WiRO
WorkCover independent review office

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RECOMMENDATION FOLLOWING AN APPLICATION FOR REVIEW OF THE INSURER'S WORK CAPACITY DECISION PURSUANT TO SECTION 44(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 25 November 2014. It was noted that at the time of the work capacity decision the applicant was not in receipt of weekly payments of compensation.

2. The Merit Review decision records that the applicant applied for internal review of this work capacity decision on 24 December 2014 and the insurer did not conduct an internal review. In the submissions received by this office from the insurer they have advised that *"no request for internal review of this matter was ever received."*

3. The Authority issued recommendation and findings dated 8 May 2015 that the applicant is able to earn $1,500 per week and is entitled to weekly payments of compensation to a maximum amount of $499.30 per week pursuant to Section 36(2) of the *Workers Compensation Act* (the 1987 Act) and that the entitlement to weekly payments is to be determined by the insurer on a week to week basis.

4. The applicant applied to this office for procedural review by way of application dated 13 May 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

5. The applicant suffered psychological injury in the course of his employment as a claims manager. The accepted date of injury is 28 February 2014. The applicant has returned to work, performing his pre-injury duties, with a different employer.

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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).

7. The relevant version of the Guidelines came into effect on 11 October 2013.

Submissions by the applicant

8. 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 requested a procedural review.

9. The applicant submitted four pages of submissions annexed to his application for procedural review. The applicant's submissions include:

- Failure of the insurer to make payments for the period 12 May 2014 to the date of the first WCD in October 2014;
- Failure of the insurer to implement the outcome of the merit review decision;
- If WIRO could be specific as to the actions required by the insurer;
- The insurer has not referred to the date of the work capacity decision;
- The insurer's explanation of Section 59A is incorrect and misleading;
- No notice period has been provided;
- The insurer has failed to explain the relevant entitlement periods
- Section 32A of the 1987 Act has not been considered; the medical report of Dr G has not been considered;
- No rehabilitation reports have been considered;
- No injury management reports have been considered; and
- No fair notice period was provided.

10. As stated above Section 44(1)(c) of the 1987 Act only allows me to review the procedure followed by the insurer in making the work capacity decision. Any decisions made by the insurer in respect of suitable duties and capacity are not issues which can be considered at

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this procedural review stage. Likewise I am unable to make any recommendations in respect of periods of non-payment which are not related to the work capacity decision under review. I am only in a position to review the procedures undertaken by the insurer in making the work capacity decision.

Submissions by the Insurer

11. The Insurer made submissions dated 19 May 2015 in response to this application. The insurer submits that the only internal review application it received was in relation to the work capacity decision dated 15 October 2015. The internal review decision was dated 15 December 2014. The insurer submits that it did not receive an internal review application in respect of the work capacity decision dated 25 November 2014, which is the subject of this procedural review application.

12. The insurer made the same submission to the WorkCover Authority in response to the merit review application. The Authority did not accept the submission and accepted that on 24 December 2014 the applicant *"made an application for internal review of the work capacity decision dated 25 November 2014."*

13. The insurer has also submitted that the applicant, noting his prior experience and current role in addition to the extent of his submissions to this office, demonstrated a significant understanding of the applicable legislation.

The Decision

14. At the time the work capacity decision dated 25 November 2014 was made the applicant was not in receipt of weekly payments of compensation. The decision made by the insurer was that the applicant was capable of earning above his PIAWE and therefore had no entitlement to weekly payments of compensation.

15. Guideline 5.3.2 requires the insurer to advise the date when the decision takes effect. Section 54(2)(a) of the 1987 Act requires at least three months and four working days' notice be given if payments are being reduced or ceased having regard to Section 76(1)(b) of the

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Interpretation Act 1987. In this particular instance the applicant was not in receipt of weekly payments, so payments were neither being reduced or ceased. The insurer informed the applicant *"as you are not a current recipient of weekly benefits this decision is effective immediately."* The insurer has complied with the Guidelines and legislation.

16. Likewise Guideline 5.3.2 also requires the insurer to advise the applicant of the impact the decision has on his entitlement to medical and related treatment expenses. The Insurer has referenced Section 59A(2) of the 1987 Act and advised the applicant that his entitlement to medical expenses will cease 12 months after he was last paid weekly payments of compensation. The insurer stated *"your entitlement to reimbursement for medical expenses will cease on 12 May 2015 which is 12 months post the last date a weekly benefit was paid."* The provisions of Section 59A(3) were also explained. The Insurer has complied with the Guideline. Given the present uncertainty that surrounds this Section 59A of the 1987 Act[1] as evidenced by conflicting views from the Workers Compensation Commission it is unlikely the insurer could do any more in the present case.

17. The applicant has submitted that the insurer failed to properly reference and explain the legislation including failure to consider Section 32A in determining suitable employment. It is noted that the applicant had returned to his pre-injury employment as a claims manager. The certificate of capacity from the nominated treating doctor certified the applicant fit for employment 5 days per week, 8 hours per day with the only restriction being not working with the pre-injury employer.

18. As the applicant had been certified and had returned to his pre-injury employment (albeit with a different employer) it is not necessary for the insurer to go through the steps of nominating alternate suitable duties. The applicant was able to return to his pre-injury duties with a different employer working his pre-injury hours. This is in accordance with the certificate of capacity from the nominated treating doctor.

[1] See *Vella v Penrith City Council* [2014] NSWWCC 363; *Brassaud v Chubb Fire Safety Ltd* [2014] NSWWCC 202; and latterly *Flying Solo Properties Pty Ltd t/as Artee Signs v Collet* [2015] NSWWCCPD 14.

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19. The applicant in his submissions has raised specific issues within the work capacity decision as being deficient and not properly explained. The comprehensive nature of the applicant's submissions support that the applicant has a very thorough knowledge of the legislation and Guidelines. This is further supported by the fact that the applicant's profession is that of a *"claims officer."*

20. Whilst the explanations provided in the work capacity decision, according to the applicant's submissions, were defective I note that Guideline 2.4 notes that work capacity assessments and decisions should be *tailored to the worker.* The very fact that the applicant can identify these issues illustrates that he does not need to have them explained to him in great detail. It is also noted that the insurer had previously made a work capacity decision which was the subject of an internal review and clearly the applicant was familiar with the procedures required to be followed.

21. The insurer has made a work capacity decision in this claim where the applicant had returned to his pre-injury employment and in doing so they have made an accurate work capacity decision given the current circumstances. I do not accept the applicant's submissions that the insurer has not properly explained the reasons for its decision nor properly explained the legislation.

22. The decision of the Insurer dated 25 November 2014 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

Finding

23. There are no procedural errors identifiable in the decision. I find that the Insurer has followed the procedures as set out in the WorkCover Guidelines as required by Section 44A of the 1987 Act. The Insurer has also followed the 1987 Act and the *Workers Compensation Regulation* 2010.

RECOMMENDATION

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24. The application for procedural review is dismissed.

Tracey Emanuel
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