



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

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 17 June 2014 in the course of his employment as a Cleaner. The resultant injuries were to the lumbar spine and the left shoulder.
2. His former employer terminated the applicant's employment in August 2015. He has not worked since. The Insurer accepted liability to make weekly payments in relation to the left shoulder and lumbar spinal injuries, however did not accept that any injury to the left hip was sustained by the applicant.
3. On 21 June 2017 a section 74 Notice was served in relation to a claim arising out of an alleged injury to the left hip.
4. The applicant now seeks procedural review of a Work Capacity Decision made by the Insurer on 27 April 2016. The Decision informed the applicant that his weekly payments of compensation would reduce to \$33.92 from 3 August 2017. The basis for the decision was said to be that the applicant had an earning capacity of \$288.00 working for 12 hours per week in the role of a Car Park Attendant. His PIAWE had been \$402.40 per week. Since he was not then working, the applicant was entitled to the difference between 80% of his PIAWE ($\$402.40 \times 80\% = \321.92) and his ability to earn in suitable employment (\$288). The difference between \$321.92 and \$288.00 being \$33.92, the calculation appears to have been accurately made.
5. An internal review on 22 June 2017 reached the same conclusion.



6. The applicant sought Merit Review from the Authority and the Authority delivered its Findings and Recommendations dated 26 July 2017. The Authority made findings that: (i) the applicant has a present inability arising from an injury such that he is not able to return to his pre-injury employment, but is able to return to work in suitable employment as defined in section 32A; (ii) the applicant has current work capacity; (iii) the applicant is able to earn \$268.44 per week in suitable employment; and (iv) Section 37(3) of the *Workers Compensation Act 1987* is to be applied to determine the amount of the applicant's weekly compensation payments.
7. In the course of purporting to make a consequential recommendation the Authority instructed the Insurer to apply section 37(3) when calculating the applicant's entitlement to weekly payments. The assumption therefore arises that the insurer has recalculated to entitlement to \$53.48, that being the difference between \$321.92 and \$268.44.
8. The different weekly rate reflects the earnings of a Light Process Worker, which the Authority found to be more appropriate to the applicant's skills than Car Park Attendant.
9. An application to this office for procedural review was received on 15 August 2017. I am satisfied that the application has been made within time and in the proper form.

Submissions by the applicant

10. 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 submission:
 - His left hip is causing severe pain and he had no hip problems prior to his accident on 17 June 2014.
11. The immediate problem arising from this submission is that it relates to an injury which cannot form any part of my deliberations, since a section 74 Notice has been served by the Insurer declining liability for the alleged left hip injury.



Submissions by the Insurer

12. In response the Insurer has submitted that:

- It has declined liability for the left hip injury; and
- It has advised the applicant to seek legal advice in relation to making an application for review of that decision under section 287A.

Decision

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

14. 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.

15. The applicant was given “fair notice” of the impending decision and an opportunity to provide further evidence.

16. Adequate notice under section 54(2)(a) was given, including an additional period for postal delivery of the decision.

17. Decisions under section 43(1)(a)-(e) were set out and fully explained.

18. Sections 37(3) was clearly and correctly explained.

19. Suitable work was identified and the reasoning fully set out. Although the Authority disagreed with the conclusions drawn, the suitable work of Light Process Worker was identified by the Insurer, together with the work of a Car Park Attendant. It was not a procedural error for the insurer to have preferred one option over the other.

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.



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

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, which appears to read "Wayne Cooper".

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
15 September 2017