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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 for procedural review is dismissed.**

##### **Introduction and background**

1. The applicant sustained an injury in the course of her employment on 31 March 2015. The insurer accepted liability for all relevant periods. Despite this, the insurer had great difficulty extracting accurate [or any] information from the applicant about her current earnings in alternative employment. As a result the Insurer invoked section 47 of the 1998 Act and later section 48A of the 1998 Act in attempts to elicit the relevant information. In the interim the Insurer had made a work capacity decision on 31 May 2016 assessing the applicant's PIAWE at \$1,057.69.
2. The applicant seeks procedural review of what her lawyers and at least one member of the merit review service are pleased to describe as a "work capacity decision," supposedly made on 22 July 2016. Oddly, no attempt is made to review the actual work capacity decision, being the one dated 15 May 2016.
3. The problems with describing the "decision" of 22 July 2016 as a "work capacity decision" are various:

First, the "decision" appears in an email between the Insurer and the WIRO. In the course of investigating a complaint, a WIRO officer communicated with the Insurer, who responded with details of payments which were proposed to be made to the worker. The method of calculation was included, relying on the PIAWE figure calculated on 15 May 2016.

Secondly, the Insurer specifically excluded this communication from the category of "work capacity decision" by express words, being the following:



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[The Insurer] note[s] **this is not a work capacity decision** of [the applicant's] ability to earn in suitable employment, but rather, in the absence and lack of co-operation in providing actual earnings, the best assessment that can be made to determine earnings.

Thirdly, a work capacity decision has to be communicated directly from an insurer to a worker by post or in person. This was an email, to a third party. There was clearly no intention on the part of the Insurer to have this communication regarded as a work capacity decision.

Fourthly, on the same date as the email, the insurer wrote a formal letter to the worker setting out her obligations under sections 47 and 48 of the 1998 Act. The Insurer alleged that the applicant had not provided adequate information for the proper management of the claim. The letter included the following words on page two:

Pursuant to section 48A of the 1998 Act, unless you comply with your obligations under this Section, weekly benefits may be suspended.

The letter from the Insurer to the applicant dated 22 July 2016 is temporally contiguous with the email to WIRO stating that there was inadequate information to make a work capacity decision.

4. For all of the above reasons it is obvious that there is no "work capacity decision" dated 22 July 2016.
5. The applicant sought Merit Review from the Authority by way of application received 24 August 2016. The Authority delivered its Findings and Recommendations dated 21 September 2016. The Authority found that, since the applicant had failed to apply for internal review of the "work capacity decision" dated 22 July 2016, there was no jurisdiction to perform a merit review. Following this startling decision, the applicant sought internal review, only to be told that the Insurer had no intention of conducting such a review, not only because there was no decision to review, but also because a section 74 Notice had been subsequently issued. For reasons set out by the Court of Appeal in the



*Sabanayagam* litigation, the declining of liability in the form of a section 74 Notice is not susceptible to internal or merit or procedural review.

6. The applicant once again approached the merit review service, this time armed with the Insurer's refusal to conduct an internal review. The Authority found that it had jurisdiction to conduct a review and made findings that the applicant:

- (i) has a present inability arising from an injury such that she is unable to return to her pre-injury employment;
- (ii) has the capacity to perform "some type of employment" for 7 hours per day, 3 days per week;
- (iii) is able to return to work in "suitable employment" as a receptionist or Call Centre Operator;
- (iv) has a current work capacity; and
- (v) is able to earn \$522.90 in suitable employment and has an entitlement to \$323.25 per week for a closed period, ending with the date that the section 74 Notice was issued.<sup>1</sup>

7. The applicant then made an application to this office for procedural review received on 8 March 2016. I am satisfied that the application has been made within time and in the proper form.

### **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. In addition to applying for procedural review the applicant has made various submissions, all proceeding from the false premise that the Insurer made, however inadvertently, a work capacity decision on 22 July 2016.

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<sup>1</sup> I note in passing that \$323.25 is less than the \$404 per week set out in the email from the Insurer to WIRO.



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### **Submissions by the Insurer**

10. The Insurer maintains its position that no work capacity decision was made on 22 July 2016. It makes other submissions in the alternative, but there is no need to proceed further with those.

### **Decision**

11. The legislation and Guidelines set out the requirements for work capacity decisions. The Insurer made no effort to comply with these, for the stated reason that it was not making a work capacity decision. It is obvious from the content of the relevant correspondence that the Insurer did not believe itself to be in possession of sufficient relevant information to make such a decision. That is the context in which the email to WIRO (made in response to a complaint) must be seen.

12. There being no work capacity decision made by the insurer dated 22 July 2016, this office has no jurisdiction to conduct a procedural review.

### **Finding**

13. There is no work capacity decision and therefore no jurisdiction to conduct a review.

14. The merit review recommendation remains binding between the parties in the absence of judicial review.

### **RECOMMENDATION**

15. 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



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Workers Compensation Independent Review Officer  
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