



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.**
- b. Such weekly payments as the applicant is receiving by virtue of the stay are to continue until receipt of this decision**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 26 June 2015. The decision informed the applicant that his weekly payments of compensation would cease from 3 October 2015. The applicant sought internal review on 28 July 2015 and the Internal Review Decision was dated 28 August 2015. That decision confirmed the work capacity decision.
2. The applicant applied to the Authority for Merit Review on 24 September 2015 and they delivered findings and recommendations dated 21 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* (the 1987 Act) to be entitled to ongoing weekly payments of compensation.
3. The applicant then made an application to this office dated 17 November 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 16 November 2010 the applicant suffered injury to his right elbow in the course of his employment as a bricklayer. He underwent a lateral epicondyle release on 8 February 2011. The applicant returned to work however he was bullied and harassed as he was unable to perform his normal duties. In July 2011 the applicant resigned from his employment due to bilateral elbow pain. On 11 November 2011 the applicant made a



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claim for psychological injury which was accepted by the Insurer. The applicant is in receipt of weekly payments of compensation and has not returned to work in any capacity.

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 applying for a procedural review the applicant has made the following submissions:
 - There was insufficient evidence to make a logical, rational and reasonable work capacity decision;
 - The Insurer did not assess all available and relevant information as a whole;
 - The report dated 29 July 2015 by [name withheld] has not been taken into account;
 - The work capacity decision is unrealistic given the true earning capacity of the applicant in light of his age, training, education and experience;
 - The Insurer has not given sufficient weight to the impact of the injury upon the applicant;
 - The Insurer has not considered the realistic availability of suitable employment for the applicant.
8. The applicant has also submitted that the determination of ‘*security guard*’ as suitable employment is not realistic and he is unable to perform the duties required. The applicant also pointed out that the work capacity decision nominates ‘*security guard*’ as suitable employment whereas the merit review by the Authority prefers ‘*traffic controller*’ as suitable duties.



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9. I am unable to review any discretion or judgment exercised by the Insurer in making decisions in respect of capacity to work or what constitutes suitable duties. I am also unable to review the Internal Review Decision and recommendations and findings made by the Authority at Merit Review. My review is limited to ensuring that the Insurer has followed proper procedures in making the work capacity decision.

Submissions by the Insurer

10. The Insurer has not made any submissions in response to the application.

The Decision

11. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
12. The applicant's submissions primarily deal with the decisions which the Insurer has made as to the applicant's capacity to work and what constitutes '*suitable employment*.'
13. The Insurer informed the applicant that in accordance with Section 43(1)(a) it had determined that he had current capacity to work 40 hours per week. The Insurer is relying upon medical evidence obtained from an Independent Medical Examiner who assessed the applicant had capacity to work '*full-time*' in a suitable role.
14. Guideline 4 sets out the information which may be considered during a work capacity assessment. This includes, but is not limited to, reports from the treating doctor, independent medical reports, vocational assessment reports and certificates of capacity.
15. Section 44(1)(c) of the 1987 Act limits the review by the Independent Review Officer to 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.



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16. The Insurer has based its decision upon material which can be reviewed during a work capacity assessment. I am unable to review the Insurer's discretion in acceptance of one opinion over another. I can only review the procedures undertaken by the Insurer and in this instance the Insurer has displayed an understanding of the Guidelines and legislation in making its determination.
17. The applicant has made a submission that he is unable to perform the duties of a '*security guard*' which is the suitable employment determined by the Insurer in the work capacity decision. The applicant notes that the Authority nominated '*traffic controller*' as suitable employment in the merit review recommendations and findings.
18. I note that I am unable to review the recommendations and findings of the merit review and I can only perform a procedural review of the work capacity decision.
19. The Insurer has determined '*security guard*' to be suitable employment in accordance with Section 43(1)(b) and the definition in Section 32A of the 1987 Act. The Independent Medical Examiner, vocational assessment and the applicant's nominated treating doctor supported '*security guard*' to be suitable employment for the applicant. The Insurer has made this determination in accordance with the Guidelines. The Insurer has also set out the issues to which it should and should not have regard for in accordance with Section 32A at page 4 of the work capacity decision.
20. In accordance with Section 43(1)(c) the Insurer has determined that the applicant can earn \$950 per week as a security guard. This was in accordance with the vocational assessment.
21. In accordance with Guideline 5.3.2 the Insurer has informed the applicant that he has received 139 weeks of compensation payments and his ongoing entitlement to compensation payments is subject to the special provisions of Section 38(b) and (c) of the 1987 Act. The Insurer has set out the special provisions at page 5 of the work capacity decision.



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22. At page 5 of the work capacity decision the Insurer has provided the applicant with an adequate explanation as to how he had not complied with the special provisions in Section 38 and the reasons he is not entitled to ongoing weekly compensation payments.
23. The Insurer has informed the applicant the decision will take effect from 3 October 2015 and has correctly referred to both Section 54(2)(a) of the 1987 Act and Section 76(1)(b) of the *Interpretations Act 1987*.
24. Likewise the Insurer has correctly referred to Sections 59A(2) and (3) of the 1987 Act and informed the applicant that his entitlement to medical and related treatment expenses would cease twelve months after his entitlement to weekly payments ceased. The Insurer provided the applicant with the correct explanation of the legislation in force at the time of the decision.
25. The applicant made a further specific submission that the report of a psychologist [name withheld] dated 29 July 2015 was not taken into consideration. I note that this report was obtained after the work capacity decision which was dated 26 June 2015. As previously indicated I am only able to review the procedures of the Insurer in making the work capacity decision.
26. The decision of the Insurer dated 26 June 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation.

Finding

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

RECOMMENDATION

28. The application for procedural review is dismissed.
29. Such weekly payments as the applicant is receiving by virtue of the stay are to continue until receipt of this decision



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Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
10 December 2015