



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 by the Insurer dated 28 October 2016 is set aside.**
- b. A new decision is to be made in accordance with Section 43(1) of the *Workers Compensation Act 1987*.**
- c. Pursuant to Section 44BB(1)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.**

Introduction and background

1. The factual background to this application is set out in WIRO recommendation 5616 (#56 of 2016) and need not be repeated .
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 28 October 2016. The Decision informed the applicant that his weekly payments of compensation would cease from 06 February 2017, as a result of section 38(3). The applicant has received more than 130 weekly payments, however has not returned to work, thereby failing to comply with section 38(3)(b) and (c).
3. The applicant sought internal review by the Insurer on 23 February 2017 and the Internal Review Decision was dated 8 March 2017, confirming the original Work Capacity Decision.
4. The applicant sought Merit Review from the Authority by way of application received on 10 March 2017. The Authority delivered its Findings and Recommendations dated 13 April 2017. The Authority made findings that the applicant: (i) has the ability to return to work in "suitable employment" as defined in section 32A; (ii) has current work capacity as defined in section 32A; and (iii) does not meet the



requirements of section 38(3) of the 1987 Act and as such is not entitled to weekly payments of compensation.

5. As is becoming customary, the Authority made no recommendation.
6. The applicant sought procedural review by way of application to this Office dated 12 May 2017. I am satisfied that the application has been made within time and in the proper form.
7. Section 44A of the *Workers Compensation Act 1987* provides that a work capacity assessment must be conducted in accordance with the relevant *Guidelines*.

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. The applicant has provided submissions through his solicitor, including the following:
 - The insurer led the applicant to believe that he had no prospect of any future weekly payments;
 - The work capacity decision fails to advise the applicant whether his weekly payments will resume if he returns to work for not less than 15 hours per week and earning \$183 or more per week;
 - The failure to so advise, whilst at the same time advising the applicant that he will “no longer have any weekly payments entitlement” (see bottom of page 2 of the decision), means that the effect of the work capacity decision is to induce a belief in the applicant that his entitlements to weekly payments have ceased, regardless of whether he does or does not return to working for not less than 15 hours per week and earning \$183 or more per week.

Submissions by the Insurer



10. The Insurer made no submissions in response.

Decision

11. The relevant *Guidelines* are dated and came into effect on 1 August 2016.

12. In contradistinction to the former *Guidelines*, which contained Guideline 5.3.1, there is no present requirement for the Insurer to spell out the full consequences of the decision. There is, however, a requirement that a worker not be misled by the insurer. This is contained within the “substantial compliance” section of the current *Guidelines*, which appears on page 6 in the following terms:

*If a worker or insurer provides information or takes action that is compliant with these guidelines, but is a technical breach of these guidelines, then the information or action remains valid **unless** a party has, as a result of that breach:*

been misled

been disadvantaged, or

suffered procedural unfairness.

It is difficult to see how something could be both “compliant with these guidelines” and “a technical breach of these guidelines” at the same time.

13. The applicant refers to statements made in the Insurer’s decision to the effect that he has no further entitlement to weekly payments. On the first page of the decision the Insurer says this:

This decision will mean that you **no longer have any weekly payments entitlement**. The change in your weekly payments will become effective from 06 February 2017.



14. On the following page there is an allusion to some sort of right of reinstatement, but it is not explained how this could ever come about. The only reference to this is contained in an explanation of section 59A in the following terms:

However, **should you again become entitled to weekly payments**, your right to medical and related treatment expenses could also be restored under section 59A(3) of the Workers Compensation Act 1987.

15. The insurer has correctly explained section 59A(3), but has in no way told the applicant what steps he might take to have his weekly payments restored. The Insurer should have told the applicant that in order to be restored to weekly payments he needs to return to work for not less than 15 hours per week, earn at least \$183 per week, and convince the insurer to agree that he cannot do any more work than he is then doing. The failure of the Insurer to so advise the applicant has left him with the false impression that there is nothing he can do to restore his right to weekly payments.

Finding

16. Under the legislation the Insurer can make an assessment of the applicant's work capacity and then a decision about that work capacity, but they must comply with the legislation, the Regulation and the Guidelines in order to produce a procedurally correct result. In the current instance there is a clear breach of the Guidelines, which are to be treated as delegated legislation. Accordingly the Work Capacity Decision must be found to be invalid.

RECOMMENDATION

17. The Work Capacity Decision by the Insurer dated 28 October 2016 is set aside.
18. A new decision is to be made in accordance with Section 43(1) of the *Workers Compensation Act 1987*.



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19. Pursuant to Section 44BB(1)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.

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
14 June 2017