

RECOMMENDATION FOLLOWING AN APPLICATION FOR REVIEW OF THE INSURER'S WORK CAPACITY DECISION PURSUANT TO SECTION 44(1)(c) OF THE *WORKERS COMPENSATION ACT 1987*.

SUMMARY:

- a. The work capacity decision of the Insurer dated 20 January 2015 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 28 April 2015.**
- c. The payments are to be back-dated to 28 April 2015.**
- d. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 20 January 2015. The decision informed the applicant that his weekly payments would cease on 28 April 2015. The applicant sought internal review on 30 January 2015 and the Internal Review Decision was dated 27 February 2015. That decision confirmed the original decision.
2. The applicant applied to the Authority for Merit Review on 18 March 2015 and they delivered findings and recommendations dated 28 April 2015. The Authority made a finding that the worker was entitled to weekly payments of compensation to be calculated by the insurer in accordance with Section 37(3) of the *Workers Compensation Act 1987* (the 1987 Act).
3. The applicant then made application to this office on 13 May 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. On 11 January 2013 the applicant suffered injury to his left arm whilst in the course of his employment as a labourer. The applicant underwent a left distal biceps repair on 21 March 2013. Approximately six months after surgery the applicant unsuccessfully attempted to return to work. The applicant has been in receipt of payments of weekly compensation from the insurer.
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 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. I have reviewed the applicant’s submissions which refer to the medical practitioners not being “*specialised*” in “*workers compensation*”, financial hardship and conflict. The submissions are not relevant to procedural review.

Submissions by the Insurer

8. The Insurer has provided submissions dated 20 May 2015 in response to the application. The insurer responded to the applicant’s submissions and provided a useful chronology of the correspondence to date.

The Decision

9. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
10. Guideline 5.3.2 requires the insurer to state the decision and give reasons for making the decision.
11. The insurer has made a work capacity decision that the applicant can work 40 hours per week in suitable employment. This decision was

based upon a "WorkCover Medical Certificate" from the nominated treating doctor who certified the applicant for "partial capacity for work 40 hours." The insurer has complied with the Guidelines.

12. The insurer made a decision that suitable employment for the applicant, in accordance with Section 32A of the 1987 Act, and the amount he could earn working a 40 hour week was as follows:

- Light process worker - \$589.30 per week
- Sales assistant (hardware) - \$880.00 per week
- Cleaner - \$769.23 per week
- Construction labourer - \$1,000.00 per week
- Forklift operator - \$1085.28 per week

13. The insurer then makes a decision as to the amount the applicant was able to earn in the identified suitable employment listed above. The insurer stated that it had made the determination in accordance with Section 35(1) of the 1987 Act. That section states:

(1) For the purposes of the provisions of this Subdivision used to determine the rate of weekly payments payable to an injured worker in respect of a week:

"AWE" means the worker's pre-injury average weekly earnings.

"D" (or a "deductible amount") means the sum of the value of each non-pecuniary benefit (if any) that is provided by the employer to a worker in respect of that week (whether or not received by the worker during the relevant period), being a non-pecuniary benefit provided by the employer for the benefit of the worker or a member of the family of the worker.

"E" means the amount to be taken into account as the worker's earnings after the injury, calculated as whichever of the following is the greater amount:

(a) the amount the worker is able to earn in suitable employment,

(b) the workers current weekly earnings.

14. The insurer has then advised that they have determined that the applicant is able to earn \$864.71 per week. This is then described at page 7 of the work capacity decision as “[the named insurer] *has deemed that you have the capacity to work full hours and earn on average \$864.71 per week.*” The insurer has made an error and failed to comply with the Guidelines and the legislation.
15. The insurer is to determine the amount the applicant is able to earn in suitable employment (*Section 35(1)(a) of the 1987 Act*). The insurer could have selected any of the vocations listed in the suitable employment options and selected the corresponding weekly earnings. This would have been an amount the applicant would have been able to earn.
16. Instead the insurer has added together the amounts that the applicant would have been able to earn in five separate vocations and divided them to come up with an average figure of \$864.71 per week. This is not a weekly amount that the applicant would have been able to earn in suitable employment. It is a mythical figure not supported by the evidence in the work capacity decision.
17. It is disappointing that this error is being repeated in work capacity decision being made in 2015.
18. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 20 January 2015.

FINDING

19. 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 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

20. The work capacity decision of the Insurer dated 20 January 2015 is set aside.
21. The applicant is to be reinstated to his weekly payments at the rate applicable as at 28 April 2015.
22. The payments are to be back-dated to 28 April 2015.
23. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
22 June 2015