



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 seeks procedural review of a Work Capacity Decision made by the Insurer on 18 November 2015. The Decision resulted in a notice dated 19 November 2015 being sent to the applicant advising that his weekly payments would cease from 28 February 2016. The reason for the cessation of payments was said to be that the applicant, having received over 130 weekly payments, did not comply with the special conditions for ongoing payments set out in section 38(3).
2. On 26 February 2016 the applicant applied to the Insurer for internal review and the Internal Review Decision was dated 29 March 2016. That decision confirmed the original Work Capacity Decision. It is noted that the application for internal review was well outside the 30 day period which would attract a "stay" of the original decision, pending the outcome of section 44BB review.
3. The applicant sought Merit Review from the Authority by way of application received on 29 April 2016. The Authority delivered its findings dated 23 May 2016. While the Authority made various findings, it issued no recommendation, for reasons hard to follow.
4. The Insurer had determined that certain types of work were suitable for the applicant, whereas the Authority rejected all but one such type of work, but then went on to say that the Insurer had made "the correct and preferable decision," an alleged consequence of which was said to be that "there is no need for the Insurer to adopt any alternative course of action on the basis of [the Authority's] findings." The last sentence simply



says: "I make no recommendation." This is an interesting approach in light of section 44BB(3)(g), which says: "recommendations made by the Authority are binding on the Insurer and must be given effect to by the Insurer." In the absence of a recommendation, doubt must be cast over the effect of the "findings" by the Authority concerning the unsuitability of the majority of the suitable work options said to be appropriate for the applicant in the Work Capacity Decision by the Insurer.

5. The applicant subsequently applied to this office for procedural review by way of application dated 20 June 2016. I am satisfied that the application has been made within time and in the proper form.

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.
7. The applicant has made a submission going to the merits of the decision, namely the calculation of weekly benefits. Given that the effect of the decision is that the applicant to receive no weekly benefits ongoing, this is an oddity.
8. The main complaint made by the applicant is that, whereas at an indeterminate time in the past he was assured he would receive a specific weekly amount, the amount actually received bore little or no resemblance to the amount so specified. This goes back to 2013. It seems that the transitional rate was specified as a gross amount and the applicant received a net amount, in which case there is no error. If there is an error, it might best be corrected by an order of the Workers Compensation Commission (WCC). This element of the dispute has no relevance for present purposes.
9. The remainder of the applicant's submissions seem to relate to the unsuitability of various types of "suitable employment." This issue was addressed and resolved at merit review, which is the appropriate forum.



Submissions by the Insurer

10. The Insurer has made no submissions.

Decision

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

12. The Guidelines require an Insurer to give a worker “fair notice” of an impending work capacity decision. That was done in this case.

13. The Insurer explained the full effect of the decision on the entitlements of the applicant, including an explanation of the relevant entitlement periods, the effect of section 59A(2) and (3) and the effect that being a worker with “high needs” might have had. The applicant does not have “high needs,” as that term is defined in the Act. The medical and other evidence relied upon by the insurer was both current and carefully set out in the Notice.

14. In passing I note that at paragraph 87 of the merit review, the following appears: “A decision as to whether the worker is a ‘worker with high needs’ is a work capacity decision under section 43(1)(f) of the 1987 Act.” This is plainly incorrect, since it is not enumerated in section 43(1)(a)-(e) and would clearly be a decision of a type susceptible of review by the WCC. It falls within section 43(2)(b) of the 1987 Act, by virtue of section 319(c) of the *Workplace Injury Management and Workers Compensation Act 1998*. Section 43(2)(c) of the 1987 Act exempts such decisions from the category of “work capacity decision.”

15. The applicant currently does not work and therefore does not meet the requirements set out in section 38(3)(b) (must work a minimum of 15 hours per week for a minimum weekly amount of \$173, as periodically indexed). All of this has been carefully explained by the Insurer.

FINDING

16. I find that there are no procedural errors in the decision of the Insurer.

RECOMMENDATION



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

17. The application is dismissed.

A handwritten signature in blue ink, which appears to read "Wayne Cooper". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
1 August 2016