

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 March 2015 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 13 June 2015.**
- c. The payments are to be back-dated to 13 June 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 March 2015 was sent to the applicant advising him that his entitlement to weekly payments would cease from 13 June 2015. The applicant requested an internal review on 8 April 2015. The insurer issued an internal review decision dated 29 April 2015. The internal review decision confirmed the original work capacity decision.
2. The applicant applied for merit review by the Authority on 27 May 2015. They delivered a decision dated 30 June 2015 which found that the applicant was not entitled to ongoing weekly payments of compensation as he did not satisfy the special requirements of Section 38 of the *Workers Compensation Act 1987* (the 1987 Act).
3. The applicant then made application to this office dated 29 July 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 14 December 2010 the applicant suffered injury to his left eye, neck, lower back and right thigh as a result of being the victim of an assault in

the course of his employment as a taxi driver. The applicant has been in receipt of weekly payments of compensation since that time.

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’s submissions are as follows:
 - He was not properly informed about his rights and entitlements under the legislation;
 - He did not have enough resources to respond to the decision made by the insurer;
 - The insurer has not obtained all available medical evidence; and
 - He was not properly advised as to the requirements of Section 38 of the legislation.

Submissions by the Insurer

8. The Insurer provided a useful chronology of events and correspondence between the parties.

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 state the impact the decision has on the applicant in terms of their entitlement to weekly payments.
11. 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 has referenced Section 54 of the 1987 Act. The insurer has informed the applicant that as a result of the work capacity decision his payments would cease from 13 June 2015. This is the correct notice period. The Insurer has complied with the legislation and the Guidelines.

12. Guideline 5.3.2 also requires the insurer to advise the applicant of the impact the decision has on his entitlement to medical and related treatment expenses. At page 2 of the decision the insurer informed the applicant that in accordance with Section 59A(1) and (2) of the 1987 Act his entitlement to medical and related treatment expenses are limited to a period of 12 months after his weekly payments cease. The insurer then advised the applicant that his entitlement to medical and related treatment expenses “*will expire on 13/06/ 2015*” (emphasis added). This is a demonstrable error.
13. The insurer has advised the applicant that his entitlement to medical and related treatment expenses will cease 12 months prior to the actual cessation date. The correct date for that the applicant’s entitlement will expire is 13 June **2016**. In advising of the incorrect date the insurer has failed to comply with the Guidelines and the legislation.
14. The insurer has amended the date in the internal review decision however this is insufficient to validate the work capacity decision. It also appears that the insurer has just provided the correct date in the internal review rather than an affirmative amendment of the incorrect advice provided in the work capacity decision.
15. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 6 March 2015.

Finding



16. 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

17. The work capacity decision of the Insurer dated 6 March 2015 is set aside.

18. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 13 June 2015.

19. The payments are to be back-dated to 13 June 2015.

20. 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
28 August 2015