

**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 11 December 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 26 March 2015.**
- c. The payments are to be back-dated to 26 March 2015 or the date payments ceased (whichever is the later).**
- 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. A work capacity decision dated 26 September 2015 was sent to the applicant advising him that his entitlements to weekly payments would cease from 2 January 2015. The applicant requested an internal review on 24 October 2014. The insurer issued a decision dated 11 December 2014 which "*replaces the decision of 5 September 2014.*" That decision made a different work capacity decision which still resulted in the applicant's payments of compensation being terminated. However, the date of cessation of the payments in the decision was 26 March 2015.
2. The applicant then requested an internal review of that decision. The internal review decision was dated 27 February 2015. That decision confirmed the work capacity decision of 11 December 2014. However, the insurer extended the notice period to 9 April 2015.
3. The applicant applied for merit review by the Authority on 1 April 2015. They delivered a decision dated 15 May 2015 which found that the applicant did not satisfy the special requirements of Section 38(3) of the

Workers Compensation Act 1987 (the 1987 Act) and was not entitled to ongoing payments of weekly compensation.

4. The applicant then made application to this office dated 29 May 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
5. On 28 June 2008 the applicant suffered injury to his cervical spine, lumbar spine, shoulders and knees as the result of a motor vehicle accident arising in the course of his employment as a business relations officer. The applicant attempted to return to work with different employers on a number of occasions. At the time of the merit review by the Authority the applicant was not working. The applicant has been in receipt of weekly payments of compensation from the insurer.
6. 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

7. 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.*”
8. The applicant has requested a procedural review of the insurer’s work capacity decision and “*all applications from the insurer*”. The applicant has submitted that he has “*many issues*” with the insurer. There are no submissions which are relevant to procedural review.
9. I am only in a position to review the procedures undertaken by the insurer in making the work capacity decision. I cannot consider all decisions from the insurer. I can only assess the validity of the work capacity decision. In this instance work capacity decision which was reviewed by the Authority was dated 11 December 2014. That is the work capacity decision I can procedurally review.

Submissions by the Insurer

10. The Insurer provided submissions dated 5 May 2015 in response to the application. The insurer also provided a useful chronology of correspondence.

The Decision

11. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
12. In accordance with Guideline 5.3.2 the Insurer advised the applicant that he had received over 339 weekly payments. Therefore his ongoing entitlements were subject to Section 38(3) of the 1987 Act.
13. The insurer had made a work capacity decision that the applicant had capacity to work for 18 hours per week. At the time of the work capacity decision the applicant was not working.
14. At pages 2 and 6 of the work capacity decision the Insurer informed the applicant that his pre-injury average weekly earnings were subject to the transitional rate contained within Schedule 6 of Part 19H Clause 9(3) of the 1987 Act as he was an existing recipient.
15. The Insurer explained the 'special requirements' of Section 38(3) of the 1987 Act at page 5 of the decision. That section states:

(3) A worker who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if:

(a) the worker has applied to the insurer in writing (in the form approved by the Authority) no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payments after the second entitlement period, and

(b) the worker has returned to work (whether in self-employment or other employment) for a period of not less than 15 hours per week and is in receipt of current weekly earnings (or current weekly earnings together with a deductible amount) of at least \$155 per week, and

(c) the worker is assessed by the insurer as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker's current weekly earnings.

16. At page 5 of the decision the Insurer advised the applicant that in respect of Section 38(3)(a) *"I note that your Application for Continuation of Weekly Payments beyond week 130 has not been received by [named insurer]. I therefore determine you do not satisfy the requirement under Section 38(3)(a) WCA. I have attached this application for your reference."* This is an error by the insurer. As the applicant is an existing recipient this sub-section does not apply.

17. The above error is sufficient to set aside the work capacity decision.

18. 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 or ceased having regard to Section 76(1)(b) of the Interpretation Act 1987. In this decision the Insurer has referenced and explained both sections of each piece of legislation. However, the insurer has informed the applicant that his payments will cease 26 March **2014** (emphasis added). I note that this is a typographical error and the applicant would most likely be able to ascertain that it should read 26 March 2015 as the letter was dated 11 December 2014. However, in future cases the Insurer should ensure that this date is correct.

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 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



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20. The work capacity decision of the Insurer dated 11 December 2014 is set aside.
21. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 26 March 2015.
22. The payments are to be back-dated to 26 March 2015 or the date payments ceased (whichever is the later).
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
30 June 2015