

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 5 February 2015 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable as at 13 May 2015.**
- c. The payments are to be back-dated to 13 May 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 5 February 2015. The decision informed the applicant that her weekly payments of compensation would cease on 13 May 2015. The applicant sought internal review on 13 March 2015 and the Internal Review Decision was dated 2 April 2015 confirming cessation of weekly payments.
2. The applicant applied to the Authority for Merit Review and they delivered findings and recommendations dated 19 May 2015. The Authority made a finding that the applicant was entitled to payments of weekly compensation pursuant to Section 38(7) of the *Workers Compensation Act 1987* (the 1987 Act) to the maximum amount of \$196.72 per week.
3. The applicant then made application to this office on 11 June 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. On 14 July 2000 the applicant moved a table for a patient in the course of her employment and developed pain in her lower back radiating to both legs. The applicant underwent a spinal fusion in 2001 and a neurolysis in June 2003. The applicant attempted to return to her pre-injury duties but failed and her employment was terminated on 31 July 2004. At the time of the work capacity decision the applicant was working part time and in receipt of weekly payments of compensation.
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 has provided three and a half pages of submissions. The submissions are primarily based upon incorrect statements, a deterioration in injury, preference of the medical opinion of the independent specialist over the nominated treating doctor and inconsistencies in the internal review decision.
8. This review is of the procedures of the insurer in making the work capacity decision. I am unable to review any judgment or discretion used by the insurer. These submissions from the applicant are not relevant to procedural review. The remainder of the applicant’s submissions are discussed within this review.

Submissions by the Insurer

9. The Insurer has provided submissions dated 18 June 2015 in response to the application. The insurer’s submissions are examined below.

The Decision

10. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.

11. Guideline 5.3.2 requires the insurer to state the impact the decision has on the applicant in terms of their entitlement to medical and related treatment expenses.
12. At page 4 of the work capacity decision the insurer advised the applicant that she has been assessed with 28% whole person impairment and as such she is entitled to payment of reasonable and necessary medical expenses until she reaches retirement age by virtue of Clause 28(2) of *Workers Compensation Amendment (Existing Claims) Regulation 2014*. If the applicant has been assessed as having whole person impairment greater than 20% this advice is correct.
13. However, in its submissions the insurer has stated the following:

“Reference is made that [the applicant] has sustained 28% whole person impairment. [The applicant] states this document has not been referenced and should in fact be 27% impairment. As per the medical report of Dr [P] dated 27 February 2014, [the applicant] has been assessed with 27% whole person impairment. However, it is noted at the time of issue of the Work Capacity Decision dated 5 February 2015, this assessment had not yet been confirmed from prior Table of Disabilities Determination (sic). The assessment of 27% Whole Person Impairment is dated 27 February 2015 and was received following the Decision notice being provided. The assessment occurred in order to determine [the applicant’s] ongoing entitlement correctly, and this assessment was not relied upon in the Work Capacity Decision determination, as such was not referenced.”
14. This is a critical issue. The work capacity decision dated 5 February 2015 has informed the applicant that she has been assessed as having 28% whole person impairment. The above submission from the insurer is confusing and contradictory. The submission appears to acknowledge that the insurer does not concede the applicant has 28% whole person impairment despite the statement in the work capacity decision.
15. The internal review decision dated 2 April 2015 informs the applicant that as she is no longer entitled to payments of weekly compensation Section 59A of the 1987 Act applies. This has the effect that the

applicant will only be entitled to payment of medical and related treatment expenses for a period of 12 months after her weekly payments cease.

16. The above is a demonstrable error by the insurer. The information provided to the applicant is contradictory and confusing. It is a critical issue to advise the applicant correctly in respect of her entitlement to medical and related treatment expenses. This error is sufficient to set aside the work capacity decision. The insurer has failed to comply with the legislation and the guidelines.
17. Guideline 5.3.2 also requires the insurer to explain the relevant entitlement periods.
18. The insurer has informed the applicant that as at 13 February 2015 she had received 721 weeks of compensation payments. Therefore any ongoing entitlements to weekly payments of compensation are subject to the provisions of Section 38(3) of the 1987 Act.
19. The insurer also advised the applicant that it made a decision that she has the capacity to work 32 hours per week. This decision was made in accordance with a vocational and functional assessment report undertaken in September 2014. The applicant's nominated treating doctor certified, in March 2014, that the applicant was only fit to return to work for 20 hours per week.
20. Despite this disparity in medical opinion it is open to the insurer to prefer the medical assessment of the functional assessment over the nominated treating doctor. The insurer has complied with the Guidelines.
21. The insurer made a decision in accordance with Section 32A of the 1987 Act that suitable duties for the applicant were that of a medical receptionist, banking officer and pre-admission clerk. This decision was based upon the work options report dated September 2014. The insurer has complied with the Guidelines.
22. At page 3 of the work capacity decision the insurer has set out the requirements of Section 38(3) of the 1987 Act. The insurer has then

advised the applicant that she does not meet all of the requirements for an entitlement to weekly payments of compensation after the second entitlement period for the following reasons:

“You have returned to work for a period of not less than 15 hours per week and are currently in receipt of weekly earnings of at least \$173 per week.”

“You are currently employed as a Sales assistant with [name withheld] working an average of 16.4 hours per week and earning an average of \$369.23. This role is considered to be a role with a medium physical demands (sic).”

“You have not been assessed as likely to continue to be indefinitely incapable of undertaking further additional employment or work that would increase your current weekly earnings.”

23. Further at page 8 of the work capacity decision the insurer states:

“As you have been assessed as having the ability to earn \$946.56 per week for working 32 hours per week in the identified suitable roles of Medical Receptionist, Bank Officer and Pre-Admissions Clerk which are roles of light physical demand you do not have an ongoing entitlement to weekly benefit payments under Section 38(3) if (sic) the Workers Compensation Act 1987.”

24. The above statement is a demonstrable error. The above statement from the insurer indicates that the applicant can earn the stated amount in all three roles or alternatively in a hybrid of all three roles. This is not in keeping with the definitions of suitable employment and earning capacity. The insurer must base a work capacity decision on an actual weekly amount a worker is able to earn in a specific type of employment. This error is sufficient to invalidate the work capacity decision.

25. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 5 February 2015.

FINDING



26. 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

27. The work capacity decision of the Insurer dated 5 February 2015 is set aside.

28. The applicant is to be reinstated to his weekly payments at the rate applicable as at 13 May 2015.

29. The payments are to be back-dated to 13 May 2015.

30. 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
15 July 2015