



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. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 27 January 2016. The Decision informed the applicant that her weekly payments of compensation would be reduced from 6 May 2016. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 23 March 2016 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 3 May 2016. The Authority delivered its Findings and Recommendations dated 31 May 2016. The Authority made a decision that the application for Merit Review was not made in accordance with Section 44(3)(a) (sic) of the *Workers Compensation Act 1987* (1987 Act) and the Authority does not have jurisdiction to undertake a review.
3. The applicant then made an application to this office for procedural review dated 27 June 2016. I am satisfied that the application has been made within time and in the proper form.
4. The applicant suffered psychological injury in the course of her employment on 20 July 2012. As at the time of the Work Capacity Decision the applicant was working 15 hours per week and in receipt of weekly payments of compensation.
5. 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

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 has applied for a procedural review.
7. In addition to applying for procedural review the applicant has made the following submissions:
 - The work capacity , internal review and merit review decisions are unfair, do not take into account the applicant’s incapacity and the procedures followed are flawed;
 - The Work Capacity and Internal review decisions insisted the applicant can work despite her medical certificates stating she has no capacity; and
 - The applicant did not receive the internal review decision dated 23 March 2016 until 2 May 2016.
8. I am only able to perform a review of the procedures undertaken by the Insurer in making the Work Capacity Decision which is the subject of this review.
9. In respect of the applicant’s first submission I am not allowed to take into consideration or review the internal review decision or merit review.
10. In respect of the applicant’s second submission I note that her nominated treating doctor certified the applicant to have capacity to work for 3 hours per day 5 days per week. It is also noted that the at the time of the Work Capacity Decision the applicant was working 15 hours per week in accordance with that certification.
11. I have dealt with the applicant’s third submission later in this decision at paragraphs 15 – 20.

Submissions by the Insurer

12. The Insurer made submissions dated 28 June 2016 in response to the application. The Insurer submits that as Merit Review made a decision



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that they did not have jurisdiction to undertake a review of the work capacity decision the procedural review cannot be undertaken as per Section 44BB(1)(c) of the 1987 Act.

Decision

13. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
14. The Work Capacity Decision was dated 27 January 2016. The applicant applied for Internal Review and the Internal Review Decision was dated 23 March 2016. The applicant submits that she did not receive the Internal Review Decision until 2 May 2016 and that is why she did not apply for Merit Review until 3 May 2016.
15. Without reiterating the events of this case which have been detailed in the Authority's decision dated 31 May 2016 it is suffice to say that the Authority did not accept the applicant's submission based upon the documentation before them and they made a decision that they did not have jurisdiction to perform a review.
16. The Insurer has made a submission that as the Authority has determined that they did not have jurisdiction to perform a merit review then WIRO does not have jurisdiction to perform a procedural review.
17. The applicant has provided additional documentation with her application for procedural review including a statutory declaration swearing that she did not receive the Internal Review Decision until 2 May 2016.
18. Section 44BB(1)(c) of the 1987 Act allows for the injured worker to refer the Work Capacity Decision for review to WIRO but not until the dispute has been the subject of internal review by the Insurer and Merit Review by the Authority.
19. The aforementioned section only requires the *dispute* to have been the subject of merit review by the Authority. In this particular instance the Authority has reviewed the dispute and determined that in their view they do not have jurisdiction. This does not preclude WIRO from



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reviewing the Work Capacity Decision if the application for procedural review has been made within the appropriate time frames.

20. It is noted that there is an issue with respect to when the applicant received the Internal Review Decision from the Insurer. The Insurer has submitted that they sent the Internal Review Decision dated 23 March 2016 by express post. The applicant has signed a statutory declaration that she did not receive the Decision until 2 May 2016 after making enquires of the Insurer. I note the dispute between the parties however it is not relevant in this particular instance as the Work Capacity Decision is procedurally sound.
21. Guideline 5.3.2 requires the Insurer to advise the applicant of the date of the work capacity assessment. On this occasion the Insurer informed the applicant that the work capacity assessment commenced on 5 November 2015 and was completed on 27 January 2016. The applicant was notified of the Work Capacity Decision by letter dated the same day.
22. The same Guideline requires the Insurer to advise the date when the Decision takes effect. Section 54(2)(a) of the 1987 Act requires at least three months and four working days notice be given if payments are being reduced. This notice period takes into account Section 76(1)(b) of the *Interpretations Act 1987*. As a result the applicant was advised that her payments would be reduced from 6 May 2016. This is the appropriate notice period.
23. The Guideline requires the Insurer to advise the applicant of the impact the decision has on her entitlement to medical and related treatment expenses. As the applicant's payments are only being reduced the Insurer has correctly informed the applicant that they will continue to pay her reasonable medical and treatment expenses as defined in Section 60 of the 1987 Act.
24. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer has informed the applicant that she has received 172.6 weeks of compensation payments. Therefore any ongoing entitlement to weekly payments of compensation is subject to Section 38 of the 1987 Act. The Insurer has explained the special



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requirements of Section 38(3) of the 1987 Act at page 6 of the Work Capacity Decision.

25. Pursuant to Section 43(1)(a) of the 1987 Act the Insurer has noted that the applicant has been certified with capacity of 3 hours per day 5 days per week as per the Certificate of Capacity from the nominated treating doctor. The Insurer determined that the applicant had current work capacity in accordance with that Certificate. It was noted that the applicant is working 15 hours per week.
26. The Insurer determined, pursuant to Section 43(1)(b), the role of child care worker to be suitable employment. The Insurer relied upon a vocational assessment report dated 1 September 2015 and the approval of the nominated treating doctor dated 27 October 2015. It was noted that the applicant is presently employed as a child care worker.
27. Finally, in respect of Section 43(1)(c) of the 1987 Act the Insurer determined that the applicant could and was earning \$297 per week in suitable employment (being \$19.80 per hour).
28. In making these determinations pursuant to Section 43 of the 1987 Act the Insurer has displayed an adequate understanding of the relevant Guidelines and legislation.
29. At pages 6 and 7 of the Work Capacity Decision the Insurer made a determination that the applicant had complied with Section 38(3)(b) and (c) of the 1987 Act. Therefore the applicant's ongoing entitlements were subject to Section 38(7) of the 1987 Act. The Insurer explained the calculation of the applicant's ongoing weekly payments at pages 7 and 8 of the Decision.
30. The Work Capacity Decision of the Insurer dated 27 January 2016 has displayed a careful consideration of the requirements of the Guidelines and legislation in force at the time.

Finding



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

RECOMMENDATION

32. The application for procedural review is dismissed.

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

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
25 July 2016