



**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 24 October 2016 is set aside.**
- b. The Insurer is to make a new work capacity decision which complies with the Guidelines and the legislation.**

**Introduction and background**

1. The applicant sustained injury to his lumbar spine due to the nature and conditions of his employment as a Table Hand. For the purposes of the *Workers Compensation Act 1987* the deemed date of injury appears to be agreed between the parties as 8 July 2016. The insurer accepted liability and made weekly payments for all relevant periods. The applicant does not currently work.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 24 October 2016. The Decision informed the applicant that his weekly payments of compensation would cease on 28 October 2016, there being no need to provide three months notice under section 54 because the applicant had only received payments for less than 12 weeks. The Insurer nonetheless seems to have provided four days notice in line with the postal delivery rule set out in section 76 of the *Interpretation Act 1987*.
3. The justification given for the cessation of payments was that the insurer had evidence that the applicant could work in suitable employment for 40 hours per week and in doing so could actually earn more than his pre-injury average weekly earnings (PIAWE). The applicant's own nominated treating doctor (NTD) concurred with the view that the applicant had such current work capacity, although did insist that the applicant was unable to engage in employment requiring prolonged standing or lifting more than 10 kilograms at a time.



4. The applicant sought internal review by the Insurer and the original decision was maintained, as advised to the applicant by letter dated 10 January 2017. The Insurer noted in the course of the internal review that it had served a section 74 Notice disputing liability in relation to medical treatment on 29 November 2016.
5. The applicant sought Merit Review from the Authority by way of application received 6 February 2017. The Authority delivered its Findings and Recommendations dated 7 March 2017.
6. The Authority made findings that the applicant:
  - (i) has “current work capacity” as defined in section 32A of the Act;
  - (ii) is able to return to work in “suitable employment” as a Product Assembler; and
  - (iii) for the purposes of assessing work capacity, the figure of \$756.40 is to be taken into account as the applicant’s “earnings after injury.”<sup>1</sup>
7. The merit reviewer made the following recommendation:
  6. The Insurer is to determine [the applicant’s] entitlement to weekly payments of compensation in accordance with my findings above from 24 October 2016.
8. The applicant then made an application to this office for procedural review received on 31 March 2017. I am satisfied that the application has been made within time and in the proper form.
9. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *Guidelines for claiming workers compensation* (Guidelines).

### **Submissions by the applicant**

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<sup>1</sup> I can only assume this refers to his **ability to earn**, since the merit reviewer was aware that the applicant was not working at the time of the decision and had not worked since the alleged date of injury.



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

10. 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.”*

11. In addition to applying for procedural review the applicant has made the following submissions:

- The Insurer advised at the bottom of page 6 of their work capacity decision that rehabilitation assistance would cease on 28.10.2016 which is the date weekly payments are to cease under the work capacity decision. However section 60 of the *Workers Compensation Act 1987* includes any workplace rehabilitation service and under section 59A, the worker would be entitled to reasonable and necessary workplace rehabilitation services for a period of at least two years after the cessation of his weekly benefits.
- Under section 59 a workplace rehabilitation service is defined as meaning *“any service provided as a workplace rehabilitation service by or on behalf of a provider of rehabilitation services approved under section 52 of the 1998 Act.”*
- On page 6 of the work capacity decision the insurer did advise the worker that medical and other related treatment expenses would cease 2 years after the cessation of his weekly benefits but did not advise that also included workplace rehabilitation services.
- Accordingly the work capacity decision misinforms the worker that he would not be entitled to any rehabilitation support services after his weekly payments are cut.

### **Submissions by the Insurer**

12. The Insurer made the following submissions:

Please note [the Insurer’s] Submissions in response to [the applicant’s] Application for Procedural Review:



Level 4, 1 Oxford Street, Darlinghurst NSW 2010  
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[The Insurer] note[s] that the Worker was provided with the relevant Transferable Skills Assessment as an attachment to the original Work Capacity Decision. Upon receipt of the Work Capacity Decision, the Worker was provided the opportunity to make any relevant submissions and or provide further material prior to lodging the Application for Review.

[The Insurer] made a number of attempts to contact [the applicant] to discuss the Work Capacity Decision and evidence. The details of the attempts are outlined in the documents attached to the Worker's Application for Procedural Review.

[The Insurer] rel[ies] on the findings on the Work Capacity Decision, Internal Review Outcome as well as the Merit Review Service Decision.

[The Insurer] relies on the following material and contents therein:

- a. Work Capacity Decision dated 24 October 2016;
- b. Internal Review Outcome dated 10 January 2017; and
- c. Merit Review Outcome dated 7 March 2017.

13. These submissions make no reference to the issue raised by the applicant. An inference might be appropriately drawn that the Insurer had nothing to say which would advance its position on this issue.

### **Decision**

14. The relevant Guidelines came into effect on 1 August 2016. Those Guidelines provide that an action taken by an insurer will remain valid even if there is a technical breach of the Guidelines, unless the worker is "misled," suffers prejudice or is a victim of procedural unfairness. The Guidelines also state that all relevant legislative instruments must be strictly complied with by the Insurer.

15. There can be no dispute that the applicant is correct in stating that rehabilitation services are included in section 60 (see: section 60(1)(d)). Similarly, it follows that the requirement for the provision of payment for



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

pre-approved medical treatment for at least two years<sup>2</sup> also extends to payment for rehabilitation services.

16. The precise wording in the work capacity decision was as follows:

We will provide you with rehabilitation assistance when (*sic*) if and when required.

However, this will cease on 28.10.2016.

17. The applicant was clearly misled by this statement into believing that the obligation of the employer to assist with workplace rehabilitation ended on the same date as weekly payments. Accordingly the Guidelines are materially breached and the decision must be set aside for procedural error.

### **Finding**

18. The work capacity decision was invalidly made.

### **RECOMMENDATION**

19. The work capacity decision dated 24 October 2016 is set aside.

20. The Insurer is to make a new work capacity decision which complies with the Guidelines and the legislation.

A handwritten signature in blue ink, appearing to read "Wayne Cooper", with a long horizontal stroke extending to the right.

Wayne Cooper  
Delegate of the Workers Compensation Independent Review Officer  
28 April 2017

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<sup>2</sup> Longer periods apply to workers with whole person impairment of greater than 10% or 20%.