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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 by the Insurer dated 2 April 2015 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 15 July 2015.**
- c. The payments are to be back-dated to 15 July 2015.**
- d. Such payments are to continue until such time as a further work capacity decision comes into effect.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 2 April 2015. The decision informed the applicant that his weekly payments of compensation would cease on 15 July 2015. The applicant sought internal review on 29 April 2015 and the Internal Review Decision was dated 25 May 2015. That decision confirmed the applicant was no longer entitled to weekly payments of compensation.
2. The applicant applied to the Authority for Merit Review on 20 June 2015 and they delivered findings and recommendations dated 22 July 2015. The Authority made a finding that in accordance with Section 37(3) of the *Workers Compensation Act 1987* (the 1987 Act) the "*applicant is entitled to weekly payments of compensation of nil.*"
3. The applicant then made application to this office dated 19 August 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.



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4. On 24 September 2013 the applicant was adjusting a machine in the course of his employment when his left middle finger was caught in the machine and was partially amputated. The applicant has listed other complaints including pain in the left wrist, complex regional pain syndrome, depression and post - traumatic stress disorder. The applicant 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.*” The applicant has applied for a procedural review.
7. In addition to requesting a procedural review the applicant has made the following submissions:
 - The insurer failed to make a decision on current treatment plans;
 - The applicant has failed to secure employment despite his best endeavours; and
 - That he requires ongoing medical treatment.
8. I am only able to review the insurer’s procedure with respect to making the work capacity decision. I am not able to consider any decisions in respect of medical treatment or take into consideration the applicant’s attempts to obtain employment. The applicant’s submissions are not relevant to procedural review.

Submissions by the Insurer



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9. The Insurer has made submissions dated 26 August 2015 in response to this application. The insurer has submitted;
- That the treatment plans are an issue separate from the work capacity decision;
 - The insurer has provided adequate assistance to help the applicant return to suitable employment; and
 - There were no grounds to alter or overturn the work capacity decision.

The Decision

10. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
11. In accordance with Guideline 5.3.2 the insurer has correctly informed the applicant that he has received 79 weeks of compensation payments and that any ongoing entitlement is determined by Section 37(3) of the 1987 Act.
12. The insurer has made a decision in accordance with Section 43(1)(a) that the applicant has the current capacity to work 40 hours per week in suitable employment. The insurer has made a further decision in accordance with Section 43(1)(b) and Section 32A that suitable employment is a Draftsperson and Inquiry Clerk/Customer Service Assistant.
13. The insurer has complied with the legislation and the Guidelines in respect of paragraphs 11 and 12 above.
14. Section 43(1)(c) of the 1987 Act allows the insurer to make a decision about *“the amount an injured worker is able to work in suitable employment.”* This amount is then used in the calculation algorithm set out in Section 37(3) of the 1987 Act to determine the amount of the applicant’s ongoing weekly payments of compensation.
15. At page 6 of the work capacity decision the Insurer relies upon a vocational assessment report dated 27 March 2015 in respect of the amount the applicant is able to earn in suitable employment. The insurer states:



*“...that you have the ability to earn an **average** of \$18.41 gross per hour being an **average** of \$736.53 gross per 40 hour week as an Inquiry Clerk/Customer and an **average** of \$20.88 gross per hour being an **average** of \$835.00 gross per 40 hour week as a Draftsperson.”* (emphasis added)

16. The insurer then makes a decision that the available evidence supports that the applicant is able to earn an **average** of \$835.00 gross per 40 hour week.
17. The insurer has failed to comply with the Guidelines and legislation in respect of the issues in paragraphs 14 and 15 above and in making the decision referred to in paragraph 16 above about the amount the applicant is able to earn.
18. The legislation at Section 43(1)(c) of the 1987 Act is clear in that the insurer is to make a decision about *the “amount an injured worker is able to earn in suitable employment”* (emphasis added).
19. In this particular case the insurer has decided that the applicant is able to earn *“an average of \$20.88 gross per hour being an average of \$835.00 gross per 40 hour week.”* The use of the word average infers that the insurer has obtained more than one hourly rate for the suitable employment option and calculated an average hourly and weekly figure.
20. The definition of the word *“average”* in the *Oxford English Dictionary*¹ is *“to estimate, by dividing the aggregate of a series by the number of its units; to take the average of.”*
21. The insurer is to make a decision as to the actual amount the applicant is able to earn in suitable employment. The applicant is unable to earn an *“average”* of more than one hourly / weekly rate as this calculated amount does not exist and is fictitious.
22. It is noted that in the Internal Review Decision dated 25 May 2015 at page 5 the insurer has noted that in the labour market analysis report dated 20 May 2015 (a different report to that relied upon in the work

¹ www.oed.com



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capacity decision) *“they provided labour market information in relation to what you would be able to earn as a Customer Service Officer (Inquiry Clerk) by contacting three potential employers in the open labour market. One of the employers indicated they would hire you in an entry level position, as such, I have taken the lowest hourly rate provided in the labour market contact to reflect what you are capable of earning. As such I have deemed your earning ability to be \$24.00 per hour, multiplied by 38 hours being \$912.00 per week.”*

23. I observe that the insurer has made a different decision in respect of the applicant’s suitable employment by relying upon the earnings of a Customer Service Officer rather than that of a Draftsman and that the applicant’s current work capacity has been reduced from 40 hours to 38 hours per week. However, most importantly, the insurer has made a decision as to an exact amount the applicant is able to earn on a weekly basis rather than referring to an “average”. The decision that the insurer has made in the Internal Review Decision in respect of this aspect is correct but is it insufficient to overcome the defective work capacity decision.

24. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 2 April 2015.

Finding

25. 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



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26. The work capacity decision by the Insurer dated 2 April 2015 is set aside.
27. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 15 July 2015.
28. The payments are to be back-dated to 15 July 2015.
29. Such payments are to continue until such time as a further work capacity decision comes into effect.

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
22 September 2015