WorkCover independent review office

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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.

Introduction and background

1. This application follows an earlier application for procedural review which was the subject of a recommendation from this Office reported and numbered as 6815 (# 68 of 2015). The background of injury and prior decisions need not be repeated here.

2. The applicant now seeks procedural review of a work capacity decision made by the Insurer on 10 September 2015. The Insurer informed the applicant that her weekly payments of compensation would cease on 18 December 2015. The applicant applied for internal review and a decision was issued on 5 January 2016, upholding the original decision.

3. The application for merit review was received by the Authority on 2 February 2016. The Authority issued a Merit Review recommendation dated 22 February 2016 that in accordance with Section 38(3) of the Workers Compensation Act 1987 (the 1987 Act) the applicant has no entitlement to weekly payments of compensation, although she might have an entitlement by virtue of section 38(3A) if found to be either a high needs or a highest needs worker. The Insurer was directed to make such a determination.

4. The applicant then made application to this office on 22 March 2016. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

5. Section 44A of the *Workers Compensation Act* 1987 (the 1987 Act) provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).

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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 made the following submissions:

   i. She was not advised that that a work capacity assessment was taking place and was advised that an email was sent to her with this information.

   ii. She was put in a category of having to work a certain amount of hours and earn a certain wage according to statistics and a labour market analysis dated back in 2014. However her doctor has assessed her with capacity to work 3 hours per day, 3 days per week and therefore working more than her current capacity is going against a medical practitioner's recommendations.

   iii. [The Insurer] assessed permanent impairment on an individual without the patient being medically assessed.

   iv. She reports having been disabled again and is unsure if she should send all the correspondence through via mail as she currently cannot work, drive or go outdoors.

Submissions by the insurer

7. The insurer responded to the applicant's submissions thus:

   i. *She was not advised that that a work capacity assessment was taking place and was advised that an email was sent to her with this information*:

   On 8 July 2015, information surrounding the work capacity assessment was emailed to [the applicant] however it appears that the email was not successfully sent through. A follow up phone call was made
   however it was file noted that [the applicant's] home number was disconnected and mobile was switched off.

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The notification of work capacity assessment was instead posted to [the applicant's] home address on 14 July 2015.

ii. *She was put in a category of having to work a certain amount of hours and earn a certain wage according to statistics and a labour market analysis dated back in 2014. However her doctor has assessed her with capacity to work 3 hours per day, 3 days per week and therefore working more than her current capacity is going against a medical practitioners recommendations*:

[The Insurer] acknowledges that [the applicant] has partial capacity to work 3 hours per day, 3 days (9 hours) per week in suitable employment. However, [the applicant] has been paid a total of 749 weeks of weekly compensation payments to 13 January 2016 which places her after the second entitlement period which means her entitlements are assessment in accordance with section 38 of the *Workers Compensation Act* 1987.

As such, [the applicant] is required to meet the special requirements of working at least 15 hours per week, earning at least $176.00 per week, and must be indefinitely incapable of further employment that would increase her current weekly earnings. As [the applicant] has been certified with capacity for 9 hours per week, she does not meet the requirements of section 38(3)(c) of the *Workers Compensation Act* 1987 to continue to receive weekly compensation entitlements.

iii. *[The Insurer] assessed permanent impairment on an individual without the patient being medically assessed*:

[The Insurer] assessed the medical evidence available on file and determined that [the applicant] has 11 – 20% whole person impairment. This means she will continue to have an entitlement to reasonable and necessary medical expenses up to 5 years from the date she ceases to be entitled to weekly compensation entitlement in accordance with section 59A of the *Workers Compensation Act* 1987.

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iv. *[The applicant] reports having been disabled again and is unsure if she should send all the correspondence through via mail as she currently cannot work, drive or go outdoors*:

[The Insurer] confirms that based on file notes available, [the applicant] has not discussed any incidences which supports she currently cannot return to work, drive or go outdoors. However, following this submission, [the Insurer] has notified her case manager to contact [the applicant] to determine the current situation and for [the applicant] to provide any new information.

The Decision

8. The relevant WorkCover Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.

9. In the previous work capacity decision, subject of recommendation 6815, the Insurer had erred by taking an average of three different wage rates for suitable employment. That error was not repeated on this occasion.

10. The Insurer accepts that the applicant can only work 9 hours per week, but section 38(3) requires a worker to both (i) work for a minimum of 15 hours per week and (ii) earn a minimum amount, which exceeds the $90 currently earned by the applicant.

11. As far as the non-receipt of the work capacity decision by the worker is relevant, it appears that the Insurer took all possible steps to communicate both the assessment and the decision to the applicant. Telephone contact was found to be impossible for unexplained reasons, the email address of the applicant apparently did not work, also for unexplained reasons, and the two letters sent via Australia Post were apparently not received. None of these things can be laid at the door of the Insurer. The narrative occlusion engaged in by the applicant in relation to these shortcomings of delivery adds no weight to the suggestion that there was error by the Insurer.

FINDING

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12. 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 no breaches of the legislation and Guidelines which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be valid.

RECOMMENDATION

13. The application for procedural review is dismissed.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
6 May 2016