



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 9 April 2015 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 16 July 2015.**
- c. The payments are to be back-dated to 16 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 9 April 2015. The decision informed the applicant that his weekly payments of compensation would cease on 16 July 2015. The applicant sought internal review and the Internal Review Decision was dated 24 June 2015. That decision maintained the original work capacity decision.
2. The applicant applied to the Authority for Merit Review on 24 July 2015 and they delivered findings and recommendations dated 23 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's entitlement to weekly payments of compensation is nil.
3. Application for procedural review was made to this office dated 24 July 2015, received on 4 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. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines). The relevant version of the Guidelines came into effect on 11 October 2013.

Submissions by the applicant

5. 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.*”
6. The applicant has made the following submission:

Prior to 5th March 2015, the date of the attempted Fair Work Teleconference,¹ I had informed my case manager [named supplied] that I would be overseas between 18th February 2015 until 13th March 2015. A copy of my fax to her dated 22 December 2014 is attached. However, [the Insurer] ignored that vital information and I was denied natural justice by being unable to put my case forward for continuing weekly benefits. This is a breach of the Guidelines.

I was overseas at the time of the fair notice letter of 5th March 2015 and I have not received that letter at all.

7. A copy of a fax to the Insurer dated 22 December 2014 was indeed attached to the application for procedural review. The text is as follows:

I would like to inform you that I will be overseas from the 18th February 2015 till the 13th March 2015.

Submissions by the Insurer

8. The Insurer provided a chronology and a series of documents in response to this application.

The Decision

¹ The applicant is misdescribing a failed attempt at a “Fair Notice” telephone call.



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9. The insurer has made a decision pursuant to Section 43(1)(a) of the 1987 Act and in doing so was bound to follow the Guidelines.
10. Guideline 5.2 sets out “Fair Notice Provisions.” These include the following:

Before making a work capacity decision that may result in a reduction or discontinuation of the worker’s weekly payments the insurer must,² at least two weeks prior to the work capacity decision, communicate this to the worker in a way appropriate in the circumstances of the case, and preferably by telephone or in person.

.....

This information should also then be confirmed in writing to the worker.

11. The Insurer has never denied that no fair notice telephone call took place. Nor has it ever said that notice of any kind (fair or otherwise) was given in person. Nor has it ever disputed that a fax was received on 22 December 2014 advising that the applicant would be absent from the country between 18/2/2015 and 13/3/2015. Despite this, the following sentences appear in the correspondence to the applicant:

- The letter dated 5 March 2015 (supplied by the Insurer) says: “I’ve been trying to call you to discuss your claim over the last few days. I wanted to advise that I am currently assessing information from your file to review your current work capacity in order to make a work capacity decision over the next few weeks. I also invite you to provide me with any additional information that you may have that you would like me to consider as part of this assessment. If you could please provide this information to me by 26/03/2015 I will be able to consider it while making my decision.
- On 9 April 2015 the Insurer sent the work capacity decision under cover of a separate letter – both documents containing the following sentences verbatim: “We unsuccessfully attempted to contact you to conduct a fair notice telephone conversation with you on 3/3/2015

² Note use of the subjunctive mood.



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and 5/03/2015 in regards to your entitlement for weekly payments. Fair notice was confirmed to you in a letter dated 5/03/2015.”³

- On 24 June 2015 the Internal Review Decision contained the following: “On 5 March 2015 a fair notice phone call was made. Details of this call were sent to you in a letter dated 5 March 2015.”⁴

12. The merit review service of the Authority made specific reference to this issue at paragraphs 24-27 of the recommendation dated 23 July 2015. The applicant had made the same submissions as above in both internal review and merit review. The Insurer has never responded to the applicant’s submission that he did not receive the letter dated 5 March 2015. The merit reviewer said that it was not a matter which could be considered in the course of merit review but went on to say that if the applicant were “dissatisfied with the processes of the insurer, he may apply to the Independent Review Officer under section 44(1)(c) of the 1987 Act, for a review of the Insurer’s procedures in making the work capacity decision.”

13. Setting out the problem for the Insurer is simple: it asserts that it has in writing, in a letter never seen by the applicant, confirmed the details of a telephone conversation which it concedes never took place. The conversation, which never took place, didn’t happen on both 3 March 2015 and 5 March 2015, being two dates occurring in a period of time during which the Insurer was on written notice from the applicant as long ago as December 2014 that he would be absent from the country. There was a limited window between 18 February 2015 and 13 March 2015 when the Insurer must have known that it was going to be impossible to speak to the applicant. This was an opportunity to fail to communicate in accordance with Guideline 5.2 which the Insurer appears to have seized with both hands.

14. The failure to communicate in accordance with the requirements of Guideline 5.2 (or at all) is fatal to the Insurer’s position.

³ Clearly a boutique application of the term “confirmed.”

⁴ Any “details” beyond a dial tone would be embellishments.



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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 9 April 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 have been breaches of 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 by the Insurer dated 9 April 2015 is set aside.

18. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 16 July 2015.

19. The payments are to be back-dated to 16 July 2015.

20. Such payments are to continue until such time as a further work capacity decision comes into effect.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
23 September 2015