



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 work capacity decision by the Insurer dated 1 July 2015 is set aside.**
- b. Such weekly payments as the applicant is receiving by virtue of the stay arising out of clause 30 of Schedule 8 to the Workers Compensation Regulation 2010 are to continue until a new decision is made in accordance with the requirements of section 43(1) of the Workers Compensation Act 1987 and any period of notice given therein has expired.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 1 July 2015. The decision informed the applicant that his weekly payments of compensation would cease on 8 October 2015. The applicant sought internal review on 29 July 2015 and the internal review decision was dated 24 August 2015 which confirmed the work capacity decision.
2. The applicant then applied to the Authority for Merit Review on 17 September 2015 and they delivered findings and recommendations dated 15 October 2015. The Authority made a finding that the applicant did not satisfy the special provisions under Section 38 of the *Workers Compensation Act 1987* (1987 Act) and is not entitled to ongoing weekly payments of compensation.



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3. The applicant then made an application to this office dated 26 October 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 17 January 1997 the applicant sustained injury to his lower back during the course of his employment as a technical parts advisor. The applicant underwent spinal surgery in or about December 2008 and February 2014. The applicant was unable to return to his pre-injury employment and is presently performing part time duties as a swimming instructor.
5. 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

6. 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.
7. In addition to requesting a procedural review the applicant has submitted his injury limits the hours that he can work, that he has recently been incapacitated with flare-ups and he was in another state attempting to source work in warmer climates.
8. I cannot review any discretion or judgment exercised by the insurer when they are making a decision in respect of the applicant’s capacity to work. I can only review the procedures undertaken by the Insurer when making the work capacity decision. I cannot consider the applicant’s personal position with respect to his injuries. The specific submissions made by the applicant are not relevant to this procedural review.

Submissions by the Insurer

9. By way of email dated 26 October 2015 the Insurer advised that the applicant was not an existing recipient of weekly compensation payments. No further submissions were made.



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The Decision

10. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
11. The Insurer has made a work capacity decision that the applicant has the capacity to work 29 hours per week. This decision was made in accordance with Section 43(1)(a) of the 1987 Act and was based upon the certificate of capacity dated 4 June 2015.
12. In accordance with Section 43(1)(b) and Section 32A of the 1987 Act the Insurer made a decision that suitable employment for the applicant was a swimming instructor. This decision was based upon a rehabilitation services report and it was noted that the applicant was currently performing these duties.
13. In accordance with Guideline 5.3.2 the Insurer has also informed the applicant that he has received 348 weeks of compensation payments and as a result his ongoing entitlement is subject to the provisions of Section 38 of the 1987 Act. The Insurer sets out the special provisions of Section 38(3) at page 3 of the work capacity decision. All these requirements were more than adequately dealt by the Insurer.
14. In making the work capacity decision the Insurer has determined that the applicant has the capacity to work for 29 hours per week. The Insurer has also informed the applicant that he must earn at least \$173 per week in accordance with Section 38(3)(b) of the 1987 Act. It is noted within the decision that the applicant was presently performing suitable employment duties as a swim instructor. The decision failed to articulate the hours worked and the weekly earnings of the applicant.
15. Guideline 5.3.2 requires the Insurer to clearly explain the line of reasoning for its decision. At page 1 of the work capacity decision the Insurer has advised the applicant:
 - *“You meet the special requirements for continuation of weekly payments after second entitlement period (after week 130) in accordance with Section 38(3) of the 1987 Act.”*



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- *Your weekly payment calculation results in \$0.00 benefit in accordance with Section 38(7) of the 1987 Act.”*

16. Then at page 4 of the work capacity decision the Insurer advises the applicant:

- *“As we have assessed you as being capable of undertaking further additional employment or work that would increase your current weekly earnings, you do not meet the special requirements for continuation of weekly payments after the second entitlement period.”*

17. The Insurer has provided the applicant with a confusing and conflicting explanation of his entitlements and has provided two different reasons for its decision.

18. In the Insurer's statement at paragraph 15 above the Insurer has failed to express which requirements of Section 38(3) the applicant has complied with in order for his entitlements to be ongoing and then failed to communicate the nature of the calculation which led to the applicant's entitlements to be \$0.00.

19. In the Insurer's statement at paragraph 16 above the Insurer has failed to communicate the additional employment the applicant is *'capable of undertaking'* as the decision has failed to specify the hours the applicant is presently working in comparison to the applicant's current work capacity as assessed by the Insurer.

20. It is noted that the Insurer has attempted to rectify the shortcomings of the work capacity decision in the Internal Review Decision. However, that is not sufficient to validate the original decision.

21. Furthermore, the insurer has failed to take the added step of quoting an hourly or daily rate of remuneration for such labour as a swim instructor. This would appear to fail the test of "suitable employment" since it does not even state that the work would attract payment at all, let alone the rate of payment.



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22. In Dewar¹ Deputy President Roche stated:

“In context, the phrase ‘employment in work’, in the definition of suitable employment, ‘in relation to a worker’, must refer to real work in the labour market. That is, it must refer to a real job in employment for which the worker is suited.” [at 59]

23. In the absence of an hourly or daily rate of remuneration the “suitable employment” identified by the Insurer might be of no more use in assessing an injured worker’s work capacity than any volunteer or community activity he might be able to perform. Such activity would not be a “real job” as stipulated in *Dewar*.

24. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 1 July 2015.

Finding

25. 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 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 invalid.

RECOMMENDATION

26. The work capacity decision by the Insurer dated 1 July 2015 is set aside.

27. Such weekly payments as the applicant is receiving by virtue of the stay arising out of clause 30 of Schedule 8 to the Workers Compensation Regulation 2010 are to continue until a new decision is made in accordance with the requirements of section 43(1) of the Workers Compensation Act 1987 and any period of notice given therein has expired.

¹ *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWWCPCD 55



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Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
20 November 2015