



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.**
- b. **Such weekly payments as the applicant is receiving by virtue of the stay pursuant to Section 44BC of the *Workers Compensation Act 1987* are to continue until receipt by the applicant of this recommendation.**
- c. **Pursuant to Section 44BB(3)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.**

Introduction and background

1. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 5 November 2015. The Decision informed the applicant that her weekly payments of compensation would cease on 19 February 2016. The applicant sought internal review by the Insurer on 4 December 2015. The Internal Review Decision was dated 23 December 2015 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 25 January 2016. The Authority delivered its Findings and Recommendations dated 8 February 2016. The Authority made findings that the applicant has current work capacity and is able to return to work in suitable employment.
3. The Authority made a recommendation 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).



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

4. The Authority also found that the Insurer was to determine the applicant's entitlement to weekly payments of compensation under Section 38 of the 1987 Act (as amended on 4 December 2015).
5. The applicant then made an application to this office for procedural review dated 19 February 2016. I am satisfied that the application has been made within time and in the proper form.
6. On 29 May 1991 the applicant suffered injury to her back in the course of her employment as a sales assistant. The applicant's employment was terminated in or about 2000. Since that time the applicant was able to obtain employment as a telemarketer, sales representative, administration assistant, school crossing supervisor and office clerk. At the time of the Work Capacity Decision the applicant was employed as an Administration Assistant and had been since 2013. The applicant was also in receipt of weekly payments of compensation.
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 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.
9. In addition to making the application for review the applicant has submitted that the Insurer should have determined whether she was a '*worker with high needs*' prior to making the Work Capacity Decision.
10. I note that the Authority has already made a Recommendation and Finding in respect of this issue.



Submissions by the Insurer

11. The Insurer made submissions by email dated 23 February 2016 in response to the application for procedural review.
12. The Insurer submitted that paragraphs 38 to 40 of the Internal Review Decision make the determination that the applicant is not a worker with high needs. Therefore the Insurer is of the view that they are not required to make another decision.
13. I do note that the Authority in its Findings and Recommendations on Merit Review dated 8 February 2016 made a finding that the applicant's *"entitlement to weekly payments of compensation is after the second entitlement period (after week 130) and must be determined under section 38 of the Workers Compensation Act 1987 (the 1987 Act) as amended on 4 December 2015."*
14. The Authority noted at page 7 of its decision that the Insurer had referred to the above issue in the Internal Review Decision however it was not considered in the original Work Capacity Decision which was being reviewed. The Authority then made the *statement "Therefore, the Insurer must make a decision about whether [named applicant] is a "worker with high needs"."*
15. In respect of the Insurer's submission that they are not required to make another decision I can only refer to Section 44BB (3)(g) of the 1987 Act which *states "recommendations made by the Authority are binding on the insurer and must be given effect to by the insurer."*

Decision

16. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
17. Guideline 5.3.2 requires the Insurer to advise the applicant of the date of the work capacity assessment. On this occasion the Insurer informed the applicant that the work capacity assessment was completed on 2 November 2015. The applicant was notified of the Work Capacity Decision by letter dated 5 November 2015.



18. The same Guideline requires the Insurer to advise the date when the Decision takes effect. Section 54(2)(a) of the 1987 Act requires at least three months and four working days notice be given if payments are being reduced or ceased. This notice period takes into account Section 76(1)(b) of the *Interpretations Act 1987*. As a result the applicant was advised that her payments would cease on 19 February 2016. This is in excess of the appropriate notice period.
19. The Guideline requires the Insurer to advise the applicant of the impact the decision has on her entitlement to medical and related treatment expenses. The Insurer has referenced and explained Section 59A (2) and (3) of the 1987 Act and advised the applicant that her entitlement to medical expenses will cease 2 years after her entitlement to weekly payments ceases. The Insurer has adequately explained the legislation.
20. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer has informed the applicant that she has received 880 weeks of compensation payments. Therefore any ongoing entitlement to weekly payments of compensation is subject to Section 38 of the 1987 Act. The Insurer has set out the special requirements of Section 38(3) of the 1987 Act at page 4 of the Work Capacity Decision.
21. Pursuant to Section 43 of the 1987 Act the Insurer has noted that the applicant has been certified with capacity of 7.5 hours per day, 2 days per week as per the Certificate of Capacity dated 23 October 2015. The Insurer determined, pursuant to the same section, the role of administration assistant to be suitable employment. The Insurer observed that the applicant had been performing the duties of an administration assistant since 2013.
22. In making these determinations pursuant to Section 43 of the 1987 Act the Insurer has displayed an adequate understanding of the relevant Guidelines and legislation.
23. The Insurer reviewed the payslips submitted by the applicant since the beginning of 2015. It was noted that the applicant had consistently worked 5-7 hours per week with the exception of a 4 week period, from week ending 21 June 2015 to 12 July 2015 where the applicant worked



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15 hours per week for 3 of these weeks and 8.5 hours for the last week. On review of the most recent 12 week period from week ending 16 August 2015 to week ending 1 November 2015 it was noted that the applicant worked a maximum of 7 hours per week and earned a maximum of \$189-00c per week.

24. The Insurer informed the applicant that she was required to comply with Section 38(3)(b) and (c) in order to be entitled to ongoing weekly payments of compensation. The Insurer noted that as the applicant was not working at least 15 hours per week *and* earning at least \$176.00 per week she had not fulfilled the special requirements of Section 38(3)(b) of the 1987 Act.

25. Furthermore, as the applicant was certified with a capacity to work 15 hours per week she has the capacity to undertake additional employment that would increase her current weekly earnings. The applicant had also not fulfilled the special requirements of Section 38(3)(c) of the 1987 Act.

26. The Work Capacity Decision of the Insurer dated 5 November 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 pursuant to Section 44BC of the *Workers Compensation Act 1987* are to continue until receipt by the applicant of this recommendation.

30. Pursuant to Section 44BB(3)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.



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A handwritten signature in black ink that reads "T. Emanuel".

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
8 April 2016