



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 18 May 2015 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 26 August 2015.**
- c. The payments are to be back-dated to 26 August 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 18 May 2015. The decision informed the applicant that her weekly payments of compensation would cease on 26 August 2015. The applicant sought internal review on 4 June 2015 and the Internal Review Decision was dated 2 July 2015. That decision confirmed the work capacity decision.
2. The applicant applied to the Authority for Merit Review on 10 July 2015 and they delivered findings and recommendations dated 11 August 2015. The Authority made a finding that the applicant did not satisfy the special provisions under Section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act) in order to be entitled to ongoing weekly payments of compensation.
3. The applicant then made an application to this office dated 3 September 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 3 August 2000 the applicant suffered injury to her back whilst in the course of her employment as a deli manager. She was unable to return to her pre-injury employment and her employment was terminated. The applicant has attempted to return to work in various capacities however, as at the time of the work capacity decision, 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 made the following submissions:
 - She is unable to obtain employment in the vocations assessed to be suitable employment as she does not have the necessary training or experience;
 - She has taken it upon herself to source education and training in certain fields to assist in her own reinstatement to the workforce;
 - She concedes that she is physically fit for some forms of employment but does not possess the training or experience required;
 - Although she has unlimited local driving abilities she cannot drive for extended periods of time;
 - The most recent certificate of capacity increased the applicant’s capacity to full duties/trial so as not to affect the applicant’s chances of employment.
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.



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9. Similarly I am unable to take into consideration the state of the labour market and the applicant's attempts to obtain employment.

Submissions by the Insurer

10. The Insurer sent an email dated 3 September 2015 enclosing a copy of the work capacity, internal review and merit review documents and advising "*we have no additional submissions to make.*"

The Decision

11. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
12. The work capacity decision which is purporting to be a decision on the applicant's "*current work capacity*" is dated 18 May 2015 and relying upon a medical certificate assessing the applicant's work capacity dated 6 February 2015 which is 14 weeks out of date.
13. Section 44B(3)(b) of the 1987 Act states that a certificate of capacity must "*certify as to the worker's incapacity for work and whether the worker has a current work capacity or has no current work capacity during the period, not exceeding 28 days..*"
14. The only other evidence referred to in the decision is a vocational plan report dated 17 September 2014 and a nominated treating doctor "*sign off*" dated 12 August 2014. There is no medical evidence considered, other than the out of date certificate of capacity, which has been obtained in the year in which the work capacity decision was made.
15. The Insurer has conceded that there was a subsequent certificate of capacity from the nominated treating doctor dated 13 May 2015. This certificate stated the applicant was fit for pre-injury duties and then states a "*trial of normal duties.*" The Insurer has then stated "*I have not considered the WorkCover NSW Certificate of Capacity for the purposes of this work capacity assessment.*"
16. Guideline 5.1 requires the Insurer to evaluate all available evidence and relevant material. The Insurer must consider all evidence which is before it when making a work capacity decision. The Insurer does not



have to accept the evidence. The Insurer has made a procedural error by not considering the certificate of capacity of the nominated treating doctor.

17. The purpose of a work capacity decision according to Section 43 of the 1987 Act is to assess a worker's "*current work capacity*". In this instance the Insurer has completed a work capacity assessment based upon medical evidence which is not current. This is sufficient to set aside the work capacity decision.
18. Furthermore, at page 3 of the work capacity decision, the Insurer, when referring to the nominated treating doctor's certificate of capacity has stated "*Dr [name withheld] has assessed in the WorkCover NSW Certificate of Capacity dated 6 February 2015 that you have current capacity to work 6 days/week and 4 days/week...*" This statement is confusing and contradictory to any reader of the decision, particularly the applicant. The statement is not a decision with respect to the applicant's capacity.
19. Guideline 5.3.1 requires the Insurer to communicate a clear message and present concise information. The Insurer has failed to do so in this instance.
20. It is noted that the Insurer has stated at page 1 of the decision that the applicant has capacity to work 6 hours/day and 4 days/week. Again this statement does not communicate a clear message. The statement provides two options of capacity – 6 hours a day **and** 4 days a week. This is not a correct work capacity decision.
21. At page 6 of the decision there is a reference by the Insurer that the applicant has capacity to work "*6 hours/day, 4 days/week with restrictions...*" This is the third explanation of the applicant's capacity to work but at least it is a description which presents a concise decision. However, given the previous inaccuracies depicting the applicant's capacity it is not sufficient to validate the work capacity decision.
22. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 18 May 2015.



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Finding

23. 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

24. The work capacity decision by the Insurer dated 18 May 2015 is set aside.

25. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 26 August 2015.

26. The payments are to be back-dated to 26 August 2015.

27. 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
19 October 2015