



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 to both elbows and his right thumb whilst working for a smash repairer. His job title is variously described as "Spray Painter/Labourer" and/or "Car Buffer." The accepted date of injury is 9 November 2008. The insurer accepted liability and made weekly payments of compensation for all relevant periods.
2. The applicant was an existing recipient immediately prior to 1 October 2012. Accordingly his PIAWE is deemed to be the statutory transitional rate.
3. On 2 February 2017 the Insurer made a work capacity decision. Having found the applicant capable of performing suitable duties, the Insurer went on to find that he did not meet the requirements of section 38(3), since he did not work at the time and therefore did not work for at least 15 hours per week, nor did he earn at least \$183 per week. The applicant was advised that his weekly payments would be paid up to and including 9 May 2017, but that he would receive no weekly payments thereafter.
4. To emphasize the point the Insurer went so far as to say that "payments of compensation will be discontinued as of 10 May 2017. Your weekly payments at your current rate will be paid up to and including 9 May 2017. This means that you will receive \$0.00 as of 10 May 2017."
5. The applicant sought internal review and the Internal Review Decision was dated 13 March 2017. The Internal Review Decision confirmed the original Work Capacity Decision. The Insurer found the applicant capable of performing suitable duties as an Assembler, or a Process



Worker, or a Sales Assistant (Hardware) or a Spare Parts Interpreter or an Administrator Assistant, but drew the line at Store Person, finding the latter too arduous. This was the only point of difference with the original decision, which had included Store Person as “suitable employment.”

6. The applicant sought Merit Review from the Authority on or about 23 March 2017. The Authority delivered its Findings and Recommendations dated 19 April 2017, consisting solely of a finding that the applicant is not entitled to weekly payments of compensation because “he does not meet the special requirements under section 38(3) of [the Act].”
7. The Authority made no consequential recommendation.
8. The applicant made an application to this Office for procedural review received on 23 May 2017. I am satisfied that the application has been made within time and in the proper form.
9. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the Guidelines. The relevant Guidelines came into effect on 1 August 2016.

Submissions by the applicant

10. 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.*”
11. The applicant submitted the following:
 - He is still injured;
 - He submits that he suffers greater than 10% WPI;
 - He cannot return to his pre-injury work due to his injury; and
 - According to the insurer he is fit to work but he maintains that after his second MRI his injury is “still there.”



12. It was the applicant's own nominated treating doctor (NTD) who said that he was fit for work for 8 hours per day, 5 days per week. The most recent NTD certification was dated 27 February 2017. There was no suggestion that he had "no injury," only that he was able to work in various occupations with what he has. Similarly, there was no suggestion that he could return to his pre-injury employment. There is no medical report assessing WPI at 10% or greater. It follows that the Insurer has no evidence on the basis of which it could be satisfied that the applicant has greater than 10% WPI or greater than 20% WPI.

Submissions by the Insurer

13. The Insurer made no submissions in reply.

Decision

14. The insurer advised the applicant on 9 January 2017 that it was proposing to conduct a work capacity assessment leading to a work capacity decision. That assessment was completed on 31 January 2017 and the ensuing decision was dated 2 February 2017.

15. The three months notice given under section 54(2)(a) was correct and included an extra four days for postal delivery of the decision, as required by the *Guidelines* and by section 76(1)(b) of the *Interpretation Act 1987*.

16. The applicant was taken through section 43(1)(a) [work capacity] and (b) [suitable employment] with appropriate explanations of both the law and the relevant evidence.

17. In the absence of evidence to the contrary, the insurer concluded that it was not satisfied that the applicant had greater than 10% WPI. It followed that section 59A allowed for only a further two years of pre-approved medical expenses. Both section 59A(2) and (3) were clearly explained.

18. The definition of "current work capacity" was set out and explained. The Insurer noted that the NTD certified the applicant fit for work for 8 hours per day, 5 days per week with the limitation that he could only lift and carry "up to" 15 kilograms. As at the time of the original decision (2



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

February 2017) the current certificate was dated 23 January 2017. As at the date of the internal review (13 March 2017) a more recent certificate dated 27 February 2017, in the same terms, was relied upon. The evidence was current and produced by the applicant's own doctor.

19. Section 38(3) was extracted and explained in clear terms.
20. The Insurer took considerable pains to set out over six pages of explanation about suitable employment, showing how the medical evidence was compatible with the conclusion that the applicant could perform the work nominated as suitable by the insurer.
21. The insurer listed and enumerated over thirty documents relied upon in making the decision.
22. I can find no procedural error in the process adopted by the Insurer.

Finding

23. The work capacity decision dated 2 February 2017 was validly made.

RECOMMENDATION

24. The application is dismissed.

A handwritten signature in blue ink, appearing to read "Wayne Cooper".

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
20 June 2017