



State Insurance Regulatory Authority
Workers Compensation
Merit Review Service

DECISION ON APPLICATION FOR REVIEW BY THE AUTHORITY

Worker:

Insurer:

Date of Decision:

Date of Injury:

Claim Number:

Our Reference:

DECISION

1. The Authority is not able to undertake a merit review of the Insurer's decision dated March 2017 because it is not a work capacity decision.

BACKGROUND

2. The worker sustained an injury to his cervical spine and left shoulder in the course of his employment with the Employer. He has also developed a psychological injury secondary to his physical injury.
3. The Insurer accepted liability for the worker's injury and has been making weekly payments of compensation to him.
4. In February 2017, the Insurer issued a notice under section 74 of the *Workplace Injury Management and Workers Compensation Act 1998* ("the 1998 Act") disputing liability for ongoing weekly payments of compensation and medical treatment.
5. In March 2017, the Insurer made a number of work capacity decisions determining the worker's entitlement to weekly payments of compensation as nil under section 37(2) of the *Workers Compensation Act 1987* ("the 1987 Act").
6. The worker applied for an internal review of the Insurer's work capacity decisions of March 2017. The Insurer conducted an internal review in May 2017 and made decisions resulting in the same outcome as the original work capacity decisions.
7. The worker made an application for merit review by the Authority in June 2017 in respect to the Insurer's work capacity decisions. The application was received by the Authority in June 2017. It has been made in the form approved by the Authority and specifies the grounds on which the review is sought.

LEGISLATION

8. The legislative framework governing work capacity decisions and reviews is contained in the:
 - *Workers Compensation Act 1987* ("the 1987 Act")

- *Workplace Injury Management and Workers Compensation Act 1998* ("the 1998 Act")
 - *Workers Compensation Regulation 2016* ("the Regulation")
9. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

NATURE OF MERIT REVIEW

10. The Authority's powers under section 44BB(1)(b) of the 1987 Act are in respect to conducting merit reviews of **work capacity decisions** made by insurers.
11. Section 43(1) of the 1987 Act defines a "work capacity decision" as follows:
- (a) *a decision about a worker's current work capacity,*
 - (b) *a decision about what constitutes suitable employment for a worker,*
 - (c) *a decision about the amount an injured worker is able to earn in suitable employment,*
 - (d) *a decision about the amount of an injured worker's pre-injury average weekly earnings or current weekly earnings,*
 - (e) *a decision about whether a worker is, as a result of injury, unable without substantial risk of further injury to engage in employment of a certain kind because of the nature of that employment,*
 - (f) *any other decision of an insurer that affects a worker's entitlement to weekly payments of compensation, including a decision to suspend, discontinue or reduce the amount of the weekly payments of compensation payable to a worker on the basis of any decision referred to in paragraphs (a)-(e).*
12. Section 43(2) of the 1987 Act provides that the following decisions are not work capacity decisions:
- (a) *a decision to dispute liability for weekly payments of compensation,*
 - (b) *a decision that can be the subject of a medical dispute under Part 7 of Chapter 7 of the 1998 Act.*

ISSUE

13. The worker has referred the Insurer's work capacity decisions dated March 2017 for review by the Authority. Those decisions are in respect to the worker's capacity for work, what is suitable employment for him and calculates his entitlement to weekly payments of compensation as nil under section 37(2) of the 1987 Act.
14. Prior to the Insurer's work capacity decisions however, the Insurer made a decision in February 2017 declining ongoing liability for the worker's injuries. This decision provided a notice period of approximately 3 months for the cessation of the worker's weekly payments in May 2017.
15. Accordingly, at the time that the Insurer made its work capacity decisions in March 2017, ongoing liability for the worker's injury had been declined. The Insurer's work capacity decisions were therefore ineffectual as the worker did not have an entitlement to weekly payments of compensation at that time.

16. In accordance with section 43(2)(a) of the 1987 Act (set out above), a decision to dispute liability for weekly payments of compensation is not a work capacity decision. The Authority is therefore unable to review the Insurer's decision dated February 2017.

SUBMISSIONS ON JURISDICTION

17. The worker makes a number of submissions in relation to the merits of the Insurer's work capacity decisions in his application for merit review. He does not make submissions specifically in respect to the Authority's jurisdiction to review these decisions.
18. In a telephone discussion with the Authority in June 2017, the worker expressed his confusion and stress relating to the Insurer's decision to decline liability in February 2017 and the subsequent work capacity decisions in March 2017 in relation to his entitlement to weekly payments of compensation. He advised the Authority that the Insurer had instructed him that if he applied for an internal review of the work capacity decisions in time, a stay of the decision would apply however his weekly payments ceased in May 2017.
19. The worker advised that he was in the process of appealing the Insurer's decision to decline liability in February 2017, in the Workers Compensation Commission.
20. In its reply to the worker's application, the Insurer makes the following submissions in relation to the Authority's jurisdiction:
 - The issuing of work capacity decision does not preclude an insurer from making a liability decision in respect of a claim. The section 74 notice in February 2017 indicates that weekly payments of compensation will cease in May 2017 in accordance with the required period of notice.
21. In a telephone discussion with the Authority in June 2017, a representative of the Insurer confirmed that the worker's weekly payments of compensation had ceased in May 2017 in accordance with the Insurer's decision to decline liability.

REASONS

22. The Insurer's decision to decline liability in February 2017 was made in accordance with section 74 of the 1988 Act ("section 74 notice") and relied on section 33 of the 1987 Act to dispute liability for ongoing payments of weekly payments of compensation and section 59 and 60 of the 1987 Act for medical expenses.
23. The section 74 notice refers to medical information the Insurer states supports its decision and states:

We have carefully considered your claim for workers compensation for a cervical neck dysfunction with radiculopathy and left shoulder injury sustained on 30/09/2014 and consequential psychological injury. Following a review of your claim, have decided to dispute ongoing liability in relation to your claim for weekly compensation and medical expenses.

This means we will not pay any weekly compensation and medical expenses in relation to your alleged ...injury as of 05/05/2017.

Pursuant to section 33 of the Workers Compensation Act 1987 (NSW) you have no entitlement to weekly compensation as you do not suffer any incapacity, be it total or partial, from any compensable work related injury.

24. As seen above, section 43(2)(a) of the 1987 Act provides that "a decision to dispute liability for weekly payments of compensation" is not a work capacity decision. Given that the Authority's

powers under section 44BB(1)(b) of the 1987 Act are only in respect to the review of work capacity decisions and a decision to dispute liability is not a work capacity decision, the Authority is unable to review the Insurer's section 74 notice dated February 2017.

25. The Workers Compensation Commission has jurisdiction to review disputes involving liability for claims for weekly payments of compensation.
26. To date, the Insurer's decision to decline liability has not been reviewed and stands.
27. The Insurer's work capacity decisions dated March 2017 resulting in the finding that the worker's entitlement to weekly payments of compensation is nil under section 37(2) of the 1987 Act were therefore made at a time when liability for the worker's injury had been declined. In order for the Insurer to make a decision about the amount of the worker's entitlement under section 37(2) of the 1987 Act, the worker must first have an entitlement to weekly payments of compensation.
28. The Insurer's work capacity decision notice dated March 2017 illustrates the Insurer's error in making the work capacity decision at that time as it steps through the work capacity decisions but then refers back to the section 74 notice and maintains that the dispute notice will come into effect in May 2017. It concludes:

Your weekly compensation payments will therefore cease as of [May 2017] in accordance with the required period of notice with the Section 74 declinature paperwork.
29. The 'work capacity decisions' made by the Insurer in March 2017 are futile. This decision and the advice contained in the decision that "in order for a stay of this decision to operate, you must apply for an internal review" has caused undue confusion and stress to the worker as his entitlement to weekly payments were ceased in May 2017 in accordance with the section 74 notice in any event.
30. In respect to the Insurer's submission that "the issuing of work capacity decision does not preclude an insurer from making a liability decision in respect of a claim", this is correct. The Insurer is able to make a work capacity decision and then later a decision to dispute liability for a claim however it cannot make those decisions in relation to the same weeks of compensation.
31. A decision about a worker's current work capacity can only be made if the insurer has come to the view that the worker has a present inability arising from an injury such that they cannot return to pre-injury employment. An insurer cannot hold that view at the same time or when it has previously determined a worker has no incapacity for work that results from an injury pursuant to section 33 of the 1987 Act, which is the basis of the Insurer's section 74 notice in this matter.
32. The Insurer clearly decided to dispute liability and then gave effect to that irrespective of the purported 'work capacity decision' notice issued in March ("March notice"). The March notice confirmed that weekly payments of compensation would cease on the date stated in the earlier section 74 notice disputing liability. Therefore, while the March notice contained language referring to a work capacity decision, it was in effect a decision to maintain its dispute of liability and this is how the Insurer proceeded in May when it ceased payment of the worker's weekly payments of compensation. The Insurer was incorrect in confusing the issue by referring to a work capacity decision when it was maintaining its decision to dispute liability.
33. I find that the Insurer did not make a work capacity decision in its notice dated March 2017 as the worker did not have an entitlement to weekly payments of compensation as of February 2017 (when section 74 notice was issued).
34. I find that the Authority is unable to undertake a merit review of the Insurer's decision dated March 2017 as the Authority is only able to review work capacity decisions.

35. If the worker wishes to pursue this matter he should seek the correct avenue for review in commencing proceedings in the Workers Compensation Commission to resolve the dispute in relation to liability for his injury. Based on information the worker has provided to the Authority, he has already commenced work through this avenue and has been in contact with WIRO.
36. The worker may also obtain assistance from the State Insurance Regulatory Authority (SIRA) Customer Service Centre by phone on 13 1050.

Merit Review Service

Delegate of the State Insurance Regulatory Authority