



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 10 September 2015. The decision informed the applicant that his weekly payments of compensation would cease from 19 December 2015. The applicant sought internal review and the Internal Review Decision confirmed the original Work Capacity Decision.
2. The applicant applied to the Authority for Merit Review on 25 November 2015 and they delivered findings and recommendations dated 23 December 2015. The Authority made a finding that the applicant's ongoing entitlements to weekly compensation are to be calculated in accordance with Section 38 of the 1987 Act. This was followed by a seemingly irrelevant further recommendation that the Insurer make a new "work capacity decision" as to whether or not the applicant is "a worker with high needs."<sup>1</sup> Since this is not enumerated in section 43(1)(a)-(e) of the 1987 Act, it is possible that the Authority took the view such a determination might fall within section 43(1)(f) which has the opening words: "any other decision of an insurer that affects a worker's entitlement to weekly payments of compensation ..."
3. Even if this is the case, there appears to be the slight difficulty that since the recommendation for the making of a new decision appears in paragraph 55, it follows closely after these words in paragraph 54: "... I have no jurisdiction to review these matters." How a reviewer with no jurisdiction to review a matter in paragraph 54 can have jurisdiction to

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<sup>1</sup> "Seemingly irrelevant" because at the top of page 2 of the work capacity decision the Insurer says this: "Your injury is considered to have resulted in whole person impairment of 10% or less."



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make a recommendation about the same issue in paragraph 55 is unknown.

4. The applicant then made application to this office dated 6 January 2016. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
5. The applicant had previously sought procedural review of a Work Capacity Decision dated 26 November 2013. The applicant was successful and the Work Capacity Decision was set aside by an earlier recommendation of this office<sup>2</sup>.
6. The facts and circumstances concerning the background of this claim are set out in the aforementioned recommendation and need not be repeated.
7. 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**

8. 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.*”
9. The applicant has applied for a procedural review on the basis that both the Insurer and the Authority have misconstrued his medical evidence. This misconception is said to arise because when the applicant’s doctor says he can work for “up to 30 hours per week,” both the Insurer and the Authority take this to mean he could work for 30 hours per week, rather than “up to” that number, which the applicant takes to mean a number less than 30. The applicant seems to regularly work between 21 and 29 hours per week, with more weeks on the lower side than the higher. Despite this, it was a finding of the Authority in the course of merit review that the applicant is physically capable of working for 6 hours per day, 5 days per week. This finding is the basis for the recommendation of the Authority and is binding on the Insurer. This

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<sup>2</sup> Reported and numbered as 192 of 2014



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Office has no power to review the findings and recommendations of the Authority.

10. It follows that the submissions of the applicant are not relevant to procedural review.

### **Submissions by the Insurer**

11. The Insurer submitted as follows:

1. We are of the opinion that the correct procedures were followed and all evidence provided to [the applicant] in the fair notice letter and his submissions in the IR application have been considered.
2. We note the original WCD correctly identified [the applicant's] permanent impairment and therefore correctly determined his entitlement under section 38(3) of the 1987 Act.
3. We submit that [the applicant] is not a worker with high needs as noted in the IRD.
4. Further, we acknowledge the MRD which states the Insurer has not made a work capacity decision as to whether [the applicant] is a worker with high needs. We submit that making a work capacity decision regarding this is not an option under section 43(1) of the 1987 Act. The Insurer therefore submits [the applicant's] entitlements were correctly determined in the WCD and IRD with reference to [the applicant's] WPI in both the WCD and IR.
5. [The applicant's] entitlement has been assessed under section 38 of the 1987 Act as recommended by MRS.
6. We note the remainder of [the applicant's] submissions are substantive rather than procedural in nature and therefore no response is required by us.

### **The Decision**

12. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.

13. The Guidelines and legislative provisions appear to have been complied with in full: the correct period of fair notice was given; the proper notice under section 54 was given, including delivery by post; relevant legislation was clearly and comprehensively explained; and the effect of the decision was fully set out. The procedural errors identified in the



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earlier recommendation of this Office were not repeated by the Insurer on this occasion.

14. In making the Work Capacity Decision dated 10 September 2015 the Insurer has displayed a careful consideration of the requirements of the Guidelines and legislation and has complied fully therewith.

### **Finding**

15. There are no procedural errors identifiable in the decision.

### **RECOMMENDATION**

16. The application for procedural review is dismissed.

Wayne Cooper  
Delegate of the Workers Compensation  
Independent Review Officer  
24 February 2016