



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 Work Capacity Decision by the Insurer dated 16 September 2015 is set aside.**
- b. Such weekly payments as the applicant is receiving by virtue of the stay are to continue until a new decision is made in accordance with the requirements of section 43(1) of the Workers Compensation Act 1987.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 16 September 2015. The decision informed the applicant that his weekly payments of compensation would cease from 3 January 2016. The applicant requested internal review by the Insurer on 14 October 2015 and the Internal Review Decision was dated 12 November 2015. That decision confirmed the cessation of the applicant's weekly payments of compensation.
2. The applicant sought Merit Review from the Authority on 11 December 2015. The Authority delivered recommendations and findings dated 12 January 2016. The Authority made a finding that the applicant does not satisfy the special requirements for continuation of weekly payments of compensation after the second entitlement period pursuant to Section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act).
3. The applicant then made an application to this office for procedural review by way of application dated 8 February 2016. I am satisfied that the application has been made within time and in the proper form.
4. On 10 November 2012 the applicant was loading boxes of soft drink which involved lifting and twisting. The applicant suffered a disc



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

prolapse at L4/5 with back pain and pain radiating down the left leg. The applicant did commence alternate employment as a self-employed insurance salesman. At the time of the Work Capacity Decision the applicant was in receipt of weekly payments of compensation.

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. In addition to requesting a procedural review the applicant has made one and a half pages of submissions. The submissions relate to the Insurer’s assessment of the applicant’s work capacity, the calculation of pre-injury average weekly earnings and the reliance on particular medical reports by the Insurer. These submissions relate to judgment and discretion exercised by the Insurer in the making of the work capacity decision. These submissions are not relevant to procedural review.

Submissions by the Insurer

8. The Insurer has made submissions dated 16 February 2016 in response to the application. The Insurer has submitted that the applicant’s request for review is not procedurally based and it is thus outside of WIRO’s jurisdiction.
9. I point out that the applicant has made an application for procedural review. Such a review is within the jurisdiction of WIRO. The submissions that the applicant has made in support of the application are not based upon procedural error. However, this only goes to the weight that will be given to those submissions during the procedural review.



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. Guideline 5.1 requires the Work Capacity Decision to be logical, rational and reasonable.
12. Guideline 5.3.2 requires the Insurer to explain the relevant entitlement periods.
13. As at the date of the Work Capacity Decision the applicant had been in receipt of weekly payments of compensation for 115 weeks. This placed the applicant in the “*second entitlement period*” which is defined by Section 32A of the 1987 Act and means his ongoing entitlements are subject to Section 37 of the 1987 Act.
14. At page 7 of the Work Capacity Decision the Insurer has informed the applicant:

“As you are not currently working and have been in receipt of weekly payments for a period of 115 weeks, your ongoing entitlement to weekly payments are (sic) to be determined under Section 38(3) of the Workers Compensation Act 1987.”
15. This statement by the Insurer is incorrect and is a procedural error. At the time of the Work Capacity Decision the applicant’s entitlements are clearly subject to the provisions of Section 37 of the 1987 Act. As the Insurer has made a decision under Section 43(1)(a) that the applicant has the capacity to work for 30 hours per week and the applicant has not returned to work his ongoing entitlements are subject to Section 37(3) of the 1987 Act.
16. The Insurer has attempted to circumvent the entitlement periods by assessing the applicant’s entitlements as at the time that the Work Capacity Decision comes into effect rather than assessing them at the time of the work capacity assessment and the time the Work Capacity Decision was made. This is a procedural error.



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

17. The Insurer is assessing the applicant's ongoing entitlement by using criteria that does not apply to the applicant at the time of the work capacity assessment and Decision.

18. At page 8 of the Work Capacity Decision the Insurer has informed the applicant:

"In conclusion, your new weekly payments of \$0.00 per week will commence effective 03/01/2016. This is the expiration date of your weekly benefit entitlements under section 37 of the Workers Compensation Act 1987 and the date which you would commence weekly benefit entitlements under section 38 of the Workers Compensation Act 1987 however [named Insurer] deem you not to meet the necessary requirements to receive such pursuant to Section 38(3) of the Workers Compensation Act 1987."

19. At the time of the work capacity assessment and the Work Capacity Decision the applicant does not have to comply with the special provisions of Section 38(3) of the 1987 Act set out at page 7 of the Decision.

20. Furthermore, the Insurer is not in a position to conclude that at the time the Work Capacity Decision comes into effect and when the applicant's ongoing entitlements are subject to Section 38(3) of the 1987 Act that the applicant will not have returned to work by that stage and be compliant with the special requirements. The Insurer has assessed the applicant's ongoing entitlements to weekly payments of compensation using the incorrect entitlement period and referring to the incorrect Section of the legislation.

21. In this instance the non-compliance of the Insurer with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 16 September 2015.

Finding



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

22. 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

23. The Work Capacity Decision by the Insurer dated 16 September 2015 is set aside.

24. Such weekly payments as the applicant is receiving by virtue of the stay are to continue until a new decision is made in accordance with the requirements of section 43(1) of the *Workers Compensation Act 1987*.

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