



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 19 August 2015 is set aside.**
- b. Such weekly payments as the applicant is receiving by virtue of the stay are to continue until a new decision is made in accordance with the requirements of section 43(1) of the *Workers Compensation Act 1987* and any period of notice given therein has expired.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 19 August 2015. The decision informed the applicant that his weekly payments of compensation would cease from 27 November 2015. The applicant requested internal review by the Insurer on 7 September 2015 and the Internal Review Decision was dated 2 October 2015. The Insurer maintained the decision to terminate the applicant's weekly payments of compensation albeit for different reasons to those expressed in the original work capacity decision.
2. The applicant sought Merit Review from the Authority on 3 November 2015. The Authority delivered recommendations and findings dated 4 December 2015. The Authority concluded in accordance with Section 37(3) of the *Workers Compensation Act 1987* (1987 Act) the applicant's entitlement to weekly payments of compensation is calculated to be \$0.00.
3. The applicant then made an application to this office for procedural review by way of application dated 30 December 2015. I am satisfied that the application has been made within time and in the proper form.



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

4. On 18 August 2014 the applicant suffered injury to his right knee and back in the course of his employment as a pick/packer with the employer. The applicant is not currently working and at the time of the work capacity decision was in receipt of weekly payments of 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 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 requesting a procedural review the applicant has made the following submissions:
 - The Insurer failed to correctly reference the legislation;
 - The Insurer failed to advise the applicant of the date his entitlement to medical benefits may stop;
 - The Insurer incorrectly advised *“there are no other documents in our possession relevant to your functional, medical or vocational status”* when at the request of Merit Review more relevant documents were found. The applicant refers to an email from the Insurer *“please find attached copies of the WCCoC post 10/10/2015 to date, an IMC file review from Dr P [name withheld] dated 24 October 2014 and report of Dr R [name withheld].”* Those reports were not mentioned nor included in the work capacity decision although they were relevant; and
 - The decision wrongly identifies the amount the applicant is capable of earning as *“\$603.99”* (as delivery driver) when both the Internal Review and the Merit Review only identify Sales Assistant role as being suitable.



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8. I cannot review any discretion or judgment exercised by the Insurer when they are making a decision. I can only review the procedures undertaken by the Insurer in making the actual work capacity decision.

Submissions by the Insurer

9. The Insurer has made submissions dated 6 January 2016 in response to this application. The Insurer's submissions are:
 - They correctly referenced the legislation including advising of the relevant entitlement period, Sections 37, 37(3), 54(2)(a), 59A(2);
 - They informed the applicant that his entitlement to medical and related treatment expenses would cease 12 months from the date his weekly payments of compensation ceased. This was in accordance with the legislation which was applicable at the time the work capacity decision was made;
 - The certificates of capacity post 10 October 2015 were provided to Merit Review because they were not available at the time the work capacity decision and the internal review decision which were completed on 19 August 2015 and 2 October 2015 respectively. The IMC review of Dr P was referred to in the work capacity decision on 19 August 2015. The report itself was signed by Dr P on 24 and 29 October 2014. The report of Dr R was provided to both merit review and the applicant as part of the merit reply. The report was not relied upon by the Insurer in making the work capacity decision or internal review decision; and
 - The work capacity decision considered vocational options of sales assistant, delivery driver and receptionist. The rate of \$603.99 per week was considered to be the applicant's ability to earn at the time taking into consideration Section 35(1) of the 1987 Act. The internal review decision considered the vocational option of Customer Service Assistant to be suitable employment and the applicant had the ability to earn \$800 per week. The vocational options relied upon were not wrongly identified as the decisions were based upon information available at the time of each decision.

Decision



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10. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
11. The Insurer correctly identified the roles of Sales Assistant, Delivery Driver and Receptionist as suitable employment for the applicant pursuant to Sections 43(1)(b) and 32A of the 1987 Act. The Insurer relied upon a vocational assessment dated 24 November 2014.
12. In accordance with Section 43(1)(a) of the 1987 Act the Insurer determined the applicant to have capacity to work for 27 hours per week (on page 1 of the decision). The Insurer relied upon a work capacity certificate from the nominated treating doctor.
13. In determining the amount the applicant could earn in suitable employment in accordance with Section 43(1)(c) the insurer noted that the applicant could earn \$17.35 per hour as a Sales Assistant, \$22.37 per hour as a Delivery Driver and \$17.86 per hour as a Receptionist.
14. Up to this stage the Insurer had displayed an adequate understanding of the legislation and Guidelines in making the work capacity decision.
15. At page 5 of the work capacity decision the Insurer advised the applicant:

“Evidence demonstrated that you are able to earn around \$603.99 per week, working 27 hours per week in the open labour market. The amount of \$603.99 gross per week is therefore the amount that has been used as your ability to earn working 20 hours per week in the suitable employment roles as a Sales Assistant, Delivery Driver and Receptionist in accordance with Section 35 of the Workers Compensation Act 1987.”

16. Guideline 5.3.2 requires the Insurer to clearly explain the line of reasoning for its decision. The preceding paragraph informed the applicant that he has the ability to earn \$603.99 gross per week working 27 hours per week. In the very next sentence the applicant is informed



that he can earn the same amount (\$603.99) working 20 hours per week. This is confusing and clearly an error.

17. In the same paragraph the Insurer informed the applicant that he has the ability to earn \$603.99 per week in the suitable employment roles of Sales Assistant, Delivery Driver and Receptionist. This is despite informing him earlier in the work capacity decision that each role has a different hourly rate. The applicant does not have the ability to earn that amount of money in each of the roles determined to be suitable employment. Again this statement is confusing to the applicant and clearly an error on the part of the Insurer.

18. It is an important part of the work capacity decision that the Insurer clearly explains to the applicant the:

- decision about the applicant's current work capacity; and
- decision about the amount the applicant is able to earn in suitable employment.

19. In this instance the Insurer provided conflicting information which was confusing and incorrect. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 19 August 2015.

Finding

20. 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 has been a breach 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

21. The work capacity decision by the Insurer dated 19 August 2015 is set aside.



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22. Such weekly payments as the applicant is receiving by virtue of the stay are to continue until a new decision is made in accordance with the requirements of section 43(1) of the Workers Compensation Act 1987 and any period of notice given therein has expired.

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
1 February 2016