



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 6 September 2013. The decision informed the applicant that she was considered to have no capacity for work and that her weekly payments of compensation would increase in accordance with the statutorily fixed transitional rate on 13 December 2013.
2. The applicant sought internal review on 15 June 2015 and the Internal Review Decision was dated 13 July 2015. The internal review decision concluded that the applicant had the capacity to work 15 hours per week and that her weekly payments of compensation would cease on 21 October 2015 as she was not working.
3. The applicant applied to the Authority for Merit Review on 29 July 2015 and they delivered findings and recommendations dated 31 August 2015. The Authority made a finding that the applicant did not satisfy the special requirements under Section 38(3) of the *Workers Compensation Act 1987* ("the 1987 Act") to be entitled to continuing payments of weekly compensation.
4. The applicant then made application to this office dated 2 September 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
5. On 13 May 1990 the applicant suffered injuries to her leg, knee, back and teeth as a result of a motor vehicle accident she was involved in while on a journey during the course of her employment as a snack food vendor. The insurer accepted liability and at the time of the work



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

capacity decision and the internal review decision the applicant was in receipt of weekly payments of compensation.

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. The applicant has requested a procedural review and has made the following submissions:

- The applicant is precluded from the 2012 amendments;

The applicant is not precluded from the 2012 amendments. The applicant was employed as a snack food vendor and her entitlements to workers compensation payments are subject to the *Workers Compensation Act 1987* and the *Workplace Injury Management and Workers Compensation Act 1998*. This submission must fail.

- The applicant contacted the insurer over the calculation of her PIAWE by way of Section 44 application, which the insurer denied, and the applicant believes they behaved in a vexatious manner and denied her of her rights;

As the applicant was in receipt of weekly payments of compensation as at 1 October 2012 she is deemed to be an existing recipient. Schedule 6 Part 19H Clause 2 of the 1987 Act states that as an existing recipient the applicant's PIAWE is deemed to be the transitional rate which at the time of the work capacity decision was \$938.30 per week. The insurer has no discretion in the calculation of the applicant's PIAWE in these circumstances. This submission must also fail.



- The insurer overturned the first work capacity decision which concluded that she had no capacity;

The applicant requested a review of the work capacity decision dated 6 September 2013 on 15 June 2015. Given the effluxion of time the internal review decision referred to additional medical evidence obtained since the making of the work capacity decision. The work capacity decision was reviewed at the request of the applicant. The applicant appears to be making the perverse submission that the insurer can only review the original decision on grounds chosen by her and that no other basis for review is allowed. This is incorrect.

In any event, as set out in Section 44 of the 1987 Act, I am only able to review the work capacity decision. I am not able to review the Internal Review Decision.

- The applicant has been constantly advised by the insurer that she will lose her weekly benefits if she does not co-operate with return to work obligations;

This submission is not a submission that is relevant to procedural review.

However, the applicant should note her return to work obligations as set out in Section 48 of the *Workplace Injury Management and Workers Compensation Act 1998*.

- The applicant's nominated treating doctor does not agree that she has capacity and has completed WorkCover certificates to this effect;

The applicant's nominated treating doctor certified the applicant to have no capacity for work. This was accepted by the insurer in the work capacity decision dated 6 September 2013.

After reviewing the work capacity decision at the request of the applicant the insurer did not accept the nominated treating



doctor's opinion in the internal review and preferred the medical opinion of its qualified doctors. However, as previously stated I am only in a position to review the procedures undertaken by the insurer in making the work capacity decision and I am not in a position to review the internal review decision.

- Rehabilitation has not been provided in a timely and responsible manner;

This submission is not relevant to procedural review.

- The applicant submits that the opinion of her nominated treating doctor should be given precedence over the doctors qualified on behalf of the insurer;

As stated above the insurer did accept the applicant's nominated treating doctor's opinion in the work capacity decision. It was not until the applicant applied for an internal review that the insurer did not accept the nominated treating doctor's opinion. I am not in a position to review the discretion used by the insurer in respect of decisions made about the capacity of a worker and I am not in a position to review the internal review decision.

- The applicant has been put under duress to agree with the insurer to participate in return to work obligations;

This submission is not relevant to procedural review although the applicant should consider that she does have to comply with certain return to work obligations as set out in the legislation.

- The applicant submits that she does not cover the criteria of being 'ready willing or able';

This submission is not relevant to procedural review. Were it so relevant, it would be a negative consideration for the applicant, since being "ready willing and able" to work are prerequisites to receipt of ongoing weekly payments after the second payment period.



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Submissions by the Insurer

9. The Insurer made submissions dated 9 September 2015 in response to this application. The insurer submitted:

- The applicant is an existing recipient of weekly compensation payments and therefore her pre injury average weekly earnings is deemed to be the transitional amount in accordance with Schedule 6 Part 19H of the 1987 Act;

The insurer does not have discretion in respect of calculating the PIAWE in the circumstances of this applicant and I accept the insurer's submission.

- The applicant's nominated treating doctor continues to certify the applicant to have no capacity for work. However, the doctor indicates that the applicant has capacity to lift/carry up to 5 kilograms, sitting up to 15 minutes, no pushing or pulling, no bending twisting or squatting, and driving short distances less than 20 kilometres. The Insurer preferred the opinion of several other treatment providers who reported that the applicant has current capacity for work;

This submission is not relevant to procedural review as I am not allowed to review any discretion exercised by the insurer with respect to issues such as capacity;

- There is a requirement for the applicant to make reasonable efforts to return to work in suitable employment or at another place of employment and referred to Section 48 of the *Workplace Injury Management and Workers Compensation Act 1998*;

This submission is not relevant to procedural review.

The Decision

10. The relevant Guidelines were dated 8 August 2013 and came into effect on 12 August 2013.



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11. In accordance with Section 43(1)(a) of the 1987 Act the insurer made a decision that the applicant was unable to return to work in either her pre-injury employment or suitable employment. Therefore, the applicant had no capacity.
12. Guideline 5.3.2 requires the insurer to explain the relevant entitlement periods. The insurer has informed the applicant that she has received 1013.52 weeks of compensation payments. As a result her ongoing entitlements will be subject to the provisions of Section 38 of the 1987 Act.
13. The insurer has correctly advised the applicant that as she was in receipt of weekly payments immediately before 1 October 2012 she was an existing recipient. It was noted that for all existing recipients the legislation specified that a transitional amount be used as the deemed amount for pre-injury average weekly earnings (PIAWE).
14. In accordance with Guideline 5.3.2 the insurer has correctly referenced the relevant legislation. The insurer has referred to Schedule 6 Part 19H Clause 2 as the section which sets out the 'transitional rate' which is deemed to be the PIAWE.
15. Guideline 5.3.2 requires the insurer to state the impact the decision has on the applicant's entitlement to weekly payments. The insurer set out at page 2 of the work capacity decision the algorithm from Section 38(6) of the 1987 Act which was used to determine her ongoing entitlement to weekly payments of compensation. The applicant was informed that her ongoing weekly payments of compensation would be \$750.64 per week.
16. The same Guideline required the insurer to inform the applicant of the date when the decision would take effect. In accordance with Section 54 of the 1987 Act the insurer informed the applicant that the new payment rate would take effect from 13 December 2013.
17. Guideline 5.3.2 also required the insurer to advise the applicant of the effect that the decision would have on her entitlement to medical and related treatment expenses. As the applicant remained in receipt of weekly payments of compensation there was no impact. The insurer correctly informed the applicant that such entitlements would continue.



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18. The decision of the insurer dated 6 September 2013 has displayed a careful consideration of the requirements of the Guidelines and legislation.

Finding

19. There are no procedural errors identifiable in the decision dated 6 September 2013. The insurer has complied with the Guidelines and relevant legislation.

RECOMMENDATION

20. The application for procedural review is dismissed.

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
14 October 2015