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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 20 November 2014 was not a "work capacity decision" or notice of a work capacity decision.

b. The "internal review" dated 18 March 2016 is titled "written advice of a work capacity decision and its outcome." However, it did not comply with the Guidelines or legislation and must be set aside.

c. As the Insurer declined liability on 20 November 2014 under section 74 of the Workplace Injury Management and Workers Compensation Act 1998 on the grounds that the applicant does "not have any incapacity for work" the correct forum for the review is the Workers Compensation Commission.

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

Introduction and background

1. The applicant seeks procedural review of a *"Work Capacity Decision"* made by the Insurer on 20 November 2014. The Decision was conveyed to the applicant in the form of *"Notice under section 74 of the Workplace Injury Management and Workers Compensation Act 1998"* (1998 Act) and informed the applicant that liability to pay compensation was disputed on the basis the applicant had no ongoing incapacity as required by Section 33 of the *Workers Compensation Act* 1987 (1987 Act).

2. Deputy President O'Grady made a decision [1] in the Workers Compensation Commission (WCC) on 21 January 2016 wherein he

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

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considered that a section 74 notice may contain evidence of an implied work capacity decision and that such a decision is reviewable under Section 44BB of the 1987 Act. Accordingly in the present case the applicant requested an "internal review" in or about early 2016 and the *"Internal Dispute Resolution Review"* was dated 18 March 2016.

3. The purported "internal review" arrived at the same decision in that the applicant is fit for his pre-injury employment and any incapacity does not result from his work injury. The Insurer made a further decision that in the event the applicant was not fit for pre-injury employment as a result of his work injury it was determined he had capacity to work 40 hours per week in suitable employment in accordance with Section 32A of the 1987 Act. That employment being light product assembler or office cleaner.

4. The applicant sought Merit Review from the Authority by way of application dated 29 March 2016. The Authority delivered its Findings and Recommendations dated 27 April 2016. The Authority made a finding that it had no jurisdiction to conduct a merit review based on the following:

    - The Insurer's decision dated 20 November 2014 is a decision to dispute liability for weekly payments of compensation and is not a "work capacity decision" under section 43(2)(a) of the 1987 Act;

    - On review the Insurer has stated that it has "maintained" that dispute but "in the alternative" the applicant has current work capacity and does not meet the requirements of Section 38(3) of the 1987 Act. However, the entitlement provisions of Section 38 are not engaged if liability under Section 33 is disputed.

    - The Insurer's decision to dispute medical expenses with reliance upon sections 59 and 60 of the 1987 Act is not a decision which falls within Section 43(1)(a)-(f) and/or 43(2)(b) and it is also not a work capacity decision.

    - Accordingly the applicant has not referred a work capacity decision for review. The Authority does not have jurisdiction to

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undertake a merit review in accordance with Section 44B(1)(b) of the 1987 Act.

5. The applicant then made an application to this office for procedural review dated 25 May 2016. I am satisfied that the application has been made within time and in the proper form.

6. On 12 August 2011 the applicant suffered a workplace injury and has been in receipt of weekly payments of compensation.

Submissions by the applicant

7. Section 44(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 applied for a procedural review.

8. The applicant has made a submission that the decision dated 20 November 2014 was essentially a work capacity decision however the correct procedures were not followed.

Submissions by the Insurer

9. The Insurer made a submission by way of email dated 2 June 2016 that queried whether WIRO had jurisdiction to perform a review in circumstances where the dispute had not been the subject of a merit review by the Authority in accordance with Section 44BB(1)(b) of the 1987 Act.

10. The applicant applied for merit review. The Authority considered the application, but rather than making findings and recommendations as a result of the merit review they have instead declined to proceed to that step and have given their interpretation of the legislation.

11. As there is no further step for the applicant to take he has applied to WIRO for procedural review. There is no basis for WIRO to be bound by the opinion of the Authority at merit review. For example if the merit reviewer had agreed that the section 74 notice was a work capacity

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decision and conducted a merit review to completion, that would be no more a relevant consideration to the question of whether or not WIRO has jurisdiction than the contrary position.

12. Despite the view expressed as to jurisdiction it appears clear that the merit reviewer has in fact conducted a merit review, even if only of a small element of the 20 November 2014 decision. It follows that WIRO has the jurisdiction to conduct a procedural review.

Decision

13. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines). The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.

14. In the recent Court of Appeal decision[2] on the very point on whether a section 74 notice can make a "work capacity decision" Sackville AJA at paragraph 145 used the Guidelines as *indicia* of the type of decision being made:

> *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*.*

15. 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 a section 74 notice must be invalid on procedural grounds.

[2] *Sabanayagam v St George Bank Limited [2016] NSWCA 145*

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RECOMMENDATION

16. The section 74 Notice issued by the Insurer dated 20 November 2014 was not a "work capacity decision" or notice of a work capacity decision.

17. The "internal review" dated 18 March 2016 is titled "written advice of a work capacity decision and its outcome." However, it did not comply with the Guidelines or legislation and must be set aside.

18. As the Insurer declined liability on 20 November 2014 under section 74 of the Workplace Injury Management and Workers Compensation Act 1998 on the grounds that the applicant does "not have any incapacity for work" the correct forum for the review is the Workers Compensation Commission.

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

T. Emanuel

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
29 June 2016