



Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

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.**
- 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 receipt by the applicant of this recommendation.**
- 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 23 March 2016. The Decision informed the applicant that her weekly payments of compensation would cease on 1 July 2016. The applicant sought internal review by the Insurer by application dated 13 May 2016 and the Internal Review Decision was dated 3 May 2016. The Internal Review Decision confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 6 June 2016. The Authority delivered its Findings and Recommendations dated 14 July 2016. The Authority made a finding the applicant has a current work capacity but she does not satisfy the special requirements of Section 38(3) of the *Workers Compensation Act 1987* (1987 Act) for continuation of weekly payments of compensation. The Authority did not make any recommendations in this matter.



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3. The applicant then made an application to this office for procedural review dated 10 August 2016. I am satisfied that the application has been made within time and in the proper form.
4. On 18 March 2010 the applicant sustained injury to her left knee in the course of her employment as a retail assistant. The applicant also had concurrent employment as a waitress. As a result of the injury the applicant underwent 4 surgical procedures which led to a staph infection and six months in hospital. The applicant returned to work in various part time employments and at the time of the Work Capacity Decision was performing duties as a swimming instructor and delivery driver. The applicant was also in receipt of weekly payments of compensation.
5. 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

6. Section 44BB (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.
7. In addition to making an application for procedural review the applicant has made the following submissions:
 - The information the Insurer relied upon was not totally correct, incomplete and out of date qualifications;
 - Medical Reports and other documents date back to 2011/2012;
 - There were no Injury Management Plans or Return to Work Plans implemented; and
 - The Insurer has not provided the applicant with the proper resources and training to return to employment.



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8. I am only able to perform a review of the procedures undertaken by the Insurer in making the Work Capacity Decision which is the subject of this review. I am not able to review the Internal Review Decision or the Merit Review Findings and Recommendations from the Authority.
9. Likewise I am unable to review or take into consideration the management of the claim by the Insurer or the personal circumstances of the applicant. This review is limited to the procedures implemented by the Insurer in making the Work Capacity Decision.

10. The applicant's submissions are addressed as follows:

- The applicant has failed to particularise which qualifications are out of date and which medical evidence is incomplete. Guideline 4 notes that a work capacity assessment considers all information which may include but is not limited to reports from treating doctors, treating specialists, allied health professionals; certificates of capacity and independent medical reports.

The documents which the Insurer has relied upon are listed at pages 5 and 6 of the Decision. The documents listed are consistent with the Guidelines.

- The applicant is correct in stating that the Insurer has relied upon medical reports dating back to 2011/2012. However the Insurer has also relied upon up to date medical evidence obtained in 2015/2016. The Insurer has complied with the Guidelines as the Insurer's decision as to the applicant's actual capacity is based upon up to date medical evidence.
- I am unable to review the procedures of the Insurer in the management of the claim. The submission that the Insurer failed to implement a return to work plans or injury management plans is not relevant to procedural review.
- The submission that the Insurer has failed to provide proper resources and training to the applicant to return to work, is for the reason referred to above, not relevant to procedural review.



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Submissions by the Insurer

11. The Insurer made the following submissions dated 18 August 2016 in response to the application:

- As the applicant has been advised, a work capacity decision follows a work capacity assessment which is a review of her functional, vocational and medical status and considers all available information to her claim file. The fact documents considered by the reviewer have referenced dated in the 2011/2012 period is evidence that a full review of the applicant's circumstances has been undertaken. Furthermore, the Insurer has assessed the applicant's current work capacity as evidenced by the work capacity decision. The Insurer submits that the information relied on was accurate, complete and the suitable employment options are in accordance with section 32A of the 1987 Act.
- A review of the applicant's claim notes that several "Injury Management Plans" have been sent to her on several occasions at relevant review points.
- The work capacity decision, internal review decision and Merit Review Authority findings all reference Vocational Assessment Reports. The applicant's nominated treating doctor has also endorsed the findings in these reports on several occasions.
- The Insurer submits that these documents have been provided to the applicant during the Fair Notice contact period and she holds these records.
- The Insurer submits that the applicant has provided evidence from three previous and current employers that note she has successfully returned to work and has been able to successfully maintain this employment on several occasions.
- No work trial documentation has been provided as the applicant had returned to work when the claim was transferred to this Insurer from a former scheme agent and her skills in identified



suitable employment options were not lacking such that they would require a work trial or any applicable section 53 retraining.

I note that I have addressed both the applicant and Insurer's submissions above.

Decision

12. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
13. Guideline 5.3.2 requires the Insurer to advise the applicant of the date of the work capacity assessment. On this occasion the Insurer informed the applicant that the work capacity assessment was completed on 10 February 2016 and she was notified of the Work Capacity Decision by letter dated 23 March 2016.
14. The same Guideline 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. This notice period takes into account Section 76(1)(b) of the *Interpretations Act 1987*. As a result the applicant was advised that her payments would cease on 1 July 2016. This is the appropriate notice period.
15. The Guideline also requires the Insurer to advise the applicant of the impact the decision has on her entitlement to medical and related treatment expenses. The Insurer has referenced and explained Section 59A (2) and (3) of the 1987 Act and advised the applicant that her entitlement to medical expenses will cease on 30 June 2021 as she has been assessed as having a permanent impairment of more than 10% but less than 21%. The Insurer has adequately explained this at page 2 of the Decision.
16. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer has informed the applicant that she has received 246 weeks of compensation payments. Therefore any ongoing entitlement to weekly payments of compensation is subject to Section 38 of the 1987 Act. The Insurer has explained the special requirements of



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Section 38(3)(b) and (c) of the 1987 Act at pages 4 and 5 of the Work Capacity Decision.

17. Pursuant to Section 43(1)(a) of the 1987 Act the Insurer has noted that the applicant has been certified with capacity for 7 hours per day, 4 days per week in the Certificate of Capacity from the nominated treating doctor. The Insurer determined that the applicant had current work capacity in accordance with that assessment.
18. The Insurer determined, pursuant to Section 43(1)(b), the roles of swimming instructor, receptionist, bank teller and delivery driver to be suitable employment. The Insurer based its determination upon a vocational assessment report and the approval from the nominated treating doctor. It was noted that at the time of the Work Capacity Decision the applicant was working as a swim teacher and delivery driver on a casual basis for approximately 21 hours combined per week.
19. In making these determinations pursuant to Section 43 of the 1987 Act the Insurer has displayed an adequate understanding of the relevant Guidelines and legislation.
20. At page 13 of the Work Capacity Decision the Insurer made a determination that the applicant had complied with Section 38(3)(b) in that she was working at least 15 hours per week and earning \$176 per week.
21. However, as the applicant had been assessed as having a capacity to undertake employment for 28 hours per week she was not working to that capacity and therefore had not complied with Section 38(3)(c) of the 1987 Act. Therefore, the applicant was not entitled to ongoing payments of weekly compensation.
22. The Work Capacity Decision of the Insurer dated 23 March 2016 has displayed a careful consideration of the requirements of the Guidelines and legislation in force at the time.

Finding



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23. There are no procedural errors identifiable in the decision. The Insurer has complied with the Guidelines and relevant legislation.

RECOMMENDATION

24. The application for procedural review is dismissed.

25. 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 receipt by the applicant of this recommendation.

26. 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 black ink that reads "Tracey Emanuel".

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
19 August 2016