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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 dated 30 March 2016 is dismissed.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 22 March 2016. The decision informed the applicant that he does not meet the requirements for continuation of weekly payments after 130 weeks under section 38(3) of the 1987 Act. Accordingly, his payments are to cease on 30 June 2016.
2. The applicant next made an application to this office for procedural review by way of application dated 30 March 2016. I am satisfied that the application has been made within time and in the proper form.
3. Despite this, I am not satisfied that the application has been properly made. There has been no attempt by the applicant to seek internal review, nor has there been any attempt to seek merit review.
4. The applicant has accused the Insurer of issuing a section 74 notice in disguise. He appears to seek some sort of declaratory relief whereby this Office gives a ruling on the question of whether or not this work capacity decision by the insurer is really a section 74 notice in sheep's clothing.

Submissions by the applicant

5. The applicant makes the following submissions, reproduced verbatim:

1. The disguised work capacity review is effectively a s74 Notice regarding weekly payment and outside the capacity review process. The concept of suitable employment is not within the domain of s44A of the 1987 Act.



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2. Suitable employment has been dealt with by Workers Compensation to be within the exclusive purview of the Workers Compensation Commission within Wollongong Nursing Home Pty Ltd v Dewar [2014] NSWCCPD 55, Cronje v Leighton Contractors Pty Ltd [2015] NSWCCPD 16, Hume v CSR Ltd [2015] NSWCCPD 7.

3. Workcover has no power to decide the question of suitable employment, there, it is a matter of jurisdiction for the WCC.

4. For the purposes of s44A and Work Capacity review SIRA has no power since it is not Workcover.

5. The powers of WIRO have been widened by the decision of the Supreme Court in 2015 as well as CSR Limited v Busbridge [2015] NSWSC 1268. I therefore seek review based upon the observations of the Supreme Court in Burbidge cases.

6. I submit the decision by the SIRA has not given due weight to the report of Dr K Q. It seems he has identified disc injury leading to nerve root injury and Lumbar radiculopathy and dramatic dislodgement of frontal incisor. I submit my capacity is impaired and my condition may put me into highest need category.

7. There is no medical report from insurance doctors relating to my needs and therefore SIRA decision must be satisfied.

8. WRO is independent of Workcover and SIRA. WIRO is not governed by workcover guidelines. in Tan v National Australia Bank 2008 NSWCA 198 at paragraph 34, it was held Workcover guidelines are "primarily intended to assist Workcover NSW Licenses Insurers" and furthermore "cannot and do not purport to, affect the proper construction of the Act" Any expectation by SIRA that workers abide by the guidelines is misguided and contrary to the decision in Tan by the highest court in NSW. It is submitted Workcover Guidelines on Work Capacity to the extent it provides guidance to Workcover may be followed by the scheme agent and does not affect the power and jurisdiction of WIRO. In any event the guidelines are not published under 1978 Act and the powers of WIRO emanate from the 1978 Act.

9. Workcover guidelines do not amend the law and are only meant to guide the Workcover and insurance companies. Workcover guidelines cannot amend the statute.

10. While my review is pending I request the scheme agent may be advised to pay all my areas of weekly payments and not stop any payments until the decision is made by WIRO. The power to decide any matter to overturn a decision of any impugned authority includes the power in the interest of justice to make a direction to continue the entitlement the applicant may be entitled to.

Submissions by the Insurer

6. The Insurer has not made submissions in response to the application.

Decision



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7. The power of this office to review work capacity decisions is set out in section 44BB of the 1987 Act. Most importantly, section 44BB(1)(c) contains the words **highlighted** below:

44BB Review of work capacity decisions

(1) An injured worker may refer a work capacity decision of an insurer for review:

(a) by the insurer in accordance with the Workers Compensation Guidelines within 30 days after an application for internal review is made by the worker, or

(b) by the Authority (as a merit review of the decision), but not until the dispute has been the subject of internal review by the insurer, or

(c) to the Independent Review Officer (as a review only of the insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer in making the decision), **but not until the dispute has been the subject of internal review by the insurer and merit review by the Authority.**

8. The wording of section 44BB(1)(c) is unequivocal. There has been no request by the applicant for either internal review or merit review.
9. It follows that this Office has no power to conduct a procedural review at this time.
10. This Office also has no power to make declaratory orders.
11. The applicant should apply to the Insurer for an internal review prior to the expiration of 30 days from the date he received the work capacity decision if he wishes to obtain the benefit of the stay to which he refers in his final submission, reproduced *supra* at paragraph 5.
12. Alternatively, the applicant might seek legal advice about testing the question of the status of the decision as a section 74 notice in another place.

Finding



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13. By virtue of section 44BB(1)(c) I cannot conduct a procedural review in the absence of internal review and merit review.

RECOMMENDATION

14. The Application for Procedural Review dated 30 March 2016 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
31 March 2016