



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 16 April 2015 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 25 July 2015.**
- c. The payments are to be back-dated to 25 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 16 April 2015. The decision informed the applicant that his weekly payments of compensation would cease on 25 July 2015. The applicant sought internal review on 15 May 2015 and the Internal Review Decision was dated "12 June 2016" (*sic*). That decision confirmed the work capacity decision.
2. The applicant applied to the Authority for Merit Review on 13 July 2015 and they delivered findings and recommendations dated 11 August 2015. The Authority made a finding that the weekly payments the applicant was entitled to under Section 37(3) of the *Workers Compensation Act 1987* (the 1987 Act) would be payable at the weekly rate of \$0.00.
3. The applicant then made an application to this office dated 10 September 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. The applicant suffered an injury to his back in or about February 2011. The applicant was able to return to modified duties for 38 hours per



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week with his pre-injury employer. The applicant then suffered a further injury to his right knee and left elbow on 22 October 2013. At the time the work capacity decision was made the applicant was in receipt of weekly payments of compensation.

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. The applicant has provided four [4] pages of submissions which go to the merits of the decision made by the Insurer and he has made submissions in respect of suitable duties, his physical abilities and his attempts to obtain employment. These submissions are not relevant to procedural review.
8. I am unable to review any discretion exercised by the Insurer in making decisions in respect of suitable duties for the applicant and capacity to work. My review is limited to ensuring that the Insurer has followed proper procedures in making the work capacity decision.

Submissions by the Insurer

9. The Insurer submits that the applicant’s submissions are not relevant to procedural review.

The Decision

10. The relevant Guidelines came into effect on 11 October 2013.
11. Guideline 5.2 requires the insurer to advise the worker, at least two weeks prior, that it is making a work capacity decision that may result in the reduction or termination of the worker’s weekly payments. In this



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instance the work capacity decision was dated 16 April 2015 and the insurer has purported to have had a *'fair notice telephone conversation'* on **18 April 2015** which was confirmed in a *'letter'* also dated **18 April 2015**. The issue being here that both of these communications, on the face of the document, took place two days after the work capacity decision was made and sent to the worker. The same errors are repeated at page 2 of the work capacity decision.

12. It is not until the Internal Review Decision is read that it becomes apparent the fair notice telephone call and letter were executed on 18 March 2015. The Internal Review Decision does not in any way attempt to correct the error in the work capacity decision. What is of most concern is that the Internal Review Decision is dated **12 June 2016**. There is clearly a quality control issue with this Insurer which must be addressed immediately as such simple but critical errors should not be occurring in these decisions. This is particularly so in light of the following sentence which appears on page 3:

This work capacity decision has been made by D (NSW Workers Compensation Case Manager) and **approved by** V (NSW Workers Coimpensation Technical Advisor) on 14/4/2015.¹ (Emphasis added.)

13. Guideline 5.3.2 requires the Insurer to advise the date of the work capacity assessment. The insurer advised the applicant that the work capacity assessment commenced on 13 June 2014 and was completed on 16 April 2015. It appears that the work capacity assessment took over 10 months to complete. It would have to be said that the evidence obtained at the commencement of the work capacity assessment would not be a reflection of the applicants *'current'* work capacity by the time the assessment was completed given the period of time which has elapsed.
14. The same guideline requires the Insurer to state the impact the decision has on the applicant's entitlement to medical and related treatment expenses. At paragraph 1 on page 2 of the decision the Insurer advises

¹ Note that the decision and approval of decision date of 14/4/2015 pre-dates the completion date for "assessment," specified on page 1 of the notice as "16 April 2015." It follows that it also pre-dates the alleged date of the fair notice call by four days.



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the applicant that it will continue to approve reasonable and necessary treatment expenses as defined by Section 60 of the 1987 Act. There is no limitation placed on this approval.

15. Then at paragraph 3 on page 2 of the decision the insurer advises the applicant that as a result of Section 59A(2) of the 1987 Act his entitlement to medical and related treatment expenses will cease 12 months after his entitlement to weekly payments cease. These two paragraphs are conflicting and would serve to confuse the applicant who has been informed that his entitlement will both continue and cease. Guideline 5.3.1 requires the insurer to communicate a clear message. The insurer has failed to do so on this occasion.
16. Section 43(1)(b) of the 1987 Act allows an insurer to make a decision as to what constitutes suitable employment for the applicant. In this decision the insurer identified the vocations of health & safety officer, retail/sales assistant manager and photographer/photography assistant as suitable employment.
17. The insurer has relied upon the certificate of capacity from the nominated treating doctor dated 19 January 2015 when making the decision in respect of suitable duties and the applicant's current work capacity. The insurer has complied with the Guidelines and the legislation when making these decisions.
18. Section 43(1)(c) of the 1987 Act allows the insurer to make a decision about the amount an injured worker is able to earn in suitable employment. At page 8 of the decision the insurer sets out the various weekly amounts the applicant would be able to earn working a 40 hour week. The insurer specifies a weekly amount for each of the vocations selected for suitable duties.
19. The insurer then states at paragraph 7 of page 8 of the work capacity decision "*Taking the average of each suitable employment options, (sic) we consider that you have the ability to earn \$1302.65 working 40 hours per week.*" This is a procedural error.
20. A work capacity decision allows an insurer to make a decision about the amount an injured worker **is able to earn** in suitable employment. The



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amount which the insurer has calculated on this occasion is not an amount the applicant is able to earn. It is a fictitious amount made up of the average of three separate weekly earnings amounts from three different suitable employment options. It is an amount the applicant is not able to earn. This decision does not comply with the legislation.

21. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 16 April 2015.

Finding

22. 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

23. The work capacity decision by the Insurer dated 16 April 2015 is set aside.
24. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 25 July 2015.
25. The payments are to be back-dated to 25 July 2015.
26. 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
16 October 2015