



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 for procedural review is dismissed.**
- b. Such weekly payments as the applicant is receiving by virtue of the stay pursuant to Section 44BC of the Workers Compensation Act 1987 are to continue until receipt by the applicant of this recommendation.**

Introduction and background

1. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 13 July 2015. The Decision informed the applicant that his weekly payments of compensation would cease on 21 October 2015. The applicant sought internal review by the Insurer on 6 October 2015. The Internal Review Decision was dated 27 October 2015 and confirmed the original Work Capacity Decision insofar as cessation of the applicant's weekly payments.
2. The applicant sought Merit Review from the Authority by way of application dated 20 November 2015. The Authority delivered its Findings and Recommendations dated 22 December 2015. The Authority made a finding that the applicant's entitlement to weekly payments of compensation is under Section 38 of the Workers Compensation Act 1987 (1987 Act).
3. The Authority also made a recommendation that the Insurer was to determine the applicant's entitlement to weekly payments of compensation under Section 38 of the 1987 Act.
4. The applicant then made an application to this office for procedural review by way of application dated 22 January 2016. I am satisfied that the application has been made within time and in the proper form.



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

5. On 1 September 2009 the applicant sustained an injury to his back in the course of his employment as an upholsterer. In or about January 2014 the applicant obtained employment as an upholsterer working 25 hours per week. That employment ceased in March 2014. Since that time the applicant has been employed for various periods. At the time of the work capacity decision the applicant was employed as an upholsterer working 15 hours per week. He was also in receipt of weekly payments of compensation from the Insurer.
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. In addition to making the application for procedural review the applicant submitted that the Work Capacity Decision does not refer to Section 38(3A) of the 1987 Act and did not make an assessment of *‘high needs’* and the Insurer has failed to comply with the Merit Review and issue a new Work Capacity Decision.
9. I am only able to review the procedures implemented by the Insurer in making the Work Capacity Decision. I am not in a position to direct an Insurer to comply with any recommendations by the Authority.

Submissions by the Insurer

10. The Insurer has made the following submissions dated 25 January 2016 in response to this application:
 - that they have followed the correct procedures;
 - at the time of making the Work Capacity Decision and the Internal Review Decision the 2015 amendments were not in force;
 - the applicant is not a worker with *‘high needs’*;



- the Internal Review Decision addresses the applicant's degree of permanent impairment and it was noted to be less than 10%;
- making a Work Capacity Decision regarding whether a worker is high need's is not permitted by Section 43(1) ;
- the applicant's entitlements have been correctly determined in the WCD and IRD; and
- the applicants entitlement has been assessed under Section 38 of the 1987 Act as recommended by MRS.

Decision

11. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
12. Guideline 5.3.2 requires the Insurer to advise the applicant of the date of the work capacity assessment. On this occasion the Insurer informed the applicant that the work capacity assessment was completed on 25 May 2015 and the applicant was notified of the Work Capacity Decision by letter dated 13 July 2015.
13. The same Guideline requires the Insurer to advise the date when the Decision takes effect. Section 54(2)(a) of the 1987 Act requires at least three months and four working days notice be given if payments are being reduced or ceased. This notice period takes into account Section 76(1)(b) of the *Interpretations Act 1987*. As a result the applicant was advised that his payments would cease on 21 October 2015. This is the appropriate notice period.
14. The Guideline requires the Insurer to advise the applicant of the impact the decision has on his entitlement to medical and related treatment expenses. The Insurer has referenced and explained Section 59A (2) and (3) of the 1987 Act and advised the applicant that his entitlement to medical expenses will cease 12 months after his entitlement to weekly payments ceases. The Insurer has adequately explained the legislation which was in force at the time of making the Work Capacity Decision.
15. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer has informed the applicant that he has received 133 weeks of compensation payments. Therefore any ongoing



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

entitlement to weekly payments of compensation is subject to Section 38 of the 1987 Act. The Insurer has set out the provisions of Section 38 at page 4 of the Decision.

16. Pursuant to Section 43 of the 1987 Act the Insurer has determined that the applicant has the current capacity to work 30 hours per week based upon the certificate of capacity dated 21 June 2015 from the nominated treating doctor.
17. The Insurer determined, pursuant to the same section, the roles of upholsterer, maintenance supervisor and assembly worker were all suitable employment options. The Insurer based this decision upon an earning capacity assessment report. It was noted that the nominated treating doctor provided written approval for these duties on 29 March 2015.
18. At page 7 of the Work Capacity Decision the Insurer noted the applicant's payslips for the period 13 March 2015 to 3 July 2015. The applicant had worked 15 hours per week and was earning \$300 per week.
19. The Insurer then noted that the applicant had satisfied Section 38(3)(b) in that he had returned to work for not less than 15 hours per week and was earning at least \$176.00 per week (adjusted figure).
20. As the Insurer had determined that the applicant had the capacity to work 30 hours per week he did not satisfy Section 38(3)(c) of the 1987 Act.
21. The Insurer did not make a work capacity decision as to the amount the applicant is able to earn pursuant to Section 43(1)(c) of the 1987 Act. However, in this instance as the Insurer had determined that the applicant was not assessed as being indefinitely incapable of undertaking further additional employment or work that would increase his current weekly earnings. The decision as to the amount the applicant could earn in suitable employment was not relevant to the determination of current work capacity and the resulting termination of the applicant's payments of compensation.¹

¹ *The Trustees of the Sisters of Nazareth v Simpson* [2015] NSWSC1730



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

22. The applicant has made a submission that the Insurer has not made reference to Section 38(3A) of the 1987 Act and did not make an assessment of *'high needs'*. I note that at the time that the Work Capacity Decision was made that the legislation had not been enacted. This submission is more relevant to Merit Review.
23. I note the recommendation of Merit Review is that the Insurer is to determine the applicant's entitlement to weekly payments of compensation under Section 38 of the 1987 Act.
24. In response to the Insurer's submission that making a work capacity decision regarding whether the worker is *'high needs'* is not permitted by Section 43(1) of the 1987 Act I can only reiterate Section 44BB (3)(g) of the 1987 Act which states *'recommendations made by the Authority are binding on the Insurer and must be given effect to by the Insurer.'*
25. In respect of the Work Capacity Decision of the Insurer dated 6 October 2015 I note that the Insurer has displayed a careful consideration of the requirements of the Guidelines and legislation.

Finding

26. There are no procedural errors identifiable in the decision. The Insurer has complied with the Guidelines and relevant legislation.

RECOMMENDATION

27. The application for procedural review is dismissed.
28. Such weekly payments as the applicant is receiving by virtue of the stay pursuant to Section 44BC of the *Workers Compensation Act 1987* are to continue until receipt by the applicant of this recommendation.

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer



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

22 February 2016