



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 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 25 November 2015. The Decision informed the applicant that her weekly payments would cease on 11 March 2016. The applicant sought internal review on 27 January 2016 and the Internal Review Decision was dated 16 February 2016 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 9 March 2016. The Authority delivered its Findings and Recommendations dated 11 April 2016. The Authority made a finding that the applicant has current work capacity and does not satisfy the special requirements for continuation of weekly payments after the second entitlement period pursuant to Section 38(3) of the *Workers Compensation Act 1987* (1987 Act).
3. The applicant then applied to this office for procedural review by way of application dated 9 May 2016. I am satisfied that the application has been made within time and in the proper form.



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4. The applicant previously sought review of a work capacity decision dated 15 September 2014 which was the subject of an earlier recommendation of this office.¹
5. The facts and circumstances concerning the background of this claim are set out in the aforementioned recommendation and need not be repeated.
6. 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

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 applied for a procedural review.
8. In addition to applying for procedural review the applicant has made the following submissions:
 - The decision is confusing and provides the applicant with false information;
 - The Insurer has failed to provide the correct calculation of weekly payments used to figure out her entitlement period;
 - The Insurer asserts that weekly payments have been paid for 144 weeks which is incorrect and the Insurer has paid approximately 230 weeks of compensation payments.

Submissions by the Insurer

9. In an email dated 7 June 2016 the Insurer made the following submissions in response to the application:
 - The Insurer has complied with the relevant legislation and Guidelines;

¹ Reported and numbered as 2415



- The decisions provided to the worker were clear and concise and all information considered has been provided to the worker;
- The Insurer relies upon the Internal Review Decision as to the calculation of the relevant entitlement period; and
- The Insurer submits that the worker has received 163 weeks of compensation payments at the time of the application for procedural review.

Decision

10. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
11. The procedural error identified in the earlier recommendation was not repeated by the Insurer on this occasion.
12. The applicant has submitted that the Insurer has provided her with false information and therefore should be found to be invalid. This is on the basis that the Insurer failed to provide the applicant with the correct calculation of her weekly payments used to figure out her entitlement period.
13. The Work Capacity Decision advises that the applicant has received 144 weeks of compensation payments. The applicant has made a submission that the figure is incorrect and it is approximately 230 weeks. The Insurer maintains in its submissions that as at the time of the application for procedural review the applicant had received 163 weeks of payments.
14. The purpose of the calculation of the number of weeks of which compensation payments have been paid is to ascertain the entitlement period relevant to the applicant. The Work Capacity Decision informs the applicant that any ongoing entitlement she may have to weekly payments of compensation payments is subject to the provisions of Section 38 of the 1987 Act.
15. Section 38 provides the special requirements for the continuation of weekly payments after the “*second entitlement period*” being after 130 weeks of payments.



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16. Therefore the issue of whether the applicant has received 144, 163 or 230 weeks of payments is not relevant as to which entitlement period is applicable. The applicant has received over 130 weeks of payments and therefore falls after the *“second entitlement period.”*
17. If the applicant’s submission was accepted I would need to consider the effect the incorrect calculation had on the Insurer’s decision. As Justice Davies commented in the Simpson² case *“Every failure to follow the Guidelines could not result in the setting aside of the insurer’s decision. Such a result would be legally unreasonable.”*
18. As Section 38 of the 1987 Act is the applicable section which applies in circumstances whether the applicant has received 144, 163 or 230 weeks of payments I do not consider this error, if there has been one, would be sufficient to set aside the Work Capacity Decision in any event.
19. The Work Capacity Decision of the Insurer dated 26 November 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation in force at the time.

The Stay

20. Section 44BC of the 1987 Act operates so as to entitle a worker, during the course of a Section 44BB review, to receipt of the same compensation payments to which she was entitled to immediately prior to the making of the adverse Work Capacity Decision.
21. The Insurer has pointed out correctly in the Internal Review Decision that the stay provisions of Section 44BC of the 1987 Act did not apply in respect of Internal Review as the applicant did not make the application within the 30 day period. The Internal Review Decision was dated 16 February 2016.
22. There appears to be a view that if an Insurer has already stopped payments prior to an application for merit or procedural review, then payments need not be resumed during such review, since the Insurer

² The *Trustees of the Sisters of Nazareth v Simpson* [2015] NSWSC 1730



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cannot take “any action” during that time, which is erroneously interpreted to include a prohibition on the resumption of weekly payments. Such an analysis begs the question, since it assumes the work capacity decision was correct, and it also completely defeats the purpose of the legislative amendment, which was to ensure that workers are paid for the duration of Section 44BB review. It also follows that the resumption of payments is not an action “based on the decision” (since the decision resulted in a reduction or cessation) and therefore cannot be the subject of prohibition.

23. Therefore, the Stay was activated at the time the applicant applied for Merit Review by the Authority on 9 March 2016 and should continue until receipt by the Applicant of this Decision.

Finding

24. There are no procedural errors identifiable in the decision. The Insurer has complied with the Guidelines and relevant legislation.

RECOMMENDATION

25. The application for procedural review is dismissed.

26. 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.

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

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

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
9 June 2016