



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 factual background to this matter was set out in recommendation 6916 (# 69 of 2016) and need not be repeated.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 07 April 2016. The Decision informed the applicant that his weekly payments of compensation would cease from 14 July 2017 because he did not meet the special requirements in section 38(3) for the continuation of payments after the expiration of the second entitlement period (post 130 weeks).
3. An internal review on 09 May 2017 reached the same conclusion. I note that the applicant was an existing recipient of weekly payments immediately prior to 01 October 2012 and that the transitional rate as at the date of the most recent decision was \$1,027.60 per week. The Insurer found the applicant capable of earning \$509.00 gross per week, working in suitable employment as a Light Process Worker for 20 hours and earning \$25.45 per hour.
4. The applicant sought Merit Review from the Authority and the Authority delivered its Findings and Recommendations dated 07 June 2017. The Authority made findings that: (i) the applicant has current work capacity; and (ii) he does not meet the special requirements set out in Section 38(3) of the *Workers Compensation Act 1987* (1987 Act).
5. Citing the reason that the findings of the Authority were *ad idem* with those of the Insurer, the Authority excused itself from making a consequential recommendation.



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

6. An application to this office for procedural review was received on 09 June 2017. I am satisfied that the application has been made within time and in the proper form.

Submissions by the applicant

7. 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 provided the following submissions:

- He has always co-operated with the insurer in looking for suitable employment and attending rehabilitation sessions;
- He is unable to tell whether the work capacity decision and or the internal review are “right” or “wrong”;
- The insurer told merit review he had received 643 weeks of payments, which varies from what appears in the work capacity decision;
- Merit review seems to suggest he could work for either five hours per day or four hours per day, both for five days per week; and
- Merit review seems to have conflated two or more periods of employment into one when describing his work history.

8. I am only able to review the procedures used by the Insurer in making this Work Capacity Decision. The errors and omissions of the merit review service are irrelevant for present purposes. The Insurer notes the typographical error in the submissions to merit review stating payments for “643 weeks,” but makes a submission in exculpation of this error (see *infra*).

Submissions by the Insurer

9. The Insurer has provided submissions dated in response to the applicant’s application. The Insurer has submitted that:
 - The applicant has been paid weekly payments of compensation for more than 130 weeks and therefore any ongoing entitlement is subject to Section 38(3) of the 1987 Act;



- The error of stating “643 weeks” in the submissions to the merit review service does not alter the applicability of section 38(3), the correct figure still exceeding 600 weeks in any event;
- The date on which the applicant arrived in Australia and started working as a machine operator is irrelevant to the suitability of the role of Light Process Worker as identified by the Insurer;
- The applicant does not meet the special requirements in section 38(3) for continuation of weekly payments after the expiration of the second entitlement period; and
- The Work Capacity Decision has been upheld at Merit Review.

Decision

10. Section 44A of the *Workers Compensation Act 1987* (1987 Act) provides that a work capacity assessment must be conducted in accordance with the Guidelines.
11. The relevant Guidelines for the purposes of section 44A are the ***Guidelines for claiming workers compensation*** which came into effect on 1 August 2016. They replaced the previous Guidelines.
12. The previous procedural review conducted by this Office found that the wrong Guidelines had been applied and accordingly the work capacity decision was set aside. The Insurer has not repeated that error on this occasion.
13. I note parenthetically that the Insurer seems to have otherwise overcome all of the procedural errors identified in WIRO recommendation 6916.
14. An examination of the new decision reveals that the applicant was given “fair notice” of the impending decision and an opportunity to provide further evidence.
15. Adequate notice under section 54(2)(a) was given, including an additional period for postal delivery of the decision.
16. Decisions under section 43(1)(a)-(e) were set out and fully explained.
17. Sections 38(3)(b) and (c) were clearly and correctly explained.



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18. Sections 59A(2) and (3) were clearly and correctly explained. Given that the applicant was assessed by an AMS in 2006 as having 7% WPI (for which he was compensated) the insurer correctly advised that he will continue to be entitled to pre-paid medical expenses for up to two years from the date of cessation of weekly payments.
19. Suitable work was identified and the reasoning fully set out.
20. Recent medical reports, including reports of the applicant's treating doctor, were considered and discussed in the course of the decision.
21. No procedural errors can be identified in the decision.

Finding

22. Under the legislation the Insurer can make an assessment of the applicant's work capacity and then a decision about that work capacity. The Insurer has done so in this case and has fully complied with the statutory requirements. Accordingly the Work Capacity Decision must be found to be validly made.

RECOMMENDATION

23. 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
12 July 2017