

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 21 July 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable at 13 June 2014.**
- c. The payments are to be back-dated to 13 June 2014.**
- 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 21 July 2014. The decision informed the applicant that his weekly payments of compensation would cease. The applicant sought internal review and the Internal Review Decision was dated 29 October 2014. He then sought Merit Review on or about 8 December 2014 and the Authority issued the Merit Review recommendation on 10 December 2014 upholding the decision. The applicant made application to this office on 19 December 2014.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. The applicant had previously sought procedural review of a work capacity decision dated 6 March 2014. The applicant was successful and the work capacity decision was set aside by an earlier recommendation of this office¹. The facts and circumstances concerning the background to the claim are encompassed in the aforementioned recommendation and need not be repeated.

¹ Reported and numbered as 12514

Submissions by the applicant

4. 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’s submissions include not being provided with a copy of all medical reports in the fair notice letter and that a further work capacity assessment should have been performed after the one on 6 February 2014 as the applicant subsequently became unfit for work for one month between April and May 2014.

Submissions by the Insurer

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

The Decision

6. As referred to in paragraph 3 above this office carried out a procedural review of a work capacity decision dated 6 March 2014. The recommendations dated 26 August 2014 were as follows:
 - a. *The work capacity decision of the Insurer dated 06 March 2014 is set aside.*
 - b. *The applicant is to be reinstated to his weekly payments at the rate applicable immediately prior to 13 June 2014.*
 - c. *The payments are to be back dated to 13 June 2014.*
 - d. *The payments are to continue until such time as a further work capacity decision is made and comes into effect.*
7. The work capacity decision which is the subject of this review is dated 21 July 2014 and pre-dated the procedural review and the above recommendations.
8. This work capacity decision was prepared giving effect to the “*Findings and Recommendations on Merit Review by the Authority*” dated 27 June 2014 and referred to on page 3 of the decision. Unfortunately for the Insurer as the WIRO recommendations set aside that work capacity decision the recommendations from Merit Review were no longer valid as that decision was no longer operational.

9. This work capacity decision does not comply with our earlier recommendations. Those recommendations remain effective until a work capacity decision is made.
10. The work capacity decision of 21 July 2014 is set aside on the basis that it was made prior to the procedural review of the earlier decision and was therefore premature. It may well have been open to the Insurer to remake an identical decision after receipt of the procedural review recommendation, but that was not done and the Insurer has therefore yet to comply with the earlier procedural review recommendation. The decision dated 21 July 2014 must be a nullity.

FINDING

11. 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 the Insurer did not comply with previous recommendations. Accordingly the work capacity decision must be found to be invalid.

RECOMMENDATION

12. The work capacity decision of the Insurer dated 21 July 2014 is set aside.
13. The applicant is to be reinstated to his weekly payments at the rate applicable at 13 June 2014.
14. The payments are to be back-dated to 13 June 2014.
15. 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 January 2015.