



## 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 for procedural review is dismissed.

##### Introduction and background

1. The applicant seeks procedural review of a "Work Capacity Decision" made by the Insurer on 11 March 2016. Inverted commas are appropriate in the circumstances, since all the insurer purported to do was comply with a recommendation by the Merit Review Service of SIRA to determine whether or not the applicant was a worker with "high needs." The Insurer concluded that she was not.
2. Since any such determination involves an assessment of whole person impairment (WPI), it is caught by the definition of "medical dispute" in section 319(c) of the *Workplace Injury Management and Workers Compensation Act 1998*. Such disputes are to be determined in accordance with Part 7 of Chapter 7 that Act. Disputes of this nature are expressly excluded from the definition of "work capacity decision" by section 43(2)(b) of the 1987 Act, which is in clear terms:
  - (2) The following decisions are not work capacity decisions:  
...
    - (b) a decision that can be the subject of a medical dispute under Part 7 of Chapter 7 of the 1998 Act.

Section 319 is the first section within Part 7 of Chapter 7 of the 1998 Act. It defines a "medical dispute" thus:

*medical dispute* means a dispute between a claimant and the person on whom a claim is made about any of the following matters or a question about any of the following matters in connection with a claim:

- (c) the degree of permanent impairment of the worker as a result of an injury,



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It follows that any decision involving an assessment of WPI cannot be a “work capacity decision.”

3. The applicant has made two previous applications to WIRO, resulting in recommendations reported and numbered as 1713 (number 17 of 2013) and 20014 (number 200 of 2014). There is no need to reproduce the factual background set out therein.
4. The present procedural review application represents at least the fifteenth [15<sup>th</sup>] process during which the entitlement to weekly payments of this applicant have been examined. In 2013 there was a work capacity decision (1) followed by an internal review (2) and a merit review (3) before this Office performed a procedural review (4). In 2014 there was a work capacity decision (5) followed by internal review (6), merit review (7) and procedural review (8). In November 2015 the insurer made another work capacity decision (9) which was followed by internal review (10) and merit review (11). As a result of the recommendation of merit review the Insurer purported to make a further “work capacity decision” in March 2016 (12) followed by internal review (13) and subsequent purported merit review (14). If we consider that the first work capacity decision in 2013 must have followed a work capacity *assessment* the number is actually 15 previous processes. Each work capacity decision must have followed a fair notice call and letter, which adds another three or four steps down the path leading to the present.
5. I said “purported merit review” (see step 14 *supra*) because the merit review service seems to have arrogated to itself the role of the Workers Compensation Commission in determining whether or not a worker has “high needs.” At paragraph 40 of a document dated 15 June 2016 a delegate of SIRA had this to say:

“40. In my view, the Insurer’s decision that it was not satisfied that [the applicant’s] degree of permanent impairment is likely to be more than 20 per cent was the correct and preferable decision based on the information before me.”

6. This goes well beyond merely accepting the submission of a party to a dispute and involves the merit reviewer in an exercise of determining whether or not the worker has more than 20% WPI. For the reasons



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appearing in paragraphs 1-2 *supra*, such a determination cannot be a work capacity decision and *a fortiori* it cannot be the subject of section 44BB review.

7. The delegate did not proceed to make a recommendation, which means that the effect of the document is unclear even on its own terms. By virtue of section 44BB(3)(g) recommendations by the Authority are binding on the Insurer and must be given effect to by the Insurer. In the absence of a recommendation, what is the Insurer to do?
8. Perhaps more intriguing is the conundrum of what the Insurer is to do in the event that the Authority recommends that the Insurer should make a determination of the “high needs” question. That is precisely what happened in the present case. Since it is not a work capacity decision and therefore cannot be reviewed under section 44BB it cannot properly be the subject of a merit review recommendation.
9. The Insurer made a work capacity decision on 26 November 2015. That decision was never submitted to procedural review, because on 25 February 2016 the merit review service recommended the Insurer determine the “high needs” question, which led the Insurer to make the determination it did on 11 March 2016. Meanwhile the applicant’s entitlements had expired due to notice under section 54(2)(a) terminating payments on and from 6 March 2016. More than 30 days had elapsed from the date of receipt of the merit review recommendation dated 25 February 2016 by the time the applicant approached this Office seeking procedural review on or about 18 July 2016.
10. It follows that WIRO has no jurisdiction due to a breach of the limitation period of 30 days appearing in section 44BB(3)(a).
11. Even if the limitations problem did not exist, WIRO can only conduct procedural reviews of work capacity decisions, and since the “high needs” question is not a work capacity decision, the want of jurisdiction is compounded.



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## **Finding**

12. This Office has no jurisdiction in this case.

## **RECOMMENDATION**

13. The application for procedural review 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  
04 August 2016