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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 section 74 Notice issued by the Insurer dated 9 July 2015 was not a "work capacity decision" or notice of a work capacity decision.**
b. **The purported "internal review" dated 24 February 2016 is more properly styled a "work capacity decision," but as such did not comply with the Guidelines or the legislation and must be set aside.**
c. **Since the Insurer purported to decline liability on 9 July 2015 under section 74 on the grounds of "no partial or total incapacity" (see section 33) the correct forum for review of that decision is the NSW Workers Compensation Commission.**
d. **The Insurer should make a new work capacity decision for the period commencing 24 February 2016, this time in accordance with the legislation and the Guidelines.**

Introduction and background

1. The applicant seeks procedural review of a "Work Capacity Decision" allegedly made by the Insurer on 9 July 2015. The Decision was conveyed to the applicant in the form of a section 74 Notice disputing liability to pay compensation due to a finding by the Insurer that the applicant had no ongoing incapacity, as required by section 33.

2. Due to a decision made by a Deputy President of the Workers Compensation Commission ["the Commission"] on 21 January 2016,[1] it was thought that a section 74 Notice might contain evidence of an "implied" work capacity decision, made prior to the issuing of the Notice, and that such a "decision" might be reviewable under section 44BB. Accordingly the applicant sought "internal review" on 3 February 2016 and the "Internal Review Decision" was dated 24 February 2016.

[1] *Sabanayagam v St George Bank Ltd* [2016] NSWWCCPD 3

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3. The purported "internal review" arrived at a different result and the Insurer conceded that the applicant was entitled to ongoing weekly payments of compensation, but the Insurer would not back-date the payments to the date of the section 74 Notice. It remains the case that the Insurer declines liability to make weekly payments at least for the period between the date of the section 74 Notice and the date of the "internal review."

4. The applicant sought Merit Review from the Authority by way of application received 26 February 2016. The Authority delivered its Findings and Recommendations dated 13 April 2016. The Authority made a finding that it had no jurisdiction to conduct a merit review because:

   - The section 74 Notice was a decision to dispute liability, which cannot be a work capacity decision by reason of section 43(2)(a);

   - The authority only has power to review work capacity decisions, not liability disputes; and

   - The decision made on 24 February 2016 that the applicant is not an "existing recipient" for the purposes of applying the transitional rate is itself a work capacity decision under section 43(1)(f), but has not been subject to internal review or even an application for internal review, so cannot be the subject of merit review.

5. The applicant then applied to this office for procedural review by way of application dated 13 April 2016. I am satisfied that the application has been made within time and in the proper form.

6. The applicant sustained injury in 2006 with a previous employer and in 2009 suffered injury to different body parts with a different employer, insured in the same interests as the earlier employer. The current proceedings concern the second injury.

7. The earlier injury was subject to proceedings in the Commission[2]. They also arose following a section 74 Notice. Those proceedings remain unresolved. As recently as yesterday the NSW Court of Appeal remitted

[2] See note 1 *supra*.

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the proceedings back to the Commission for an Arbitrator to determine in accordance with reasons for the judgment of the Court.[3] The Court made the following findings which are relevant for present purposes:

- There was no evidence that a work capacity decision had been made prior to the section 74 Notice. To "infer" such a decision is an error of law.

- The Insurer was not making a decision within section 43(1)(a).

- Section 43(1)(f) cannot convert a purported decision by an insurer that it has no authority to make into a decision that is subject to the privative clauses in section 43(1) and section 43(3).

- The decision the subject of the section 74 Notice was not a work capacity decision because, *inter alia*, it purported to be a decision "to dispute liability for weekly payments of compensation," thus falling within section 43(2)(a), because it gave notice pursuant to section 74, and because there was a failure by the Insurer to consider the worker's ability to return to work in suitable employment.[4]

8. Since the background to the two sets of proceedings is so similar (both started with a section 74 Notice, both subsequently had that Notice at some stage treated as a work capacity decision notice), it follows in my view that the decision of the Court of Appeal would apply *mutatis mutandis* to the current proceedings.

9. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).

10. The Court of Appeal used the Guidelines as *indicia* of the type of decision being made. At paragraph 145 Sackville, AJA said:

[3] *Sabanayagam v St George Bank Limited* [2016] NSWCA 145
[4] Note: Basten JA (Beazley, P agreeing) makes the point about section 43(2)(a) at paragraphs 20-25; *contra* is Sackville, AJA who at paragraphs 164 and 167 gives his "opinion" (see paragraph 156) that sections 43(2)(a) and (b) do not exclude a decision from the definition of "work capacity decision." By virtue of the seeming disclaimer in paragraph 156, Sackville, AJA might be flagging that his statements are at best *obiter dicta*. Otherwise, the question might not be as settled as it seems.

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145. There are other indications that the insurer was not purporting to make a decision about the Worker's current work capacity. The insurer did not comply with the fair notice provisions in the Work Capacity Guidelines *applicable to work capacity decisions. Nor did the Insurer give notice of its decision in the manner required by the* Work Capacity Guidelines *for a work capacity decision. Instead it gave a notice that was said to comply with* s 74 *of the* WIM Act*. But that provision, as* s 74(6) *suggests, is not concerned with notification of a dispute based on a work capacity decision made by an insurer pursuant to* Div 2 of Pt 3*.*

11. It is clear from the Court of Appeal decision that a section 74 Notice cannot substitute for a work capacity decision. The failure to follow the *Work Capacity Guidelines* also means that any work capacity decision embedded within the cloak of a section 74 Notice must be invalid on procedural grounds.

Section 44BB Review

12. A question thus arises about the status of the merit review document, which, despite being 49 paragraphs and more than six closely spaced pages long, seems to conclude that SIRA has no jurisdiction to conduct a merit review. Despite this conclusion being reached in paragraph 1 on page 1, paragraphs 38-49 engage in a detailed examination of whether or not the applicant was an existing recipient immediately prior to 1 October 2012, which is a question the merit reviewer says arises out of a "work capacity decision" made on 24 February 2016.

13. Despite the view expressed as to jurisdiction, it seems clear that the merit reviewer has in fact conducted a merit review, even if only of a small element of the decision dated 24 February 2016. It must follow that this Office has power to conduct a procedural review.

Finding

14. For the reasons expressed by the merit reviewer[5] and for the reasons given by the Court of Appeal[6] the section 74 Notice issued by the

[5] See the three bullet points at paragraph 4 *supra*.

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Insurer on 9 July 2015 cannot be found to be a work capacity decision, the "internal review" conducted by the Insurer on 24 February 2016 cannot be a valid internal review, but might be styled an attempt at a work capacity decision, and if so, that decision did not follow the correct procedures for a work capacity decision set out in the legislation and Guidelines and must be found invalid on procedural grounds.

RECOMMENDATION

15. The section 74 Notice issued by the Insurer dated 9 July 2015 was not a "work capacity decision" or notice of a work capacity decision.

16. The purported "internal review" dated 24 February 2016 is more properly styled a "work capacity decision," but as such did not comply with the Guidelines or the legislation and must be set aside.

17. Since the Insurer purported to decline liability on 9 July 2015 under section 74 on the grounds of "no partial or total incapacity" (see section 33) the correct forum for review of that decision is the NSW Workers Compensation Commission.

18. The Insurer should make a new work capacity decision for the period commencing 24 February 2016, in accordance with the legislation and the Guidelines.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
28 June 2016

[6] At paragraphs 7-10 *supra*.