



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 by the Insurer dated 31 March 2016 is set aside.**
- b. Such weekly payments as the applicant is receiving by virtue of the stay pursuant to Section 44BC of the *Workers Compensation Act 1987* are to continue until a new decision is made in accordance with Section 43(1) of the *Workers Compensation Act 1987*.**
- c. Pursuant to Section 44BB(3)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.**

Introduction and background

1. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 31 March 2016.¹ The Decision² informed the applicant that her weekly payments of compensation would cease on 7 July 2016. This was stated to be due to failure to meet the special requirements of section 38(3) of the 1987 Act, although on a later page it was said, despite medical evidence from her NTD to the contrary, that the applicant was believed to have some capacity to work.
2. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 20 May 2016 and confirmed the cessation of the applicant's weekly payments of compensation.
3. The applicant sought Merit Review from the Authority by way of application received on 10 June 2016. The Authority delivered its Findings and Recommendations dated 15 July 2016. The Authority

¹ For unexplained reasons the merit review delegate referred to this as "a number of work capacity decisions," as though they were severable and susceptible of separate review. While the elements of a decision may be several, they form a whole and are not severable.

² See note 1.



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made a finding that the applicant has current work capacity and did not meet the special requirements under Section 38(3) of the *Workers Compensation Act 1987* (1987 Act) for continuation of weekly payments of compensation.

4. The applicant then applied to this office for procedural review by way of application dated 19 July 2016. I am satisfied that the application has been made within time and in the proper form.
5. The applicant sustained a cervical spinal injury during the course of her employment as a factory worker on 29 June 2007. The applicant had subsequently been in receipt of weekly payments of compensation.
6. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the WorkCover Work Capacity Guidelines (Guidelines).

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. In summary the applicant asserts that the Insurer has acted in breach of procedural fairness by failing to disclose the existence of investigatory film. The film was shown to doctors qualified by the insurer, but not to the applicant herself, her doctors or her lawyers. In particular the film was never shown to the applicant’s Nominated Treating Doctor (NTD), who had certified her as having no work capacity.

Submissions by the Insurer

9. The Insurer has not provided any submissions in response to the application.

Decision

10. The question of procedural fairness is relevant to procedural review, following the decision of Davies, J in *The Trustees of the Sisters of Nazareth v Simpson* [2015] NSWSC 1730 (*Simpson*).

11. In *Simpson* the scope of procedural review was examined and at paragraph 36 his Honour made the following observations:

36. A narrow reading of the “insurer’s procedures” would result in the enquiry being only concerned with procedural fairness. I do not think that is what the legislation means. If that was the focus of the enquiry I should have expected that s 44(1)(c)³ would refer to procedural fairness. However, the procedures certainly include procedural fairness.

12. In *Kubovic v HMS Management* [2015] NSWCA 315 (*Kubovic*) the Court of Appeal dealt with a case involving film which was not shown to a plaintiff. The only reason the film was allowed to be admitted into evidence was that it was not readily available to the defendant at the time of serving its pre-filing statement. Otherwise, the film should have been shown to the plaintiff and made available to his expert witnesses. Failure to serve the film would have been a clear breach of procedural fairness, if the film had been available at the time.

13. *Kubovic* concerned litigation conducted through the court system. There is a significant difference between court based litigation and section 44BB review. One of the main differences is that the *Markus* discretion⁴ cannot exist in the course of section 44BB review. That is to say, there is no basis on which a party can be allowed to shield evidence (such as film) from the gaze of an opposing party until such time as that opposing party has given evidence which is directly contradicted by it. Trial by “Gotcha” moment captured on film is unavailable under section 44BB.

14. Given that the *Markus* discretion is the only known exception to the rule requiring full prior disclosure of relevant evidence for the purposes of procedural fairness, and given that it does not apply under section 44BB, it follows that the failure by the insurer in this case to serve the film on the applicant prior to the making of the work capacity decision was a clear breach of procedural fairness. The applicant and her

³ Section 44BB(1)(c) was numbered 44(1)(c) at the time of the decision.

⁴ See *Markus v Provincial Insurance Company Ltd* (1983) NSWCCR1.



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medical and legal advisers should have been given an opportunity to view the film prior to any determination by the Insurer that the applicant had work capacity, which was a view contrary to that held by her nominated treating doctor at the time.

Finding

15. The Insurer had clearly denied the applicant procedural fairness. Accordingly the Work Capacity Decision must be found to be invalid.

RECOMMENDATION

16. The Work Capacity Decision by the Insurer dated 31 March 2016 is set aside.
17. Such weekly payments as the applicant is receiving by virtue of the stay pursuant to Section 44BC of the *Workers Compensation Act 1987* are to continue until a new decision is made in accordance with Section 43(1) of the *Workers Compensation Act 1987*.
18. Pursuant to Section 44BB(3)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.

A handwritten signature in blue ink, appearing to read "Wayne Cooper".

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
05 August 2016