



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 Work Capacity Decision by the Insurer dated 1 March 2016 is set aside.**
- 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 a new decision is made in accordance with Section 43(1) of the *Workers Compensation Act 1987*.**
- c. Pursuant to Section 44BB(1)(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 1 March 2016. The Decision informed the applicant that her weekly payments of compensation would cease from 16 June 2016. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 14 April 2016. That review confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 12 May 2016. The Authority delivered its Findings and Recommendations dated 8 June 2016. The Authority made a finding that the applicant has current work capacity and does not meet the special requirements under Section 38(3) of the *Workers Compensation Act 1987* (1987 Act) for the continuation of weekly payments of compensation.



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3. The applicant made an application to this office for procedural review by way of application dated 22 June 2016. I am satisfied that the application has been made within time and in the proper form.
4. On 7 February 2002 the applicant reported injury to her right elbow whilst in the course of her employment as a process worker. The applicant's injury was sustained over a period of time due to the repetitive nature of her employment. She subsequently developed symptoms in her left arm. The applicant's employment was terminated on 6 June 2003 and she has not been able to secure employment since that time. The applicant has been in receipt of weekly payments of compensation from the Insurer.
5. Section 44A of the *Workers Compensation Act 1987* (1987 Act) provides that a work capacity assessment must be conducted in accordance with the WorkCover Work Capacity Guidelines (Guidelines).

Submissions by the applicant

6. 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. The applicant has provided the following submissions which are relevant to procedural review:
 - The Insurer has not complied with Guideline 5.3.1;
 - The Insurer has not provided fair notice; and
 - The Insurer has not referred to relevant evidence in making the determination that the applicant's injury resulted in a permanent impairment of 10% or less.
7. I am unable to have regard for the personal circumstance of the applicant and I am only able to review the procedures used by the Insurer in making this Work Capacity Decision.

Submissions by the Insurer

8. The Insurer has not provided submissions in response to the applicant's application.



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Decision

9. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.

10. Guideline 5.2 states that before making a Work Capacity Decision that may result in a reduction or discontinuation of a worker's weekly payments the insurer must, at least two weeks prior to the Work Capacity Decision communicate this to the worker in a way appropriate in the circumstances of the case, and preferably by telephone or in person. This must be done to:

- Inform the worker that a review of their current work capacity is being undertaken and that a work capacity decision is going to be made;
- Explain that this review may include further discussions with other parties such as their employer, nominated treating doctor or other treatment providers;
- Advise of the potential outcome of this review and detail the information that has led the insurer to their current position;
- Provide an opportunity for the worker to supply any further information to the insurer for further consideration and the date that this information is to be provided by; and
- Tell the worker the decision is expected to be made.

11. The same Guideline then goes on to state that the *"information should also then be confirmed in writing to the worker. The written confirmation should be sent by post or served personally."*

12. The first line of the Work Capacity Decision sent to the applicant states:

"We refer to our attempted discussions with you on 8 February and 1 March 2016..."

13. The applicant has made submissions that she did not receive any notification, either by telephone or in writing, that the Work Capacity Decision was being made. The first notification the applicant received was the Decision dated 1 March 2016.



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14. The Insurer has not made any submissions in response to the applicant's submissions/application therefore I accept the applicant's submission that she did not receive any fair notice of the Work Capacity Decision being made.
15. The Decision dated 1 March 2016 confirms that the Insurer "attempted" to contact the applicant but this certainly does not satisfy compliance with Guideline 5.2 which not only requires communication preferably by telephone or in person but that it also "*be confirmed in writing.*"
16. In the above circumstances the Insurer has failed to comply with the fair notice provisions set out in Guideline 5.2.
17. I note the comments by Davies J in the decision of *The Trustees of the Sisters of Nazareth v Simpson*¹ that "*Every failure to follow the Guidelines could not result in the setting aside of the insurer's decision. Such result would be legally unreasonable.*"
18. However, in this particular instance the Guidelines have actually pointed out the reasons why fair notice must be provided to the applicant. This includes a provision which allows that applicant to obtain and supply any further information they would like the Insurer to consider before the Work Capacity Decision is finalised. This is a basic requirement of procedural fairness.
19. Davies J, in the decision referred to above, also stated "*Procedural error which amounts to procedural unfairness will amount to an error of law and would ordinarily justify the setting aside of the decision.*"
20. I consider that in this instance the Insurer's breach in failing to provide the applicant with fair notice of the Work Capacity Decision is sufficient to set aside that Decision dated 1 March 2016.

Finding

21. 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

¹ [2015] NSWSC 1730



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Guidelines in order to produce a procedurally correct result. In the current instance there have been breaches of the legislation and the Guidelines which are to be treated as delegated legislation. Accordingly the Work Capacity Decision must be found to be invalid.

RECOMMENDATION

22. The Work Capacity Decision by the Insurer dated 1 March 2016 is set aside.
23. 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 a new decision is made in accordance with Section 43(1) of the *Workers Compensation Act 1987*.
24. Pursuant to Section 44BB(1)(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
20 July 2016