



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.**

Introduction and background

1. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 15 September 2015. The Decision informed the applicant that his weekly payments of compensation would cease on 23 December 2015. The applicant sought internal review by the Insurer on 15 October 2015. The Internal Review Decision was dated 5 November 2015 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 4 December 2015. The Authority delivered its Findings and Recommendations dated 8 January 2016. The Authority made a finding that the applicant's entitlement to weekly payments of compensation is after the second entitlement period and must be determined under Section 38 of the *Workers Compensation Act 1987* (1987 Act). The Authority also made a recommendation that the applicant was entitled to weekly payments of compensation at the rate of \$93.96 per week under Section 38(7) of the 1987 Act from 24 December 2015 and continuing.
3. The applicant then made an application to this office for procedural review dated 5 February 2016. I am satisfied that the application has been made within time and in the proper form.
4. The applicant had previously sought procedural review of a Work Capacity Decision dated 3 December 2013. The applicant was successful and the Work Capacity Decision was set aside by an earlier



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

recommendation of this office ¹. The facts and circumstances concerning the background of this claim are set out in the aforementioned recommendation and need not be repeated.

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 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.*" The applicant has applied for a procedural review.
7. The applicant has attached 18 pages of submissions to his application for procedural review. The applicant's submissions address the Insurer substantiating '*suitable employment*'; relying upon earning capacity reports which had allegedly been fabricated; failure of the Insurer to verify the sources used in its reports; failure to provide access to the applicant's file; failure to correctly reference the relevant legislation; failure to correctly identify the entitlement periods; failure to comply with the Section 54 notice requirements and failure to advise of right to apply for procedural review.
8. As stated above I am only able to review the procedures implemented by the Insurer in making the Work Capacity Decision and in advising the applicant of that Decision. I am not able to review the discretion exercised by the Insurer in coming to its decision. The applicant's submissions are merit based, refer to the Internal Review Decision and deal with claims management. The submissions are not relevant to procedural review.

Submissions by the Insurer

9. The Insurer has not made submissions in response to this application.

¹ Reported and numbered as 21814



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

Decision

10. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
11. The Guidelines and legislative provisions insofar as the correct period of fair notice; the proper notice under Section 54, including delivery by post; and explaining relevant legislation were complied with by the Insurer in this Work Capacity Decision.
12. The procedural errors identified in the earlier recommendation were not repeated by the Insurer on this occasion.
13. It is noted that the Insurer made a Work Capacity Decision which resulted in the applicant's weekly payments of compensation ceasing on 23 December 2015. The Authority, at Merit Review, made findings and recommendations that the applicant is entitled to ongoing weekly payments of compensation pursuant to Section 38(7) of the 1987 Act in the sum of \$93.96 per week. The Authority's recommendation was based on the merit review of the Work Capacity Decision and reviewed the discretion exercised by the Insurer in respect of the amount the applicant is able to earn in suitable employment. This is an aspect of the Work Capacity Decision that this procedural review is not able to address.
14. In making the Work Capacity Decision dated 15 September 2015 the Insurer has displayed a careful consideration of the requirements of the Guidelines and legislation.

Finding

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



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

RECOMMENDATION

16. The application for procedural review is dismissed.

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
18 March 2016