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 is dismissed.

Introduction and background

1. The applicant suffered injury to the thoraco-lumbar spine when he had a fall in the course of his employment on or about 23 March 2015.[1] The Insurer accepted liability and made weekly payments for all relevant periods. The applicant returned to work on suitable duties with the same employer and is currently certified as capable of working for five hours per day, three days per week.

2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 15 December 2017. The Decision informed the applicant that his payments of compensation would reduce to $0.00 per week from 23 March 2018. The applicant's PIAWE was $657.68. The insurer found he had a capacity to earn $$698.18 per week. This decision was maintained following internal review.

3. The applicant sought Merit Review from the Authority by way of application dated 27 April 2018. The Authority made the following somewhat terse finding:

> The insurer's decision to reduce the amount of [the applicant's] weekly payments of compensation to $0.00 stands.

4. An application was made to this Office for procedural review received on 10 July 2018. I am satisfied that the application was made within time and in the correct form.

[1] This date, which is seemingly uncontentious, is variously described as 23 March 2015, 1 June 2018 (both of which appear on page 1 of the merit review findings) and 23/03/2017 (which appears on page 3 of the work capacity decision, although in the very next paragraph it is more correctly described as 23/03/2015).

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

Submissions by the applicant

5. 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."*

6. The applicant made several submissions, mainly variations on the one theme, being that he has upper spinal symptoms, and the insurer's doctors have ignored those symptoms in their reports. He goes on to say that this results in an under-reporting of his limitations. The foregoing might seem a touch polite, when considered against the actual wording used in the application:

   - False interpretation of Doctor report
   - False labour analysis report
   - Reports do not reflect my upper back injury
   - Doctor report and examination did not consider my upper back injury

Submissions by the Insurer

7. The Insurer countered the applicant's submissions by referring to the specific comments of two doctors as follows:

   - Dr S at p4 of his report asserted there was "about half normal rotation in the thoracic spine" without spasm.
   - Dr V at p2 of his report noted the applicant "gets some degree of thoracic discomfort and left thoracic radiation from time to time." He noted, however, that no specific diagnosis could be made because the applicant could not undergo appropriate imaging due to his "anxiety."

   Accordingly the Insurer submits that the upper back (thoracic spine) was considered by the doctors. They further note that the applicant himself has failed to provide any objective medical evidence in support of his asserted upper spinal injury.

Decision

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

8. The Insurer made a decision about PIAWE and the applicant's ability to earn in suitable employment. The latter was based in part on Certificates of Capacity provided by the applicant's own doctor, and in further part on the earnings currently derived from suitable employment.

9. It was made clear to the applicant that he had received more than 130 weekly payments as at the date of the decision, bringing him into the period immediately following the second entitlement period. Section 38 was clearly explained.

10. As part of the internal review the insurer quoted the following from Dr S:

> *I have highlighted that there are no objective clinical findings and, to some extent, [the applicant's] disability is dictated by his reported symptoms.*
>
> *[The applicant] presents with ongoing lumbar spine pain with symptoms of non-verifiable radiculopathy. There are no objective neurological findings. The course of his symptoms could be discogenic or mechanical. His presentation is modified by his level of anxiety.*

11. The insurer goes on to make the following observation:

> Neither Dr S nor Dr V identified a specific upper back injury, and as noted previously, Dr M [the applicant's Nominated Treating Doctor] has not included an upper back injury as part of [the] diagnosis.

12. It is tolerably clear that the "upper back" symptoms experienced by the applicant were addressed by the insurer, although not with the outcome sought. It remains open to the applicant to acquire objective medical evidence in support of his claim.

13. Since the applicant is not in possession of an assessment of Whole Person Impairment in excess of 10% the insurer advised that he will continue to be able to claim pre-approved medical treatment for two years following 23 March 2018 under section 59A(2). This is in accordance with the legislation.

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

Finding

14. The Insurer has not committed any procedural errors in the course of making the work capacity decision in this case. It follows that the decision was validly made.

RECOMMENDATION

15. The application is dismissed.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
14 August 2018