



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 is as set out in recommendation 8414 (#84 of 2014) and 3516 (#35 of 2016).
2. The applicant had succeeded in getting the Authority to overturn an earlier work capacity decision. The Authority had found that the applicant was entitled to be paid in accordance with section 38(6) and recommended that the insurer make the relevant calculations.
3. In attempting to follow the recommendations of the Authority, the insurer requested the worker attend an assessment session for the purpose of determining work capacity. The worker did not attend and made no reasonable attempt to do so. Nor did the worker provide a satisfactory reason for not attending. Accordingly the Insurer issued a notice under section 44A(6) on 8 July 2016 suspending the weekly payments of the applicant, based on her refusal to cooperate with a reasonable request by the insurer.
4. The applicant made what is described as an "optional review request" and on 28 July 2016 the Insurer advised that it was maintaining its position.
5. It appears that at this stage the applicant actually sought merit review of what she called the "work capacity decision" of the insurer. This was misguided, since the payments were terminated precisely because the conduct of the applicant was making it impossible for the Insurer to make a work capacity assessment, leading to a decision. The Authority received this application on 9 August 2016.



6. I will extract the following directly from a subsequent document produced by the merit review service, dated 9 February 2017, since it is likely no one reading this would believe it were authentic if it were not in quotation marks:

“15. On 5 September 2016, the Authority issued a decision that it did not have jurisdiction to undertake a review of the Insurer’s decision to suspend [the applicant’s] weekly payments of compensation. The Authority found that **there had been no internal review of the decision**, which was required in accordance with section 44(1)(b) of the 1987 Act.

“16. [The applicant] submitted a ‘*Work Capacity – application for internal review by insurer*’ [form] to the Insurer. The application is dated 21 November 2016.

“17. On 14 December 2016, the Insurer wrote to [the applicant] and expressed the view that the decision that had been made to suspend her weekly payments of compensation **was not a work capacity decision**. The Insurer therefore declined to conduct an internal review.

“18. The application for merit review was received by the Authority on 13 January 2017. As **the insurer has declined to review the work capacity decision**¹ and it has been more than 30 days since the application for internal review was made, **I am satisfied that the Authority may conduct a merit review of the work capacity decision**, in accordance with section 44BB(3)(b) of the 1987 Act.”

7. The considered view of the Authority, as far as can be gleaned from what appears above, appears to be that any decision by an Insurer can be turned into a work capacity decision by the simple expedient of a worker submitting a form requesting “internal review” under section 44BB. This magic appears to work even when there has been no

¹ Note that this is the first time the Authority has referred to the decision of 8 July 2016 to suspend payments under section 44A(6) as a “work capacity decision.”



decision under section 43(1) and even when the Insurer expressly states that it has not made any such decision.

8. Having decided that it now had jurisdiction to conduct a review, the Authority proceeded to make the following findings:
 - (i) The applicant refused to attend an assessment (for the purpose of a work capacity assessment) under section 44A of the *Workers Compensation Act 1987*;
 - (ii) The insurer's requirement that [the applicant] attend a work capacity assessment was reasonably necessary; and
 - (iii) [The applicant's] entitlement to weekly payments of compensation was suspended in accordance with section 44A(6) of the 1987 Act.
9. As is becoming increasingly customary, the Authority made no recommendation. This renders the commentary above even more toothless than it already was, since it is only recommendations which bind the parties, not findings. "Toothless" refers to the slightly awkward fact that the merit review service has no power at all to make orders about section 44A(6), its jurisdiction being strictly limited to the merit review of work capacity decisions made pursuant to section 43(1). Since no such decision was made in this case, there was no power to conduct a review at all, perhaps rendering otiose the distinction between findings and recommendations.
10. The applicant sought procedural review by application received by this office on 20 March 2017. While the application would have been made within time and on the correct form had there been a work capacity decision in dispute, there is not such a decision in dispute and therefore I do not accept that the application is made (or can be made) validly.

Finding

11. The decision to suspend benefits dated 8 July 2016 was not a work capacity decision. This Office has no jurisdiction to conduct a procedural review of such a decision.



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

RECOMMENDATION

12. 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
13 April 2017