



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 6 February 2015 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 20 May 2015.**
- c. The payments are to be back-dated to 20 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. A work capacity decision dated 6 February 2015 was sent to the applicant advising her that her entitlements to weekly payments would cease from 20 May 2015. The applicant requested an internal review on 24 February 2015. The insurer issued an internal review decision dated 26 March 2015. That decision confirmed the work capacity decision.
2. The applicant applied for merit review by the Authority on 21 April 2015. They delivered an amended decision dated 9 June 2015 which found that the applicant did not satisfy the special requirements of Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) and was not entitled to ongoing payments of weekly compensation.
3. The applicant then made application to this office dated 16 June 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 12 April 2004 the applicant suffered injury to her back in the course of her employment as a clerical assistant. On 1 December 2009 a

Certificate of Determination was issued by the Workers Compensation Commission noting an agreement that a voluntary award of \$165.67 per week be paid to the applicant. The award was calculated pursuant to Section 40 and it was agreed the applicant had the capacity to work 25 hours per week. At the time of the work capacity decision the applicant remained in receipt of weekly payments and was working on a casual basis.

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.
8. The applicant’s primary submission is that she is only able to work 16 hours per week and that her nominated treating doctor had been “*pressured*” to certify her fit for 25 hours per week in accordance with the voluntary agreement entered in the Workers Compensation Commission in 2009.
9. As referred to above I am only able to review the procedures undertaken by the insurer in making the work capacity decision. I am unable to review any judgment or discretion the insurer has exercised in assessing the applicant’s capacity to work. The submissions made by the applicant are not relevant to procedural review.

Submissions by the Insurer

10. The Insurer provided submissions dated 23 June 2015 in response to the application. The Insurer’s submissions addressed the issues raised by the applicant in respect of capacity to work.

The Decision

11. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
12. Guideline 5.3.2 requires the insurer to “*explain the relevant entitlement period.*” In order to do this the insurer must inform the applicant as to the number of weeks compensation payments have been paid.
13. At page 2 of this work capacity decision the insurer has informed the applicant “*As at 457, a total of 6 February 2015 entitlement weeks of weekly compensation payments have been paid to you.*” This statement is nonsensical and does not inform the applicant of any useful information. The statement does not provide, in a clear and concise manner, the information required by the Guideline.
14. It is most alarming that the statement, which contains an obvious error, could remain in the work capacity document which should be peer reviewed prior to being sent to the applicant.
15. The statement is an error and sufficient to set aside the work capacity decision.
16. At page 1 of the work capacity decision the insurer has made the decision that the applicant has capacity to work 38 hours per week. At page 4 of the document the insurer provides reasons for its decision. There was no dispute at the time of the work capacity decision that the applicant was working at least 13 hours per week. It is the applicant’s contention that she is actually working 16 hours per week.
17. The insurer based its decision that the applicant has the capacity to work 38 hours per week upon the following:

“On 3 February 2015, whilst in discussion with your Nominated Treating Doctor, Dr L [name withheld], it was confirmed that she agreed with Dr K [name withheld] that you would be able to work a full 38 hour week in your current employment. In order to adapt to a full week, it was agreed for a referral to be made for you to attend 8-10 sessions with an Exercise psychologist.”

18. The only certificates of capacity referred to from Dr L in the work capacity decision state *“you currently have the capacity to work variable hours 5 days per week with a lifting restriction of 5kg”* and *“that you currently have the capacity to work up to 25 hours until 3 February 2015.”*

19. This is another case¹ where Dr K alleged that an NTD will agree to upgrade a worker’s capacity. There is no subsequent verification from the nominated treating doctor, Dr L that she has agreed with the proposition raised and that that the pre-condition put in place for the proposed increase in work capacity had been fulfilled.

20. This medical evidence does not support the insurer’s assertion that the applicant can work 38 hours per week.

21. The insurer has relied upon the *“discussion”* between Dr K and Dr L under the heading *“Reasons for the Decision”*. Therefore it has formed part of the decision making process. Therefore the work capacity decision must be set aside on the basis of the way in which the *“evidence”* was obtained and lack of corroboration.

22. The insurer advised on page 6 *“I have considered your application along with all available and relevant material, in particular the documents listed below. There are no other documents in our possession relevant to your functional, medical or vocational status or current work capacity.”* The documents which are referred to are:

- Labour Market Analysis for [name withheld] dated 30 October 2014
- Independent Medical Consultant report by Dr K [name withheld] dated January 2015

23. Guideline 5.3.2 requires the insurer to outline the evidence considered in making the decision, noting the author, the date and key information. All evidence considered should be referred to, regardless of whether or not it supports the decision.

¹ See cases numbered 23214 and 6615

24. The concerning issue is that the work capacity decision lists the documents mentioned at paragraph 20 above as being those considered. If one then refers to the Internal Review Decision dated 26 March 2015 the list of documents considered includes among other documents, a Certificate of Capacity dated 30 January 2015 along with 5 other sets of documents which were available at the time of the original work capacity decision.
25. This omission by the insurer leaves it open for speculation that not all documentation may have been considered at the time of the original decision. In this regard the insurer has not complied with the Guidelines by failing to list and / or refer specifically (by author, date and key information) to all the documents upon which it relied in the original work capacity decision.
26. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision.

Finding

27. 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

28. The work capacity decision of the Insurer dated 6 February 2015 is set aside.
29. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 20 May 2015.
30. The payments are to be back-dated to 20 May 2015.



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31. 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
27 July 2015