



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 is dismissed.

Introduction and background

1. The applicant suffered injury on 31 August 2005 in the course of his employment as a Truck Driver. As a result of the injury he was later redeployed by the employer to a different role as a Tractor Mower Operator, which is less physically demanding than his pre-injury employment. Weekly payments of compensation were made for all relevant periods and the applicant is an "existing recipient" for all relevant purposes.
2. The applicant now seeks procedural review of a work capacity decision made by the Insurer on 5 October 2016. The decision informed the applicant that his weekly payments of compensation would cease on 11 January 2017. This decision was made on the basis that his ability to earn in suitable employment is assessed at an amount which exceeds the transitional rate payable to an existing recipient. Under the formula in section 38(7) there can be no ongoing entitlement.
3. The evidence for this assessment is incontestable, it being the actual amount the self-insured employer continues to pay him in his current job. The applicant has successfully performed this role for more than eight years, since April 2008. The earnings in this role exceed the transitional rate by more than \$170 per week.
4. The applicant sought internal review and by letter dated 30 November 2016 was advised that the original decision to cease weekly payments was affirmed. Despite the decision remaining the same, the Insurer conceded that it had failed to serve the correct documents in support of



the original decision. Therefore the Insurer varied the notice period given to the applicant, giving a further three months and four days from the date of the internal review decision. As a result the applicant would be in receipt of ongoing payments until 6 March 2017, rather than 11 January 2017.

5. The applicant then applied to the Authority for Merit Review, received on 20 December 2016 and they delivered findings and recommendations dated 31 January 2017. The Authority made findings that the applicant: (i) has current work capacity; (ii) has a statutory PIAWE equal to the transitional rate of \$1,014.40 per week; (iii) is able to earn \$1,186.11 per week in his current employment; and (iv) has an ongoing entitlement of \$0.00 by virtue of section 38(7).
6. An application for procedural review was received in this Office on 27 February 2017. I am satisfied that the application was made within time and in the correct form.
7. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the relevant *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 made only one submission, which has the advantage of brevity, thus:

1. I THINK THE DECISION IS UNFAIR.

Submissions by the Insurer

10. The Insurer made the following submissions:

1. We note the only basis for seeking a procedural review is based in [the applicant’s] belief that the decision is unfair. We draw attention to the conversations with [the applicant], explaining the work capacity decision and the legislative basis for the decision. You will



note that this was roughly the same issue raised in the application for Internal Review By The Insurer and the Application for Merit Review. We submit that the decision is in line with the legislation:

- It is simply based on his earnings, earned in the job to which he has been redeployed since 21 April 2008.
 - In that role, his current weekly earnings are \$1,186.11, as per the printout provided to him.
 - He is an existing recipient and his PIAWE = the transitional rate.
 - His earnings are greater than the PIAWE (let alone 80% of PIAWE).
 - Therefore, his weekly entitlements were to be reduced to Nil (i.e. discontinued).
2. Procedurally, we submit that we have acted with procedural fairness:
- Fair Notice phone call and letter took place on 17/08/2016; [the applicant] was invited to provide any documents or make submissions for consideration in the Work Capacity Decision.
 - Work Capacity Decision was made on 5/10/2016.
 - The worker sought an Internal Review by Insurer.
 - The 'Work capacity decision –notification of insurer's decision on internal review' was sent to [the applicant] on 30/11/2016, noting that the wrong documents were attached to the original Work Capacity Decision. Therefore, whilst the original decision was affirmed, the 2 further documents were served and a further 3 months and 4 working days' notice were provided.
 - The Application for Merit Review by the Authority was received and the responses forwarded to the Authority and [the applicant].
 - The outcome of the Merit Review was emailed to us and to [the applicant] on 31/01/2017.
 - We received the Application for procedural review of a work capacity decision from WIRO on 27/02/2017.

The Decision

11. The Insurer wrote to the applicant on 17 August 2016 giving fair notice of a future decision and soliciting any information from the applicant which he might wish to have considered in the decision-making process.



12. The applicant was told that an assessment of his claim was completed on 5 October 2016 and a decision was made on that date.
13. In accordance with Section 54(2)(a) of the 1987 Act the Insurer must provide the applicant with 3 months notice when the decision results in reduction or termination of the applicant's weekly payments. The effect of Section 76(1)(b) of the *Interpretation Act* 1987 allows for an additional four business days to be added to the notice period. These notice requirements were correctly observed by insurer.
14. When the Insurer gave a further notice of three months and four days in the course of the Internal Review that notice was also in accordance with the relevant legislation.
15. The Insurer informed the applicant that he had received 259 weeks of compensation payments. As a result his ongoing entitlements are subject to Section 38 of the 1987 Act. Since he currently works for more than 15 hours per week and earns well in excess of \$1,000 per week, he easily meets the "special requirements" within section 38(3)(b). However, when the formula in section 38(7) is applied, the applicant exceeds his PIAWE (the statutory "transitional rate") and has no eligibility for continuing payments.
16. The applicant was taken through section 43(1) by the Insurer. The findings and outcomes of the decision were also set out.
17. Section 59A was set out and explained. Because the applicant has a certified Whole Person Impairment (WPI) of 7% for which he has already been paid, the Insurer advised that pre-approved medical expenses might be paid for a further two years after weekly payments cease.
18. Under a series of headings, the Insurer set out and had explained to the applicant all of the following:
 - Legislative framework
 - Existing recipient
 - Existing claim
 - Transitional amount
 - Reasons for this decision
 - Current work capacity

- Current return to work status
- Relevant medical information
- Relevant vocational information
- Impact of this decision
- Entitlement period
- Special requirements for continuation of payments after 130 weeks
- Notice period
- Medical and related expenses (section 59A(1)-(3))
- Evidence considered in making the decision
- The review process

19. The decision was very thorough and comprehensive. There were no procedural errors sufficient to invalidate the decision.

Finding

20. The work capacity decision of the Insurer dated 5 October 2016 complies with the legislation and the Guidelines and was validly made.

RECOMMENDATION

21. The application is dismissed.



Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
28 March 2017