



**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 10 August 2015. The decision informed the applicant that her weekly payments of compensation would cease from 14 November 2015. The applicant sought internal review and the Internal Review Decision was dated 8 October 2015. That decision confirmed the original Work Capacity Decision.
2. The applicant applied to the Authority for Merit Review on 12 November 2015 and they delivered findings and recommendations dated 11 December 2015. The Authority made a finding that the amount taken into account as the applicant's earnings after the injury is \$421.12 per week and that the Insurer is to determine the applicant's entitlement to weekly payments of compensation pursuant to Section 37(3) of the *Workers Compensation Act 1987* (1987 Act).
3. The applicant then made application to this office dated 7 January 2016. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. The applicant had previously sought procedural review of a Work Capacity Decision dated 14 June 2013. The applicant was successful and the Work Capacity Decision was set aside by an earlier recommendation of this office<sup>1</sup>.
5. The facts and circumstances concerning the background of this claim are set out in the aforementioned recommendation and need not be repeated.

---

<sup>1</sup> Reported and numbered as 7114



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

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. At the outset in her submissions the applicant states “*I did in fact win the merit review, but would now like you to look at the procedures used by the insurer over the course of this claim.*”
9. I am only able to review the Insurer’s procedures with respect to making the actual work capacity decision. I am unable to review the procedures implemented by the Insurer in the management of the applicant’s claim in its entirety.
10. The applicant has made specific submissions in respect of her pre-injury average weekly earnings (PIAWE). I am not able to review the discretion used by the Insurer in calculating PIAWE.
11. In addition to the submissions the applicant made in the Application for Procedural Review she also sent an email dated 11 January 2016 with further submissions. In that email the applicant describes the various treatments she has undergone as well as discussion she has had with the Insurer.
12. The submissions made by the applicant in the email are related to the actual day to day management of her claim. In this procedural review I am only able to review the procedures of the Insurer in making the actual work capacity decision. I am not able to review the discretion used by the Insurer in preferring one medical opinion over the other or in calculating PIAWE. I am not in a position to address the submissions of the applicant as they are not relevant to procedural review.



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

### **Submissions by the Insurer**

13. The Insurer has not provided any submissions in response to this application for procedural review.

### **The Decision**

14. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.

15. Guideline 5.3.2 requires the Insurer to advise the applicant of the date of the work capacity assessment. The Insurer informed the applicant that a work capacity assessment was undertaken 30 June 2015. The applicant was provided with a 'fair notice' telephone call on 2 July 2015 informing her of an impending work capacity decision. The applicant was notified of the work capacity decision on 10 August 2015.

16. 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 from 14 November 2015.

17. I do note that the Insurer has advised the applicant of the date of cessation of her weekly payments of compensation at page 5 of the Work Capacity Decision under the heading '*Impact of our decision.*' It would be preferable if such important information, which clearly impacts greatly upon the applicant, was at the beginning of the decision.

18. Guideline 5.3.2 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 12 months after her entitlement to weekly payments ceases. The Insurer has adequately explained the legislation which was in force at the time of making the work capacity decision.



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

19. The Insurer is also required to inform the applicant of the relevant entitlement periods. The Insurer advised the applicant that she has received 95 weeks of compensation payments. Therefore any ongoing entitlements of the applicant are subject to Section 37 of the 1987 Act.
20. The Insurer made a Work Capacity Decision that the role of Call or Contact Centre Worker was suitable employment for the applicant. The Insurer relied upon a rehabilitation services transferable skills analysis dated 19 February 2015 in making this decision.
21. Based upon a WorkCover Certificate of Capacity from Dr G dated 4 August 2015 and a report from Dr A dated 5 March 2015 the Insurer made a decision that the applicant had capacity for *'full time hours.'* As stated above I am unable to review the Insurer's discretion as to which medical evidence they prefer provided they have followed the correct procedures in coming to the decision.
22. The Insurer made these decisions in accordance with Section 43 of the 1987 Act and the relevant Guidelines.
23. I do note that the Authority in their Findings and Recommendations on Merit Review made a finding that the applicant could only work 16 hours per week in suitable employment. As stated earlier I am not in a position to review the discretion used by the Insurer.
24. The Work Capacity Decision of the insurer dated 10 August 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation.

### **Finding**

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

### **RECOMMENDATION**

26. The application for procedural review is dismissed.



Level 4, 1 Oxford Street, Darlinghurst NSW 2010  
T: 13 9476  
[contact@wiro.nsw.gov.au](mailto:contact@wiro.nsw.gov.au)  
[www.wiro.nsw.gov.au](http://www.wiro.nsw.gov.au)

Tracey Emanuel  
Delegate of the Workers Compensation  
Independent Review Officer  
9 February 2016