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.

Introduction and background

1. The background to this application was fully set out in WIRO recommendation 2116 and requires no repetition.

2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 29 July 2016. The Decision informed the applicant that his weekly payments would be ceasing from 05 November 2016. An internal review by the insurer confirmed the original decision.

3. As at the date of the work capacity decision, the applicant was certified by his own Nominated Treating Doctor as capable of working for 20 hours per week. Since he was not working, the Insurer terminated payments on the basis of section 38(3)(b) and (c).

4. The applicant sought Merit Review from the Authority by way of application received 28 September 2016. The Authority delivered its Findings and Recommendations dated 12 October 2016. The Authority made findings that the applicant: (i) is able to return to work in "suitable employment"; (ii) has current work capacity; and (iii) does not satisfy the special requirements under section 38(3) for the continuation of weekly payments.

5. An application was subsequently made to this Office for procedural review, received on 17 November 2016. I am satisfied that the application has been made within time and in the proper form.

Submissions by the applicant

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

6. Section 44BB(1)(c) of the *Workers Compensation Act* 1987 (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."*

7. The submissions made by the applicant are as follows:

    1. On page 3 of the work capacity decision, the Insurer refers to "section 338" in its provision of the definition of "Suitable employment" to the worker. However, there is no "section 338" under the Act.
    2. In the fifth paragraph on page 4 of the work capacity decision, the Insurer states "*As you have not worked for 15 hours per week, earning $176 per week and your current certification of 20 hours per week, you do not meet the special requirements of section 38(3)(b) and (c) as explained above, for continuation of of weekly payments after the second entitlement*." However section 38(c) does not require a worker to be working 15 hours per week warning $176 per week.
    3. On page 5 of the work capacity decision, the Insurer explains that "*Because you have received 591 weeks of weekly payments since the date of injury, your benefits are currently calculated using section 38…."* and that "*As you have been paid 591 weeks of weekly benefits, you fall within section 38 of the Workers Compensation Act 1987 and the Special requirements for the continuation of weekly payments after the second entitlement period (after week 130)."* However the Insurer states in other parts of the work capacity decision that the worker does not fall within the Special Requirements for the continuation of weekly payments after the second entitlement period. Additionally on page 5 of the work capacity decision, after stating that the worker has received 591 weeks (which is a period of over 11 years) of weekly payments, the Insurer provides for the worker the "*other benefit periods*" including "*Section 39 – cessation of weekly payments after 5 years.*" One would presume that they fell under section 39.

Submissions by the Insurer

8. The Insurer made four submissions:

    1. [The Insurer] notes the error on page 3 of the Work Capacity Decision and provides [its] apologies on behalf of the case manager.

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

> However, [the Insurer] does not believe that this typographical error has materially impacted the outcome of this decision.
>
> 2. [The Insurer] notes the poor phrasing on page 4 and again provides [its] apologies on behalf of the case manager. However, given the wording of the legislation at section 38 (3), the fact that the worker does not satisfy the special requirement of section 38(3)(b) means that section 38(3)(c) becomes redundant. [The Insurer] does not believe that this poor description materially impacts the outcome of this decision.
>
> 3. [The applicant] is aware that he falls under section 38 and that he has done so for some time due to the previous work capacity decision and review process that commenced in October 2015 and completed by a WIRO review on 04 March 2016. I note that in the penultimate paragraph on page 4 of the WIROs recommendation issued on 04 March 2016, it states; 'The insurer is not required to explain the entitlement period which is associated with Section 38 of the 1987 Act as it is not relevant to the applicant.'[1]
>
> 4. [The Insurer] submits that given [the applicant] has availed himself of legal advice and representation and been through the Work Capacity Decision and Review process previously, and in respect of the errors identified, there have been no procedural errors that have materially impacted the outcome of this claim.

9. Neither set of submissions add much to the exercise. The three submissions by the applicant are overstated and misconceived. First, the reference to the non-existent "section 338" was a reproduction of the statutory parenthetical insertion of a reference to section 44B, which provides for workers to supply certificates of capacity to insurers. It has nothing to do with the definition of "suitable employment." The Insurer did correctly reference section 32A in the context of suitable employment. The Insurer is right to say that it is no more than an obvious typographical error with no consequences.

10. Secondly, the applicant is wrong to refer to "section 38(c)" (which the Insurer did not reference) and is also wrong to assert that section 38(3)(c) does not require a worker to comply with section 38(3)(b). The

[1] The apparent *non-sequitur* is entirely revealed when the original text is examined – it was in fact section 39 which was said to be "not relevant."

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

conjunctive “and” between sections 38(3)(b) and (c) shows that both are requirements, with (b) being a precondition of (c).

11. Thirdly, while the Insurer certainly said more than once that the applicant does not meet the requirements of section 38(3), which applies to the post-second entitlement period (after 130 weeks), the applicant seems to think the Insurer has said the applicant does not fall within the relevant period. That is a complete misreading by the applicant of the decision.

12. Fourthly, while the Insurer has no need to explain section 39 since it will not apply to any worker, including the applicant, until 1 October 2017, it was probably not helpful of the Insurer to include a reference to it at this stage. But, unhelpful though it may well be, it can scarcely be a procedural error, or an error of any kind, to merely state a correct interpretation of a section of an Act.

Decision

13. The Insurer contacted the applicant on 4 July 2016 giving notice that a work capacity decision might be made in around 21 days, following a work capacity assessment. This complies with the “fair notice” provision in *Work Capacity Guideline* 5.2.

14. In the work capacity decision notice the Insurer advised the applicant that the work capacity assessment had commenced on 4 July 2016 and was completed on 29 July 2016.

15. The Insurer explained sections 43(1)(a),(b) & (f).

16. Under section 43(1)(a) the applicant was found to have current work capacity for 4 hours per day, 5 days per week.

17. The Insurer found the applicant to be capable of performing the “suitable employment” of a Packer and a Light Process Worker, in accordance with section 43(1)(b).

18. The Insurer purported to “decide” under section 43(1)(f) that the applicant does not comply with section 38(3)(b). Whether this is strictly speaking a “decision” or a mere statement of fact which requires no

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

deciding may be an interesting question, but it does not invalidate the decision-making process either way.

19. The Insurer explained the entitlement periods and noted that the applicant had received no less than 591 weeks of payments, clearly placing him in that period following the second entitlement period which ends after 130 weeks. Section 38 was clearly set out and explained. This may have been a more appropriate place to insert the statement that the applicant did not comply with section 38(3)(b), although since that had already been said the Insurer avoided a redundancy by not repeating it.

20. The Insurer found no evidence that the applicant was a worker with 'high needs,' there being no Medical Assessment Certificate issued by an Approved Medical Specialist assessing more than 20% Whole Person Impairment (WPI).

21. Section 59A(2) and (3) were fully and clearly explained. The applicant was advised that his entitlement to payment for pre-approved ongoing medical expenses might continue for a further two years until 05 November 2018. This is the correct period for a worker with less than 10% WPI.

22. The correct notice period was given in accordance with section 54(2)(a).

23. I can identify no procedural errors in the decision-making process.

Finding

24. The work capacity decision of the Insurer was validly made.

RECOMMENDATION

25. The application for procedural review is dismissed.

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

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
14 December 2016