



**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 5 June 2015 is set aside.**
- b. Such weekly payments as the applicant is receiving by virtue of the stay arising out of clause 30 of Schedule 8 to the Workers Compensation Regulation 2010 are to continue until a new decision is made in accordance with the requirements of section 43(1) of the Workers Compensation Act 1987 and any period of notice given therein has expired.**

**Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 5 June 2015. The decision informed the applicant that his weekly payments of compensation would cease on 12 September 2015. The applicant sought internal review on 25 June 2015 and the Internal Review Decision was dated 24 July 2015. That decision confirmed the work capacity decision.
2. The applicant applied to the Authority for Merit Review on 18 August 2015 and they delivered findings and recommendations dated 10 September 2015. The Authority made a finding that the applicant did not satisfy the special requirements under Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) to be entitled to a continuation of his weekly payments of compensation.
3. The applicant then made an application to this office dated 8 October 2015 received 12 October 2015.
4. The Insurer has made a submission that the applicant has not made the application within the 30 day timeframe as prescribed by Section 44(1)(c) of the 1987 Act.



5. I note that the applicant's application is dated 8 October 2015. The application was not received by email and on the application form the applicant does not have an email address. Therefore under Section 76(1)(b) of the *Interpretations Act 1987* a further four business days should be allowed for postage. After taking this into consideration I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
6. On 29 June 2000 the applicant sustained injury to his lower back during the course of his employment as a carpenter and joiner. The applicant returned to his pre-injury employer on suitable duties until his employment was terminated on 20 November 2000. At the time of the work capacity decision the applicant was in receipt of weekly payments of compensation.
7. 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**

8. 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.
9. The applicant has submitted that he is unable to return to his pre-injury employment as a result of his current medical condition. He states that he was not even able to obtain an interview when one potential employer found out about his injury. The applicant also disputes he can perform the roles considered to be suitable employment.
10. 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. The applicant's submissions are not relevant to procedural review.



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### **Submissions by the Insurer**

11. The Insurer has made submissions in response to this procedural review dated 13 October 2013. The submissions are limited to the timeliness in which the applicant has made his application for review. I note that I have dealt with this submission at paragraphs 4 and 5 above.

### **The Decision**

12. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.

13. Guideline 5.3.2 requires the insurer to advise the applicant of the impact that the work capacity decision will have on his entitlement to medical and related treatment expenses.

14. The Insurer has correctly referred to Section 59A(2) and (3) of the 1987 Act and reproduced each section at page 5 of the work capacity decision. Most notably the Insurer correctly advised the applicant that he is entitled to medical and related treatment expenses for 12 months after his entitlement to weekly payments cease.

15. Then inexplicably at paragraph 3 of page 5 of the work capacity decision the Insurer has advised:

*“This means that if there are no changes to your current circumstances, your entitlement to reimbursement for medical expenses will cease on 15 June 2015.”*

16. This is clearly incorrect and a demonstrable error which renders the entire work capacity decision invalid. It is incumbent upon the Insurer to advise the applicant of the correct dates that his entitlements will cease.

17. I do note that the Insurer corrected the date in the Internal Review Decision however, this is not sufficient to validate the work capacity decision.



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18. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 5 June 2015.

### **Finding**

19. 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 has been a breach 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**

20. The work capacity decision by the Insurer dated 5 June 2015 is set aside.

21. Such weekly payments as the applicant is receiving by virtue of the stay arising out of clause 30 of Schedule 8 to the Workers Compensation Regulation 2010 are to continue until a new decision is made in accordance with the requirements of section 43(1) of the Workers Compensation Act 1987 and any period of notice given therein has expired.

Tracey Emanuel  
Delegate of the Workers Compensation  
Independent Review Officer  
30 October 2015