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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 work capacity decision made by the Insurer on 7 April 2017 is set aside.
- b. The Insurer is to make another work capacity decision after an appropriate period of fair notice is given to the applicant.

Introduction and background

1. The applicant sustained injury in the course of his employment as a Production Worker/Graphic Designer on or about 06 October 2015. After an initial denial of liability by way of section 74 Notice, the later insurer accepted liability and made weekly payments for all relevant periods. The applicant does not currently work.
2. The Insurer wrote to the applicant on 4 April 2017, purporting to give Fair Notice of an impending work capacity decision. The words "**Work Capacity Decision – Fair Notice**" appear in bold as a heading to the letter. In that very document the following paragraph appears:

[The Insurer] wishes to provide an opportunity for you to supply information you believe relevant to a decision about your capacity to work. We request that this information be received before 11 April 2017 so [the Insurer] can consider the information when making our final decision which will then be communicated to you accordingly.

3. Given that section 76(1)(b) of the *Interpretation Act 1987* generally requires four working days to be allowed for postal delivery, meaning that the applicant would be deemed to have received this letter no earlier than Monday 10 April 2017, it might be thought that the deadline imposed was, to say the least, tight. If the applicant responded also by



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post, and did so on the date of receipt of the letter from the Insurer, then the Insurer would be deemed to have received the reply no earlier than Friday 14 April 2017.

4. The awkward position this places the Insurer in is caused by the date of the ensuing work capacity decision, which was dated 7 April 2017. That is to say, the Insurer wrote to the applicant via ordinary post on Tuesday 4 April 2017 purporting to give Fair Notice and requesting documents by 11 April 2017, but then made the work capacity decision three days later on Friday 7 April 2017.
5. Although the *Guidelines* which came into effect on 1 August 2016 do not specify a hard and fast period of Fair Notice, the Insurer has in this case imposed a deadline itself which it failed to honour. There was clearly no opportunity for the applicant to respond to the Fair Notice letter prior to the decision being made.
6. In the circumstances the applicant has clearly been denied procedural fairness and the work capacity decision must be set aside.

Finding

7. The applicant was denied procedural fairness in that he was not provided adequate Fair Notice prior to a work capacity decision being made.

RECOMMENDATION

8. The work capacity decision made by the Insurer on 7 April 2017 is set aside.
9. The Insurer is to make another work capacity decision after an appropriate period of fair notice is given to the applicant.



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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
24 October 2017