



State Insurance Regulatory Authority

Workers Compensation

Merit Review Service

FINDINGS AND RECOMMENDATIONS ON MERIT REVIEW BY THE AUTHORITY

Worker:

Insurer:

Date of Review:

Date of Injury:

Claim Number:

Our Reference:

FINDINGS ON REVIEW

1. The following are findings made by the State Insurance Regulatory Authority (the Authority) on review.
2. The Worker refused to attend an assessment (for the purpose of a work capacity assessment) under section 44A of the *Workers Compensation Act 1987* (the 1987 Act).
3. The Insurer's requirement that the Worker attend a work capacity assessment was reasonably necessary.
4. The Worker's entitlement to weekly payments of compensation was suspended in accordance with section 44A(6) of the 1987 Act.

RECOMMENDATION BASED ON FINDINGS

5. The Authority may make recommendations based on its findings that are binding on the Insurer in accordance with section 44BB(3)(g) of the 1987 Act.
6. The Authority makes no recommendations in this matter.

BACKGROUND

7. The Worker sustained a psychological injury in the course of her employment as a Teacher.
8. The Worker ceased her employment as a Teacher following her injury and has been in receipt of weekly payments of compensation from the Insurer.
9. The Insurer has made previous work capacity decisions in relation to the Worker. Some of these decisions have been the subject of merit reviews by the Authority.
10. The Authority issued reasons and findings on 29 April 2014 and 14 January 2016 in relation to work capacity decisions of the Insurer regarding the Worker.
11. On 8 July 2016, the Insurer sent the Worker a "Notice of suspension to weekly benefit entitlements". The Insurer indicated that it had made the determination in accordance with section 44A(6) of the 1987 Act. The reason provided for the suspension was:

"That you have failed to attend an assessment of your work capacity and you have not been able to establish a reasonable explanation for not meeting these obligations."

12. The Worker made a request to the Insurer for an optional review of the decision to suspend her payment of weekly benefits. This request appears to have been made on 26 July 2016, according to correspondence from the Insurer.
13. On 28 July 2016 the Insurer wrote to the Worker and informed her that it had decided to "Maintain the decision to suspend weekly payments."
14. The Worker sought a merit review of the Insurer's decision. The application for merit review was received by the Authority on 9 August 2016.
15. On 5 September 2016, the Authority issued a decision that it did not have jurisdiction to undertake a review of the Insurer's decision to suspend the Worker's weekly payments of compensation. The Authority found that there had been no internal review of the decision, which was required in accordance with section 44BB(1)(b) of the 1987 Act.
16. The Worker submitted a "Work Capacity – application for internal review by Insurer" to the Insurer. The application is dated 21 November 2016.
17. On 14 December 2016, the Insurer wrote to the Worker and expressed the view that the decision that had been made to suspend her weekly payments of compensation was not a work capacity decision. The Insurer therefore declined to conduct an internal review.
18. The application for merit review was received by the Authority on 13 January 2017. As the Insurer has declined to review the work capacity decision and it has been more than 30 days since the application for internal review was made, I am satisfied that the Authority may conduct a merit review of the work capacity decision, in accordance with section 44BB(3)(b) of the 1987 Act.

LEGISLATION

19. The legislative framework governing work capacity decisions and reviews is contained in the:
 - *Workers Compensation Act 1987* (the 1987 Act);
 - *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act);
 - *Workers Compensation Regulation 2016* (the Regulation);
20. Section 43 of the 1987 Act describes a "work capacity decision".
21. Section 44BB of the 1987 Act provides for merit review of a work capacity decision of the Insurer, by the Authority.

INFORMATION CONSIDERED

22. The information I have considered are those listed in, and attached to, the application and the Insurer's reply and any other information provided by the parties since the application for merit review, which I am satisfied has been exchanged between the parties.

SUBMISSIONS

23. In her application for merit review, the Worker has requested a review of the following work capacity decision of the Insurer:
 - To suspend her weekly payments of compensation.
24. In the application for merit review, the Worker's submissions may be summarised as:
 - On 8 July 2016 she received a notice from the Insurer that her weekly entitlements were to cease as of 15 July 2016. The reason given was that she had failed to attend an assessment of her work capacity without reasonable explanation.

- In the notice the Insurer listed one document that supported her claim for ongoing compensation, and six documents that purported to support its decision.
- The Worker then details the process of applications for review that has been set out in the "background" section of this document.
- The decision to suspend her payments is without merit because section 44A(1) of the 1987 Act states that "an insurer is to conduct a work capacity assessment of an injured worker when required to do so by this Act or the Workers Compensation Guidelines and may conduct a work capacity assessment at any time.
- The Authority had found, after considering all of the evidence that she had no work capacity on 14 January 2016. That decision was binding on the Insurer. There was no requirement under the Act or Guidelines to conduct a work capacity assessment.
- If her point above is accepted then it follows that if a work capacity assessment is not required then a requirement to attend any assessment is not reasonably necessary.
- If the Insurer was relying on the words of the provision that they "may conduct a work capacity assessment at any other time", their requirement for an assessment still fails the "reasonably necessary" test. This is because the Authority found that she has no current work capacity and that she is entitled to payments under section 38(6) of the 1987 Act.
- Section 38(6) of the 1987 Act applies to a worker with no current work capacity after the second entitlement period. The Authority has found that she has "no current work capacity and is likely to continue indefinitely to have no current work capacity". If she is likely to continue indefinitely to have no current work capacity then obviously a vocational assessment only six months after the merit review of the Authority would not be reasonably necessary. This is particularly true as her circumstances have not changed since the decision and the Insurer has not presented any new information that would support its decision.
- Section 38(4)(b) of the 1987 Act states that an insurer must, for the purpose of assessing an injured worker's entitlement to weekly compensation, conduct a work capacity assessment of the worker at least once every two years.
- Within 2 weeks of the decision of the Authority on 27 January 2016, the Insurer had forwarded her an injury management plan that stated that she had work capacity, was job seeking/retraining/work trial [sic]. This is incorrect. As per the findings of the Authority she had no current work capacity.
- It is obvious from the actions of the Insurer that it had no intention of following the Authority's findings.
- She then refers to earlier findings and recommendations made by the Authority in relation to other work capacity decisions of the Insurer. These findings and recommendations were made on 29 April 2014.
- She states that on two occasions the roles as a Customer Service Representative and Administration Officer have been presented by the Insurer as suitable employment for her and on two occasions these roles have been rejected by the Authority.
- Despite having had two opportunities to establish that she had current work capacity, and despite having the resources of a large multi-national company, the Insurer has been unable to do so.
- It is clear that the Insurer is only paying lip service to the findings of the Authority by paying her benefits under section 38(6) of the 1987 Act.

- The Insurer believes that she has current work capacity and is determined to promote that view. The insurer is attempting to force her to attend yet another assessment from which it is obviously going to make a work capacity decision.
- There is no new evidence that the Insurer has collected since the decision of the Authority on 14 January 2016 to indicate that it has current work capacity. There is no reasonable necessity to send her to a vocational assessment.
- As the information sent to the vocational assessor was the information that was previously relied on by other assessors, it appears that the Insurer was hoping for a different outcome with the same information.
- She considers that the actions of the Insurer in supplying this information are also unreasonable as she considers that the report of Doctor 1 is not relevant in light of her injury having been accepted by the Insurer and as the Authority found that the opinion of Doctor 2 was against the weight of other medical opinions.
- The earning capacity document provided to the current work assessor was found previously by WIRA [sic] to have been obtained through a clear breach of procedural fairness.
- She then restates her opinion that the decision of 8 July 2016 is a work capacity decision and provides reasons in support of her opinion.
- She believes that the persistent, procedurally unfair and dishonest attempts by the Insurer to prove that against all available evidence that she has current work capacity have not assisted her recovery from her injury.
- Her injury and the Insurer's treatment of her affect her in the following ways:
 - She has a consuming sense that something bad is going to happen to her or her family. She recently took out a life insurance policy on herself but could not explain her reason for doing so to her husband.
 - She has very poor sleep patterns, talks in her sleep and moves her limbs incessantly to the point where she now sleeps in a separate bed from her husband.
 - She has gained weight as she no longer has motivation to exercise. She has lost motivation to participate in many things that she once enjoyed. She has gradually drifted away from a local sporting club where she was once very active.
 - She dreads the prospect of being sent by the Insurer to one of their appointed medical specialists/allied health professionals.
 - She avoids confrontation, and in the last year became extremely upset on two minor interactions. One was with a Sales Assistant and another with a neighbour.
 - She does not feel comfortable interacting in large groups preferring the company of family members.
 - She dreads the prospect of job seeking or being forced to retrain. She knows that she does not have the emotional/psychological capability to do so.
 - She becomes extremely upset when considering the various discredited medical reports provided by the Insurer in its work capacity decisions, that ostensibly present her as a malingerer.

25. In reply, the Insurer:

- Refers to a letter to the Worker dated 14 December 2016 advising that the notice issued to her on 8 July 2016 is a suspension notice and not a work capacity decision. It notes that there was no work capacity decision issued and therefore no internal review was

conducted.

- States that section 43(1)(a)-(e) of the 1987 Act state that any decision of an insurer that affects a workers entitlement to weekly payments of compensation, including a decision to suspend, discontinue or reduce the amount of weekly payments of compensation payable to a worker is on the basis of any decision referred to in paragraphs (a)-(e).
- Submits that the notice of suspension that was issued to the Worker on 8 July 2016, which stated that the weekly payments of compensation were suspended due to failure to comply with obligations under section 44A(6) of the 1987 Act and section 119 of the 1998 Act within 7 days after the requirement was communicated to the worker.
- Does not believe that the notice dated 8 July 2016 is subject to review under section 44BB of the 1987 Act.

REASONS

Nature of merit review

26. This matter involves a merit review of the work capacity decision of the Insurer in accordance with section 44BB(1)(b) of the 1987 Act.
27. The review is not a review of the Insurer's procedures in making the work capacity decision and/or internal review decision. The review requires that I consider all of the information before me substantively on its merits and make findings and recommendations that, in light of the information before me, are most correct and preferable.

Power of the Authority to conduct a merit review

28. The Insurer has submitted that the decision to suspend the Worker's weekly payments is not a work capacity decision but a decision in accordance with section 44A(6) of the 1987 Act and section 119 of the 1998 Act.
29. The Insurer is therefore of the view that the decision is not subject to review by the Authority in accordance with section 44BB(1)(b) of the 1987 Act.

Notice to the Worker

30. The Insurer's letter to the Worker, dated 8 July 2016, indicates that the Worker's weekly payments are to be suspended as she has failed to attend an assessment of her work capacity and has not been able to establish a reasonable explanation for this failure.
31. The Insurer has relied on section 44A(6) of the 1987 Act for its authority to suspend payments. Section 44A(6) of the 1987 Act states:
If a worker refuses to attend an assessment under this section or the assessment does not take place because of the worker's failure to properly participate in it, the worker's right to weekly payments is suspended until the assessment has taken place.
32. The Insurer also quoted section 119(2) of the 1998 Act in its letter to the Worker, which states:
A worker receiving weekly payments of compensation under this Act must, if so required by the employer, from time to time submit himself or herself for examination by a medical practitioner, provided and paid by the employer.
33. Section 119(2) refers to an examination by a medical practitioner. In the email from an occupational rehabilitation provider, she asks that the Worker initially meet with her and that following this meeting they both proceed to the surgery of the Worker's NTD to have an open discussion on "the most appropriate return to work path for you".

34. It is necessary for me to determine whether the decision of the Insurer is a work capacity decision. If the decision is so classified then it is subject to merit review by the Authority in accordance with section 44BB(1)(b) of the 1987 Act.

Nature of the decision to suspend payments

35. Section 43(1)(a)-(f) of the 1987 Act sets out the decisions of an insurer that are work capacity decisions as follows:

(1) The following decisions of an insurer (referred to in this Division as work capacity decisions) are final and binding on the parties and not subject to appeal or review except review under section 44BB or judicial review by the Supreme Court:

(a) a decision about a worker's current work capacity,

(b) a decision about what constitutes suitable employment for a worker,

(c) a decision about the amount an injured worker is able to earn in suitable employment,

(d) a decision about the amount of an injured worker's pre-injury average weekly earnings or current weekly earnings,

(e) a decision about whether a worker is, as a result of injury, unable without substantial risk of further injury to engage in employment of a certain kind because of the nature of that employment,

(f) any other decision of an insurer that affects a worker's entitlement to weekly payments of compensation, including a decision to suspend, discontinue or reduce the amount of the weekly payments of compensation payable to a worker on the basis of any decision referred to in paragraphs (a)-(e).

36. I am satisfied that the decision of the Insurer to suspend the Worker's weekly payments, to the extent that it related to her non-compliance with a requirement under section 44A of the 1987 Act, is not one that is excluded from being a work capacity decision.

37. Section 44A of the 1987 Act is contained within Part 3, Division 2, Subdivision 3. It is this subdivision that sets out the provisions of the Act in relation to work capacity.

38. I am satisfied that the Insurer's decision does not fall within the scope of decisions described in sections 43(1)(a)-(e) of the 1987 Act.

39. I am, however, satisfied that it is a decision that falls within the scope of section 43(1)(f) of the 1987 Act, that is, *"any other decision of the insurer that affects a worker's entitlement to weekly payments of compensation..."*.

40. The Insurer's decision had affected the Worker's entitlement to weekly payments by suspending them.

41. The Insurer has argued that a decision under section 43(1)(f) of the 1987 Act must be contingent upon an initial decision under 43(1)(a)-(e). I do not agree with the Insurer's interpretation of the provision.

42. The word "including" is not restrictive, it does not act to exclude any decision not specifically mentioned but only to clarify that the decisions described following the word "including" in the paragraph are particularly included. The word "including" is expansive in nature and broadens rather than narrows the categories or types of decisions that fall within the meaning of section 43(1)(f) of the 1987 Act.

Finding the power of the Authority to conduct a merit review

43. I find that the decision of the Insurer which was communicated to the Worker by way of a letter dated 8 July 2016, to the extent that it relied on section 44A(6) of the 1987 Act, is a work capacity decision in accordance with section 43(1)(f) of the 1987 Act and is subject to merit review by the Authority in accordance with sections 44BB(1)(b) or 44BB(3)(b) of the 1987 Act.

Merit review of the work capacity decision

44. The Worker has requested a review of the Insurer's decision to suspend her weekly payments of compensation. The Worker submits that an assessment of her current work capacity was not "reasonably necessary" as the Authority had found that she had "no current work capacity" on 14 January 2016.
45. Section 44A of the 1987 Act sets out the relevant provisions in relation to work capacity assessments as follows:
- (1) An insurer is to conduct a work capacity assessment of an injured worker when required to do so by this Act or the Workers Compensation Guidelines and may conduct a work capacity assessment at any other time.*
- (2) A work capacity assessment is an assessment of an injured worker's current work capacity, conducted in accordance with the Workers Compensation Guidelines.*
- (3) A work capacity assessment is not necessary for the making of a work capacity decision by an insurer.*
- (4) An insurer is not to conduct a work capacity assessment of a worker with highest needs unless the insurer thinks it appropriate to do so and the worker requests it.*
- (5) An insurer may in accordance with the Workers Compensation Guidelines require a worker to attend for and participate in any assessment that is reasonably necessary for the purposes of the conduct of a work capacity assessment. Such an assessment can include an examination by a medical practitioner or other health care professional.*
- (6) If a worker refuses to attend an assessment under this section or the assessment does not take place because of the worker's failure to properly participate in it, the worker's right to weekly payments is suspended until the assessment has taken place.*

Reasonably necessary

46. Section 44A(5) indicates that "an insurer may require a worker to attend for and participate in any assessment that is reasonably necessary for the purposes of the conduct of a work capacity assessment".
47. The term reasonably necessary is not defined within the 1987 Act. Section 44A(5) also stipulates that any referral for assessment must be in accordance with the Workers Compensation Guidelines.
48. The guidelines that were applicable to a work capacity assessment on 8 July 2016 were the *WorkCover Work Capacity Guidelines* as amended (the Guidelines). These guidelines relevantly state at section 4:
- "The insurer may conduct a work capacity assessment at any stage throughout the life of a claim. This can be on ongoing process of assessment and reassessment..."*
49. Section 4.1 of the Guidelines indicates that referrals to various parties may be needed if the file information is incomplete. The Guidelines state that a worker must attend and participate in any evaluation required as part of a work capacity assessment. It goes on to describe the notice requirements for attendance.
50. I consider that the term "reasonably necessary" is a lesser threshold than "necessary". In this case requiring the Worker to attend the work capacity assessment appointment would be reasonably necessary if the process could be expected to provide information that was currently "incomplete", as per section 4.1 of the Guidelines.
51. A Delegate of the Authority found in her merit review of a previous work capacity decision of the Insurer that the Worker "currently has some capacity for employment". This finding was made on 14 January 2016.
52. A finding that a worker has no current work capacity is not a finding that the worker cannot undertake any work. The finding is specific to a definition under section 32A of the 1987 Act. In

her review, the Delegate of the Authority found that the information that was available to her did not support a finding of suitable employment for the Worker.

53. The Delegate of the Authority's findings did not remove the Worker's responsibility to comply with her obligations under the Act, nor did it prevent the Insurer from conducting ongoing management of her claim which includes conducting work capacity assessments.
54. I consider that the Delegate of the Authority's findings indicated that there was a possibility that the Insurer had incomplete information regarding suitable employment options for the Worker. In order to obtain the information, the Insurer required the Worker to attend an appointment with an occupational rehabilitation provider. I am satisfied that the actions of the Insurer were "reasonably necessary" in the circumstances.
55. On 1 June 2016 the Worker sent an email to the nominated occupational rehabilitation provider in which she states:

"Thank you for your emails. I will not be attending the meeting with you. There is currently an ongoing complaint with SIRA addressing [the Insurer's] non-compliance with the SIRA merit review recommendations..."
56. Section 44A(6) of the Act is set out above. I am satisfied that the Worker refused to attend an assessment under section 44A of the 1987 Act that was reasonably necessary for a work capacity assessment and that her weekly payments of compensation were suspended accordingly.

MERIT REVIEW SERVICE

DELEGATE OF THE STATE INSURANCE REGULATORY AUTHORITY