



**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 dated 9 January 2015 is set aside.**
- b. **The applicant is entitled to weekly payments of compensation at the rate applicable immediately prior to 9 January 2015 until such time as a new work capacity decision is made and the relevant notice period therein has expired.**

**Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 9 January 2015. The decision informed the applicant that his weekly payments of compensation would cease. The date of cessation was variously and conflictingly stipulated.
  - On page two he was told: "By the time this Work Capacity Decision **becomes effective on 17 April 2015**, an aggregate period of 130 weeks (whether consecutive or not) ... " Clearly this was an incidental comment in a sentence referring to the relevant payment period. It was a part of an explanation given about section 38(3) of the 1987 Act.
  - On page three of the same decision notice the applicant was told two things:
    - [The Insurer] will continue to pay your weekly compensation for a period of 3 months from the date of this notice, with the addition of four working days to allow for our postage and your receipt of this notice; and
    - **This means that** you will only continue to be entitled to weekly compensation payments until **10 December 2014** at which time your entitlement to weekly compensation



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payments will terminate (*pursuant to sections 38(3), 38(8) and 54 of the Workers Compensation Act 1987*).

2. The applicant sought internal review<sup>1</sup> and it appears that no internal review was ever conducted.
3. The applicant applied to the Authority for Merit Review and they delivered findings and recommendations dated 7 August 2015. The Authority made a finding that in accordance with Section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act) the applicant was not entitled to weekly payments of compensation.
4. The applicant then made application to this office for procedural review. I am satisfied that the applicant has made the application for procedural review in the proper form and within 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.*” The applicant has applied for a procedural review.
7. The applicant was represented in the course of procedural review and submissions made on his behalf were repeated in full and replied to in the course of submissions made by the Insurer.

#### **Submissions by the Insurer**

8. The Insurer has provided the following, which includes a recitation of the applicant’s submissions and the Insurer’s replies:

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<sup>1</sup> Although there is controversy about this – see the final paragraph on page 5 *infra*.



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The applicant says that the Work Capacity decision of [the Insurer] does not comply with the relevant legislation and guidelines and therefore should be found invalid on the basis that the insurer failed to:

- Correctly reference the legislation
- Inform the applicant of the date his entitlement to medical benefits are to cease
- Advise the applicant as to his right with respect to workplace rehabilitation
- Provide the worker with a clear calculation of his PIAWE
- Clearly identify the entitlement periods and provide the worker with details as to how payments are to be calculated and or refer to the appropriate formula to be applied when calculating his new benefits.
- Inform the worker as to the date his medical expenses benefits are to stop

Substantively, the Insurer replies thus:

- **Correctly reference the legislation**

[The Insurer] made reference to the correct legislation, that the decision was made in accordance with section 38(4) of the Workers Compensation Act 1987 to determine [the Applicant's] entitlements when he reaches the after second entitlement period.

[The Insurer] correctly referenced his medical entitlement as per what was applicable at the time in accordance with section 59A of the Workers Compensation Act 1987. The decision correctly referenced the applicable legislation of section 38(3) of the *Workers Compensation Act* 1987.

However, [the Insurer] ***failed to correctly reference the special criteria that [the applicant] is required to satisfy to continue to receive weekly compensation payments.*** [The applicant] is an existing recipient of weekly compensation payments however [the Insurer] stated that he must meet the criteria of section 38(3)(a) of the Workers Compensation Act 1987. I note this is procedurally incorrect as [the applicant] is an existing recipient and does not need to apply to the



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insurer in writing for continuation of weekly payments after the second entitlement period.

- **Inform the applicant of the date his entitlement to medical benefits are to cease**

[The Insurer] reported that [the applicant's] medical entitlements will cease 12 months from the effective date, being 12 months from the last date weekly compensation payments were paid in accordance with section 59A(2) of the Workers Compensation Act 1987. The timeframe of 12 months was correct at the time the original work capacity decision was made **however I note that medical benefits have now been extended dependant on whole person impairment assessed or paid.**

- **Advise the applicant as to his right with respect to workplace rehabilitation**

On page 3 of the work capacity decision dated 9 January 2015, it was identified that [the applicant] was in receipt of support from a workplace rehabilitation provider and was advised to contact his case manager should he require additional support during the notice period.

- **Provide the worker with a clear calculation of his PIAWE**

Reference was made to Schedule 6 Part 19H, Division 1, Clause 1 of the Workers Compensation Act 1987 that as an existing recipient of weekly compensation payments [The applicant's] pre-injury average weekly earnings are deemed to be the transition amount applicable at the time, being \$960.50 per week. [The applicant's] pre-injury average weekly earnings are indexed biannually and the rate set in accordance with Schedule 6, Part 19H, Division 1, Clauses 2 and 9(3) of the Workers Compensation Act 1987.

- **Clearly identify the entitlement periods and provide the worker with details as to how payments are to be calculated and or refer to the appropriate formula to be applied when calculating his new benefits.**



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[The Insurer] identified that [the applicant] had been paid 120 entitlement weeks of weekly compensation payments paid to 13 September 2014<sup>2</sup> and reported his entitlement would be assessed under section 38 of the Workers Compensation Act 1987, being after 130 weeks of entitlements as [the applicant] would fall under this cohort once the notice period comes into effect.

In regards to the appropriate formula to be applied when calculating [the applicant's] new weekly payments, [the Insurer] did not include a formula as the decision made was in accordance to section 38(3)(b) of the Workers Compensation Act 1987 that he does not meet the criteria to receive ongoing weekly compensation payments and therefore no formula is applicable.

- **Inform the worker as to the date his medical expenses benefits are to stop**

Under the heading of 'Required notice period' [the Insurer] informed that in accordance with section 59A of the Workers Compensation Act 1987 [the worker's] entitlement to medical and related experience will 'only continue for a further 12 months from the effective date listed above' which was in accordance to the legislation applicable at the time.<sup>3</sup>

- I would also like to advise that the Insurer did not conduct an internal review decision on the claim. It appears, after investigation, that an Application for Internal Review was submitted on 4 June 2015 however it was never forwarded to the applicable team for allocation and completion of the decision and we cannot locate a copy. As such, the Authority confirmed that the Insurer was outside of the 30 day timeframe to conduct our review and thus the Authority proceeded to conduct their findings and outcome. The Application for Internal Review dated 30 July 2015 attached is the only copy we have.

## The Decision

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<sup>2</sup> Not strictly true - in the notice dated 9 January 2015 he was told that he had received 120 weekly payments. It is that notice which is the subject of this procedural review.

<sup>3</sup> Exactly which "effective date" – 17 April 2017 or 10 December 2014 – was not specified.



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9. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
10. In accordance with Guideline 5.3.2 the insurer has correctly informed the applicant that that any ongoing entitlement is determined by Section 38(3) of the 1987 Act.
11. The insurer has made a decision in accordance with Section 43(1)(a) that the applicant has the current capacity to work in suitable employment. The insurer has made a further decision in accordance with Section 43(1)(b) and Section 32A and has identified suitable employment.
12. There was adequate medical evidence on which to base the decision.
13. The Insurer made a reasonable attempt at explaining the effect of section 59A.
14. The submissions of the Insurer concede that there were procedural errors. First, the applicant was told that he had an obligation to seek an extension of payments in accordance with section 38(3)(a), which the Insurer concedes is untrue due to his status as an existing recipient. Secondly the Insurer acknowledges there are now extra criteria applicable in the explanation of section 59A, including the extent of any whole person impairment.
15. Those concession by the Insurer are noted, however the real damage was done by something not even referred to by either party in the course of submissions. The incoherent way in which the date of cessation of payments was set out in the notice is fatal to the Insurer's decision. In the course of an explanation of section 38(3) the applicant was told only incidentally that the "effective date" of the decision was 17 April 2015, whereas on the very next page he was told that the three month notice period "means that" payments will continue until 10 December 2014. Is the worker to assume it is a typographical error? If so, is he to think the error is in the specification of the year (so that payments carry on until 10 December 2015) or in the period of three months or some other, inexplicable error? In any event the applicant is a Sudanese national who has acquired English as a second language while an adult. It would



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be extremely difficult for him to comprehend the significance of the notice given the inclusion of incorrect information.

16. This must constitute a serious breach of the requirement to accurately explain the effect of the work capacity decision, as set out in Guideline 5.3.2.

### **Finding**

17. 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 invalidly made.

### **RECOMMENDATION**

18. The work capacity decision dated 9 January 2015 is set aside.
19. The applicant is entitled to weekly payments of compensation at the rate applicable immediately prior to 9 January 2015 until such time as a new work capacity decision is made and the relevant notice period therein has expired.

Wayne Cooper  
Delegate of the Workers Compensation  
Independent Review Officer  
16 October 2015