

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 of the insurer dated 2 December 2013 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable immediately prior to 12 March 2014.**
- c. The payments are to be back-dated to 12 March 2014.**
- d. The payments are to continue until such time as a further work capacity decision is made and comes into effect.**

Introduction and Background

1. The applicant seeks procedural review of a work capacity decision made by the insurer dated 2 December 2013. This decision reduced the worker's weekly benefits to a maximum of \$178.80 gross effective from 12 March 2014. An internal review was conducted on 3 January 2014, which reduced the worker's weekly payments to \$102.80 gross effective 11 April 2014. The applicant sought merit review. The Merit Review Service (MRS) recommendation dated 10 July 2014 found the worker was not entitled to any weekly benefits as he did not satisfy the special requirements in Section 38 of the 1987 Act. The applicant made an application to this office dated 5 August 2014.
2. I am satisfied that the applicant has made the application for review in the proper form and within time.
3. The applicant was injured in the course of his employment as a meat transporter on 4 January 2001. He was carrying a pig carcass when he experienced lower back pain. He later experienced right knee pain. The applicant retrained as a real estate agent. He has worked in that role since July 2007 and has worked for his present employer since 2011. The applicant is currently working 25 hours per week.
4. The applicant was in receipt of weekly payments immediately before 1 October 2012. Accordingly *Clause 8 of Part 19H of Schedule 6* to the

Workers Compensation Act 1987 (1987 Act) required the Insurer to conduct a work capacity assessment.

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).
6. The relevant version of the *Guidelines* came into effect on 11 October 2013. That publication stated that the *Guidelines* provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessments and decisions.
7. Once the Insurer has conducted an assessment then the Insurer is required to make a work capacity decision¹. Where that decision involves a reduction or cessation in the weekly benefits payable to the injured worker then the Insurer is required to give proper notice to the worker pursuant to *Section 54(2)(a)* of the 1987 Act.

Submissions by the applicant

8. The applicant submitted he had been unfairly treated. A procedural review may not consider matters of merit. *Section 44(1)(c)* circumscribes procedural review as follows:

a review only of the insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer in making the decision²

Submissions by the Insurer

9. The Insurer made no submissions.

CONSIDERATION

10. *Clause 5.3.2* of the *Guidelines* set out the twelve requirements of a written advice of a work capacity decision and its outcome.
11. *Guideline 5.3.2* requires the insurer to “reference the relevant legislation”. The insurer’s decision does not state that the assessment was required pursuant to *Clause 8 of Part 19H of Schedule 6* to the 1987 Act. This constitutes a breach of the Guideline.

¹ Schedule 8, Clause 22 of the *Workers Compensation Regulation 2010*

² See *Workers Compensation Act 1987* section 44(1)(c)..

12. *Guideline 5.3.2* requires the Insurer “to state the impact of the decision on the worker in terms of their entitlement to weekly payments, entitlement to medical and related treatment expenses and return to work obligations.” At page two of the decision, the insurer advised the applicant that his entitlement to weekly payments “at the current rate must cease within 3 months of this decision – please refer to: section 43(1)(f) and 54(2)(a)” of the 1987 Act. This explanation misrepresents the purpose and effect of Section 54 of the 1987 Act. The section provides workers with a period of time in which to adjust to the upcoming changes in weekly benefits. It is both misleading and incorrect to say Section 54 mandates when payments “must cease.” The section should be explained as creating a period of time during which payments must not cease. It is a minimum notice period, as opposed to a maximum payment period. Therefore, the insurer has not properly stated the impact of the decision on the applicant’s entitlement to weekly payments.

13. *Guideline 5.3.2* requires the insurer to “explain the relevant entitlement periods”. The decision states that because the applicant has received 631.6 weeks of weekly compensation, his entitlements are assessed under Section 38 of the 1987 Act. The insurer attached a copy of Section 38 but this does not satisfy the requirement of the *Guideline*. The insurer did not explain that compensation pursuant to Section 38 may be payable whether or not a worker has been assessed by the insurer as having current work capacity³. Further, the insurer did not explain all three requirements to claim compensation in situations where they assess a worker as having current work capacity⁴. Specifically, they did not explain that the worker must be earning at least \$155 per week (indexed) or more⁵. They also did not explain that the worker must be assessed by the insurer as “being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker’s current weekly earnings”⁶. This failure to explain constitutes a breach of the *Guideline*.

FINDING

14. I find that the Insurer has failed to follow the procedures as set out in the WorkCover Guidelines. Therefore the work capacity decision is invalid.

RECOMMENDATION

³ The worker must meet the criteria of either Section 38(2) or Section 38(3) of the 1987 Act.

⁴ The criteria in Section 38(3)(a)-(c) of the 1987 Act

⁵ Section 38(3)(b) of the 1987 Act.

⁶ Section 38(3)(c) of the 1987 Act.



15. I recommend that the Insurer conduct a new work capacity assessment in accordance with the WorkCover Guidelines and make a new work capacity decision.
16. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 12 March 2014 until such time as he is properly transitioned. Those payments should continue from 12 March 2014 being the date on which they ceased.
17. The applicant is not required to produce work capacity certificates for the period from 12 March 2014 to date by virtue of the operation of section 44B(2) of the 1987 Act.
18. These recommendations are binding on the Insurer: see section 44(3)(h) of the 1987 Act.

Jeffrey Gabriel
Delegate of the WorkCover Independent Review Officer
22 September 2014