lay workers may presume apply in seeking legal review of a decision, this has the effect of dissuading workers from seeking legal advice and/or from seeking a review.
 - On page 8 of the work capacity decision, the insurer advised the worker that “in conclusion, your weekly payments of \$0.00 will cease effective 05 February 2017.” This is confusing and does not advise when the worker’s weekly payments will reduce to \$0 per week or cease.
9. The submissions of the applicant raise issues relevant to procedural review of a work capacity decision. It is clear that the first submission quotes words directly from the work capacity decision, however it also leaves out the following words, which give a kinder picture of the



insurer's conduct: "At this time solicitors are not entitled to be paid or recover any amount for costs which have been incurred in connection with the requested review of your work capacity decision." To suggest that the applicant was left with the impression that to apply for a review of the insurer's decision might lead to large legal bills is probably an exaggeration. Having said that I acknowledge that the wording used by the Insurer could have been clearer and was, to say the least, infelicitous.

10. The second submission made by the applicant has more in the way of force. It is one thing to tell a worker that his payments will cease, it is another thing to say that they will reduce to \$0.00, but it is a completely different thing again to tell that same worker in the same letter that the reduced amount of \$0.00 will "cease effective 05 February 2017." Most sane readers confronted with that sentence would be at a loss to produce a coherent explanation for the words appearing within the inverted commas. This is exacerbated by the words "in conclusion" appearing at the beginning of the sentence: the placement of those words would lead the ordinary reader to believe that this was the final position, summed up in one sentence, without qualification. I have no doubt that the applicant was indeed confused, and likely misled, by the wording of that sentence.
11. This is critical, because in the new *Guidelines for claiming workers compensation* it is relevant that a worker might have been misled. Under the heading "Substantial compliance" on page 6 of the *Guidelines* it is said that if there is a technical breach of the *Guidelines* (albeit they self-identify as "delegated legislation") but the *Guidelines* are substantially complied with, then the breach does not invalidate the decision, unless:
 - The worker has been misled,
 - The worker has been disadvantaged, or
 - The worker suffered procedural unfairness.
12. There can be no dispute that the failure to correctly advise the applicant of the effect of the decision is a breach of procedural fairness and there is equally no doubt that the words complained of are not only confusing but also misleading.



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Submissions by the Insurer

13. The Insurer made the following submissions in reply:

- In relation to comments regarding legal costs – at the time of the decision this was applicable and we advised the worker accordingly.
- Regarding the comment “your weekly payments of \$0.00 per week will cease effective 5 February 2017” – we acknowledge that this should have stated \$657.60. This was stated on page 1 & 2 of the work capacity decision.

14. I accept the first submission by the Insurer and note that nothing turns on the submission by the applicant on that point.

15. The second submission by the Insurer contains an admission which goes further than the applicant’s submission, noting that on pages 1 & 2 information appeared which was different to and contradictory of information appearing at page 8.

16. The Insurer stated on page 2 that the work capacity decision had been made by a specific Case Manager, and had been approved by a specific Technical Advisor. The reason for requiring a second set of eyes to look at work capacity decisions before they are formally issued to workers is to avoid the sort of error which has appeared in this case. That the error exists at all is a sign that the internal checking system might not be effective in every case.

Decision

17. I note that the remainder of the decision appears to comply with the Guidelines and the legislation. I further note that the decision reached was in accord with the findings of the Authority in the course of merit review.

18. Despite this, for the reasons appearing at paragraphs 10-16 *supra*, the Guidelines have been breached and the worker has been misled and subject to procedural unfairness. It follows that the decision must be set aside.



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Finding

19. The work capacity decision was not validly made and is set aside.

RECOMMENDATION

20. The work capacity decision dated 26 October 2016 is set aside.

21. The Insurer is to make a new work capacity decision in accordance with the Guidelines.

22. Payments to the worker should resume from the date of termination until the date on which any notice given is a new decision has expired.

A handwritten signature in blue ink, appearing to read "Wayne Cooper".

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
24 March 2017