



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 for procedural review is dismissed.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 11 June 2015. The decision informed the applicant that her last weekly payment of compensation would cover the period up to 19 September 2015, with no payments following. The applicant sought internal review and the Internal Review Decision dated 23 July 2015 confirmed the earlier decision.
2. The applicant applied to the Authority for Merit Review and they delivered findings and recommendations dated 25 September 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") and it followed that she was not entitled to ongoing weekly payments.
3. The applicant then made application to this office dated 14 October 2015. I am satisfied that the application is within time and in the proper form.
4. The applicant sustained binaural hearing loss in the course of her employment as a flight attendant with an international airline. The agreed notional date of injury was 15 April 2010. In March 2012 the applicant underwent multiple complicated surgeries, including tympanoplasty, posterior atticotomy, a mastoidectomy, canalplasty and removal of granulation and polyps from the middle ear. Follow-up



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surgery several months later attempted to increase or facilitate ventilation to the ear canal and “promote healing.”

5. From early 2014 the applicant was capable of working for reduced hours in alternative duties. She cannot return to work as a flight attendant. Since late 2014 she has worked as a retail sales assistant with David Jones. Recently she has averaged less than 20 hours per week, whereas she is certified as capable of working 28 hours per week.
6. Weekly payments were made for all relevant periods and the applicant was an existing recipient of weekly payments immediately prior to 1 October 2012.

Submissions by Applicant

7. The applicant says the following by way of submissions:
 - a. The decision should be reversed, as it is based on a false claim that I am not undertaking further additional work that increases my earnings. The Notice to Discontinue Weekly Payments was made in retaliation to a complaint made to [name of General Manager of Insurer], dated 11 March 2015 regarding [name of case manager].
 - b. Section 38(3)(c) of the Act states that a worker who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if the worker is assessed by the insurer as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker’s current weekly earning.
 - c. Based on my payslips, I am consistently undertaking further additional work that increases my earnings.

Submissions by Insurer

8. The Insurer made no submissions in reply.



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Discussion

9. In the course of Merit Review the applicant made the same submissions as those appearing *supra* at 6 a.-c. While those submissions seek to impugn the motives of the Insurer, they do not address the central problem identified by both the Insurer and the Authority in the course of Merit Review, being that the applicant continues to regularly work fewer than 28 hours per week, despite certification that she is capable of 28 hours work per week.

10. In the course of procedural review I cannot go beyond the wording in section 44(1)(c) of the 1987 Act which describes the process as follows:

“ ... a review only of the insurer’s procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer in making the decision ... ”

11. If the Insurer has the considered view that the applicant is capable of working for 28 hours per week but those hours are not being worked, it is entirely within the discretion of the insurer to make a determination that the applicant has not satisfied the requirements of section 38(3)(c) and to terminate her payments. That decision is not reviewable by this office. It has already been the subject of scrutiny by the Authority, which agreed with the Insurer.

12. On the face of it the decision by the insurer discloses no procedural errors. The correct notice period was given, alternative suitable employment was identified, reports relied upon were cited and, where relevant, the legislation was clearly set out and explained.

Finding

13. I find that the decision dated 11 June 2015 fully complies with the legislation and guidelines and accordingly the decision was validly made.

RECOMMENDATION

14. The application for procedural review is dismissed.



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Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
16 November 2015