



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 44(1)(c) OF THE *WORKERS COMPENSATION ACT 1987*.**

### **SUMMARY:**

- a. **The application is dismissed.**

#### **Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 18 December 2014. The decision informed the applicant that his weekly payments of compensation would cease on 1 April 2015. The applicant sought internal review and the subsequent decision, dated 27 May 2015, confirmed the original decision.
2. The applicant applied to the Authority for Merit Review on 22 June 2015 and they delivered findings and recommendations dated 22 July 2015. The Authority made a finding that in accordance with Section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act) the applicant was not entitled to weekly payments of compensation.
3. The applicant then made application to this office dated 20 August 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. 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**

5. 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.



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

6. In a document attached to his application and described as a "Statement" the applicant set out what might be accurately styled an incidental apercu about his situation, as opposed to submissions *qua* submissions in the classic sense. This document set out the date of injury (but not the manner) and the physical, domestic, recreational and occupational consequences said to have arisen therefrom.
7. In the course of the "Statement" the applicant noted that the insurer had assessed him as suitable for despatch and warehouse administration, clerical work and work as an administrative assistant. The applicant averred that this was not possible, since he had once been terminated "in the administrative field" due to being too slow. He is of the view that he is therefore unqualified to perform the work described above.
8. An unexpected inclusion in the applicant's parrhesiastic "Statement" is the revelation that, despite his own self-assessment as being unqualified for clerical or administrative work, he has, subsequent to his injury, become an elected local councillor. The council work is said to consist of attending meetings and reviewing documents and usually occupies around 10 hours per week. It is unpaid except for payment for "expenses" and in the words of the applicant "does not qualify as employment."
9. The applicant's final salvo is to say: "I believe that I have currently no real work capacity and the insurer has failed to identify suitable work for me."
10. None of the matters raised by the applicant in the "Statement" are relevant for the purposes of procedural review.
11. The applicant was represented in the course of procedural review and submissions more relevant to the process were made on his behalf in the application form as follows:

The Work Capacity decision of [the Insurer] does not comply with the relevant legislation and guidelines and therefore should be found invalid on the basis that the insurer failed to:

- a. Correctly reference the legislation;



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

- b. Advise the applicant that his payment was to be terminated and inform the applicant of the date the benefits are to be stopped;
- c. To advise the applicant that any documents or information that have not already been provided to the worker can be provided to the worker on request to the insurer;
- d. Provide the worker with a clear calculation of his PIAWE;
- e. Clearly identify the entitlement periods and provide the worker with detail as to how payments are to be calculated; and
- f. Inform the worker as to the date of his medical expenses benefits are to stop.

### **Submissions by the Insurer**

12. The Insurer has provided documents and a chronology as well as the following answers to the submissions set out as a.-f. above:

The work capacity decision of [the Insurer] dated 18 December 2014 does comply with the relevant legislation and guidelines.

- a. The decision was made in accordance with *section 38 of the Workers Compensation Act 1987* as [the applicant] had been paid a total of 134 weeks of weekly payments which places him after the second entitlement period.

The decision notice correctly referenced [the applicant's] entitlement to reasonable and necessary treatment in accordance with *section 59A of the Workers Compensation Act 1987*.

The decision notice correctly referenced the notice period in accordance with *section 54(2)(a) of the Workers Compensation Act 1987* with an effective date of 1 April 2015.

[The former scheme agent]<sup>1</sup> had correctly referenced the Workers Compensation Act 1987 to their work capacity decision dated 18 December 2014 and have taken into consideration the requirements of the *WorkCover Work Capacity Guidelines*.

---

<sup>1</sup> This was a claim transferred to the current scheme agent for a former scheme agent after the date of the work capacity decision.



- b. [The applicant] was advised that the outcome of the decision was he had no entitlement to weekly payments effective 1 April 2015 as evident in the work capacity decision notice of [the former scheme agent] dated 18 December 2014.

Unfortunately, there are no recorded file notes available at [the current scheme agent] so I cannot confirm if [the applicant] was contacted to discuss the outcome of the decision.

- c. In accordance with '*Attachment B - Evidence considered in making the decision*' states that '*Any documents or information that have not already been provided to you can be provided upon request*' therefore, 5.3.2 of the WorkCover Work Capacity Guidelines is met.
- d. The outcome of the work capacity decision was that [the applicant] did not meet the requirements of the *section 38(3) (a), (b), or (c) of the Workers Compensation Act 1987*, as [he] was assessed as working less than 15 hours per week and assessed with capacity to further undertake additional employment or work that would increase his current weekly earnings. As [the applicant] does not meet the requirement to receive ongoing weekly compensation payments, [the former scheme agent] did not provide a calculation of [the applicant's] pre injury average weekly earnings.

Likewise, in the Findings and Recommendations on Merit Review by the Authority dated 22 July 2015, the Authority found that [the applicant] had only returned to work for 10 hours per week but had the capability to work 30 hours per week therefore the decision was that [he] does not meet the special requirements under *section 38(3) of the Workers Compensation Act 1987*. Therefore, the Authority did not provide a calculation of [the applicant's] pre injury average weekly earnings.

- e. On page 9 of the work capacity decision notice, [the former scheme agent] provided a table identifying the special requirements for continuation of weekly payments after the second entitlement period which explains how entitlements are calculated in accordance with *section 38 of the Workers Compensation Act 1987*.
- f. On page 5 of the work capacity decision notice under '*Important Information*', [the former scheme agent] indicated that [the applicant's] entitlement to medical, hospital and rehabilitation services will be affected and that he will '*lose the right to payment*



*or re-imburement for the cost of any treatment, service or assistance given or provided more than 12 months after the cessation date (Section 59A (2)).'*

5.3.2 of the *WorkCover Work Capacity Guidelines* is met as [the former scheme agent] explained the impact of the work capacity decision on [the applicant's] entitlement to medical and related treatment expenses.

### **The Decision**

13. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
14. In accordance with Guideline 5.3.2 the insurer has correctly informed the applicant that he has received 134 weeks of compensation payments and that any ongoing entitlement is determined by Section 38(3) of the 1987 Act.
15. The insurer has made a decision in accordance with Section 43(1)(a) that the applicant has the current capacity to work 30 hours per week in suitable employment. The insurer has made a further decision in accordance with Section 43(1)(b) and Section 32A and has identified suitable employment.
16. There was adequate medical evidence on which to base the decision.
17. Although it would scarcely be described as either sophisticated or nuanced, the insurer's explanation of section 59A(2) certainly falls within the wide range of available possibilities recently canvassed by various stakeholders including the Workers Compensation Commission of NSW and the (now former) WorkCover Authority.
18. The former scheme agent provided more than adequate notice for the purposes of section 54(2)(a).
19. I accept the submissions made by the current scheme agent in response to those of the applicant.

### **Finding**



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

20. Under the legislation the Insurer can make an assessment of the applicant's work capacity and then a decision about that work capacity, but they must comply with the legislation, the Regulation and the Guidelines in order to produce a procedurally correct result. In the current instance there have been no breaches of the legislation and the Guidelines which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be validly made.

### **RECOMMENDATION**

21. The application is dismissed.

Wayne Cooper  
Delegate of the Workers Compensation  
Independent Review Officer  
30 September 2015