

**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 9 January 2015 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 17 April 2015.**
- c. The payments are to be back-dated to 17 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. A work capacity decision dated 9 January 2015 was sent to the applicant advising her that her entitlement to weekly payments would cease from 17 April 2015. The applicant requested an internal review on 11 February 2015. The insurer issued an internal review decision dated 10 March 2015. The internal review decision confirmed the work capacity decision.
2. The applicant applied for merit review by the Authority on 13 April 2015. They delivered a decision dated 8 May 2015 which found that the insurer was to calculate the applicant's entitlement to weekly payments of compensation in accordance with the formula in Section 37(3) of the *Workers Compensation Act 1987* (the 1987 Act).
3. The applicant then made application to this office dated 9 June 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 21 September 2014 the applicant sustained an injury to her back whilst unpacking boxes of meat and placing the contents onto a shelf.

She was in the course of her employment. The applicant ceased work and was in receipt of weekly payments of compensation at the time of the work capacity decision.

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.*”
7. The applicant has requested a procedural review of the insurer’s work capacity decision. The applicant has submitted that the insurer failed to:
 - Advise of the process available for requesting review of the decision and how to access the required form. (I do note that the insurer attached a copy of the form “*Application for review of a work capacity decision by insurer form*” to the letter and directed the applicant to the workcover website. This is sufficient to comply with the legislation and guidelines.);
 - Properly outline the evidence considered in making the decision, noting the author, the date and key information. (I do note that the insurer has listed the information considered at page 2 of the decision. The insurer has also referred to relevant medical reports throughout the decision. The insurer has complied with the Guidelines.);
 - Seek additional information that is required to ensure the worker’s current capacity for work is fully understood. The applicant submits that the insurer failed to consider reports from her physiotherapist. (I note that this is a procedural review only. I am not to review any judgment or discretion exercised by the insurer. This submission is not appropriate to procedural review.);
 - Obtain copies of all physiotherapy reports prior to making its decision. (This submission is not relevant to procedural review.);

- Comply with the fair notice provisions and Guideline 5.2. (I note that a fair notice letter was sent to the applicant dated 11 December 2014. This is in accordance with the Guideline.); and
- Failed to respond to the request by Dr D to have a functional assessment. (I confirm that this submission is not relevant to procedural review).

Submissions by the Insurer

8. The Insurer provided submissions received 15 June 2015 in response to the application. The Insurer provided a useful chronology of events and responded appropriately to the applicant's submissions.

The Decision

9. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
10. Section 43 of the 1987 Act defines the decisions of insurers which are considered to be work capacity decisions. Section 43(1) states:

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 44 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).

11. In the present work capacity decision the Insurer has made a decision that the applicant has the capacity to work 35 hours per week in accordance with the Certificate of Capacity from Dr D dated 11 December 2014. This decision has been made in compliance with the legislation and Guidelines. This decision is in accordance with Section 41(1)(a) of the 1987 Act.

12. The next decision made by the insurer is what constitutes suitable employment for the applicant. The insurer determined that suitable duties for the applicant were food services assistant, retail sales assistant and hospitality worker. These vocations were included in a vocational assessment report dated 28 November 2014 and approved by the applicant's nominated treating doctor, Dr D. This decision is in accordance with Section 43(1)(b) of the 1987 Act.

13. The insurer has then made a decision about the amount the applicant is able to earn in that suitable employment. The insurer has noted that the weekly earnings for the suitable employment options are:

- Food Services Assistant \$829.50 per week
- Retail Services Assistant \$746.97 per week
- Hospitality Worker \$838.16 per week

14. The insurer has then stated the *"average of these amounts is \$800.40 per week. This is the amount that [named insurer] has determined that you are able to earn per week in suitable employment."* This is incorrect.

15. In accordance with Section 43(1)(c) of the 1987 Act a decision is made *"about the amount an injured worker is able to earn in suitable*

employment.” The insurer has made an error by determining the amount the applicant is able to earn in suitable employment as being the average of three separate employment options. This is not an actual amount the applicant is able to earn.

16. The applicant is able to earn the amount which is applicable to the suitable employment option. The insurer should have selected a suitable employment option and its corresponding weekly earning as the amount the applicant could earn in suitable employment.

17. The amount the insurer has calculated in the decision is a fictitious amount based upon three separate employment options. This is not an amount the applicant can earn in suitable employment. Therefore the insurer has not complied with Section 43(1)(c) of the 1987 Act.

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 9 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 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

20. The work capacity decision of the Insurer dated 9 January 2015 is set aside.

21. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 17 April 2015.

22. The payments are to be back-dated to 17 April 2015.



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23. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.

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8 July 2015