



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 November 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 11 February 2015.**
- c. The payments are to be back-dated to 11 February 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 11 November 2014. The decision informed the applicant that his weekly payments of compensation would cease on 11 February 2015. The applicant sought internal review on 3 February 2015 and the Internal Review Decision was dated 27 February 2015 confirming the original decision.
2. The applicant applied to the Authority for Merit Review on 23 March 2015 and they delivered findings and recommendations dated 8 May 2015. The Authority made a finding that the worker did not meet the special requirements for the continuation of weekly payments after the second entitlement period contained in Section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act).
3. The applicant then made application to this office on 1 June 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. On 1 March 2001 the applicant suffered injury to his lumbar spine whilst in the course of his employment as a baggage handler. On 9 June 2004 a Certificate of Determination was issued by the Workers Compensation Commission stating the applicant was to receive “\$322.23 per week from 17 September 2003 to date pursuant to Section 40 of the Workers Compensation Act 1987 and thereafter in accordance with the provisions of the Act.” The applicant is also self-employed as a handyman.
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. The applicant’s submissions include that the insurer has failed to assist him through the work capacity process and the insurer has failed to consider all the evidence.

Submissions by the Insurer

8. The Insurer has not provided submissions in response to the application.

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 advise the applicant of the date of the work capacity assessment. In this decision the Insurer has informed the applicant “*we have conducted a work capacity assessment on XXXXX in accordance with the WorkCover guidelines and made a work capacity decision.*” The Insurer has failed to comply with the Guideline

as it has not advised the applicant of a valid date upon which the assessment has taken place.

11. The legislation and Guideline 5.3.2 requires the insurer to advise the date the decision takes effect. 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 advised the applicant that his weekly payments of compensation will cease on 11 February 2015. This is the incorrect notice period as the insurer has failed to allow the four business days for postal and receipt of the work capacity decision. The insurer has again failed to comply with the Guidelines.
12. Guideline 5.3.2 also requires the Insurer explain the relevant entitlement period. In this decision the Insurer has informed the applicant "*From the date of your injury, you have been entitled to in excess of 560 weeks of weekly compensation.*" The statement does not inform the applicant of how many weeks of payments he has actually received. It informs him of how many weeks he has been entitled to but not for how many weeks he has been paid. The insurer has failed to comply with the Guidelines.
13. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 11 November 2014.

FINDING

14. 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



15. The work capacity decision of the Insurer dated 11 November 2014 is set aside.
16. The applicant is to be reinstated to his weekly payments at the rate applicable as at 11 February 2015.
17. The payments are to be back-dated to 11 February 2015.
18. 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
1 July 2015