



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 purportedly made on 28 June 2017 is set aside.**
- b. The Insurer should: (i) either make a valid work capacity decision based on a proper construction of the terms in section 32A, or make a liability decision and (ii) issue a consequential notice, as appropriate.**

Introduction and background

1. The applicant suffered injury on or about 14 February 2015 when he slipped and fell in the course of his employment as a Kitchen Hand. The insurer accepted liability and made weekly payments for all relevant periods.
2. The former employer terminated the applicant's employment and he has not worked since.
3. The insurer purported to make a work capacity decision on 28 June 2017. In the course of this decision the insurer made two findings which are of interest for present purposes: first, it was found by the insurer that the applicant had an ability to perform his pre-injury duties; and secondly, the insurer found that "suitable employment" was the same pre-injury employment engaged in by the applicant at the time of his initial injury. A consequent finding was made that the applicant could earn more than his PIAWE.
4. As a result of these findings the Insurer advised the applicant that his weekly benefits would cease, effective on 4 October 2017.
5. I said "purported" to make a work capacity decision at paragraph 3 *supra* because a work capacity decision has to have as its subject the "current



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work capacity” of a worker. Relevantly, section 32A of the 1987 Act defines “current work capacity” as:

... a present ***inability arising from an injury*** such that the worker is ***not able to return to his or her pre-injury employment*** but is able to return to work in suitable employment. (Emphasis added)

Further, section 32A defines “suitable employment” as:

... employment in work for which the worker is currently suited:

(a) having regard to:

- (i) the nature of the worker’s incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and
- (ii) the worker’s age, education, skills and work experience, and
- (iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and
- iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and
- (v) such other matters as the Workers Compensation Guidelines may specify, and

(b) regardless of:

- (i) whether the work or the employment is available, and
- (ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and
- (iii) the nature of the worker’s pre-injury employment, and
- (iv) the worker’s place of residence.

6. The applicant sought internal review, which resulted in the earlier decision being affirmed.



7. The applicant sought Merit Review from the Authority, which delivered its Findings and Recommendations on 25 September 2017. The Authority made findings that the applicant (i) has current work capacity; (ii) is able to return to work in suitable employment as a Kitchen Hand; and (iii) is able to earn \$792 per week in suitable employment (his PIAWE was \$671.70).
8. The Authority made no consequential recommendation, having made the same findings as the Insurer.
9. An application to this office for procedural review was received on 5 October 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:

There is a breach of Procedural Fairness as the Insurer incorrectly found:

- i. That the worker is capable of returning to pre-injury duties which is outside the scope of section 32A definition of “current work capacity;” and
 - ii. The finding that the “suitable employment” as defined in section 32A is the worker’s pre-injury employment
11. The submissions go more to a question of jurisdiction than procedural fairness, but they are relevant for present purposes. They also have considerable force.

Submissions by the Insurer

12. In response the Insurer has submitted:



- The Insurer determine that the applicant has a current incapacity for work whereby he cannot return to his “pre-injury employment” due to his termination which prevents such a return to work in the same conditions of that pre-injury employment however he has the functional capacity to perform his pre-injury role.

13. It is hard to know where to start in responding to the Insurer’s submission. Perhaps all that need be said is that the “inability to return to pre-injury employment” as described in section 32A has to arise from injury, rather than from an industrial decision made by an employer.

14. That the Insurer actually repeats the statement that the applicant “*has the functional capacity to perform his pre-injury role*” in the course of submissions to this Office betrays a misunderstanding of section 32A and the definition of “current work capacity” which is apparently ongoing.

Decision

15. For the reasons canvassed by the Court of Appeal in *Sabanayagam v St George Bank Limited* [2016] NSWCA 145 there is a serious distinction to be drawn between a work capacity decision and a decision to dispute liability to make weekly payments of compensation. A decision to dispute liability to make weekly payments is specifically excluded from the definition of “work capacity decision” by operation of section 43(2)(a).

16. Similarly, it is incontestable that a work capacity decision, which concerns “current work capacity,” must have as its premise that the worker suffers from a present inability to perform his pre-injury employment, with that inability arising from injury.

17. In the present case the Insurer does not accept that the applicant has a present inability to perform his pre-injury employment arising from injury. It follows that the decision made by the Insurer is not a true work capacity decision, but is more in the style of a liability dispute. If the latter, the appropriate course for the Insurer would have been to issue a section 54 Notice (or a section 74 Notice) declining liability to make ongoing payments.



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Finding

18. The decision made by the Insurer on 28 June 2017 was not a valid work capacity decision.

RECOMMENDATION

19. The work capacity decision purportedly made on 28 June 2017 is set aside.

20. The Insurer should: (i) either make a valid work capacity decision based on a proper construction of the terms in section 32A, or make a liability decision; and (ii) issue a consequential notice, as appropriate.

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
26 October 2017