



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 is dismissed.

Introduction and background

1. The applicant suffered injury on or about 28 June 2013 in the course of his employment as a Packer/Loader. The former insurer accepted liability and made weekly payments for all relevant periods.
2. His former employer terminated the applicant's employment in September 2013. He has not worked since.
3. The former insurer made a work capacity decision in November 2013 certifying the applicant as capable of earning \$890.52 per week in suitable employment.
4. More than four months having elapsed from the date of the work capacity decision, on 27 March 2014 a section 74 Notice was served declining liability to make further payments.
5. Between that date and 2017 the former Insurer passed its file to the new Insurer, which received from the applicant in June 2017 an application for internal review of the original work capacity decision made by the former insurer in November 2013.
6. Perhaps unsurprisingly the applicant was informed that the new Insurer could not undertake an internal review of the former insurer's decision, since it had been overtaken by events, including the issuing of no less than two section 74 Notices, in 2014 and 2015.
7. The applicant sought Merit Review from the Authority and the Authority delivered its Findings and Recommendations dated 11 September 2017.



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The Authority made findings that: (i) the applicant had no current work capacity between 12 November 2013 and 26 March 2014.

8. The Authority made the consequential recommendation that the applicant is entitled to be paid \$879.79 per week for the period 12 November 2013 to 26 March 2014. It was noted that the Authority has no power to recommend weekly payments for the period following the issuing of a section 74 Notice, the first of which was issued on 27 March 2014.
9. An application to this office for procedural review was received on 19 September 2017. I am satisfied that the application has been made within time and in the proper form.

Submissions by the applicant

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.”* The applicant has provided the following submissions:

- He seeks a “fair go”; and
- The section 74 Notice declining liability was “wrong.”

11. The first submission is somewhat vague in scope, particularly since no specific instances of unfairness are enumerated, whereas the second submission is outside the jurisdiction of this office.

Submissions by the Insurer

12. In response the Insurer has submitted:

- It appears that the applicant is seeking a review of the Section 74 refusal of liability decision and will need to lodge a section 287A application for review by Insurer and as a result the Insurer is unable to review the work capacity decision.

Decision



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13. It appears that events have overtaken this applicant. The original work capacity decision was clearly subsumed within the subsequent section 74 Notices, the first of which was not made until the expiration of any notice period required by section 54(2)(a). In that time the applicant had sought neither internal review nor merit review. In the intervening period between the date of the original work capacity decision (12 November 2013) and the application for internal review (2 June 2017), no less than two section 74 Notices had issued and the applicant had litigated a section 66 claim in the Commission.
14. I can see no utility in investigating the original work capacity decision in the circumstances outlined above. This is particularly so since the Authority has actually awarded compensation to the applicant for the only period which does not fall within the jurisdiction of the Commission.

Finding

15. Section 44BB(3)(c) allows this office to decline to conduct a review when the request is frivolous or vexatious. Given the delay of more than three years between the original decision and the request for internal review, particularly in the context of the two section 74 Notices and the section 66 litigation, I find that this application falls within the range of those which might be declined under section 44BB(3)(c).

RECOMMENDATION

16. The application 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
19 October 2017