



**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 29 May 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 29 May 2015. The decision informed the applicant that her weekly payments of compensation would cease on 7 September 2015. The applicant sought internal review on 17 June 2015 and the Internal Review Decision was dated 4 August 2015. That decision confirmed the work capacity decision.
2. The applicant applied to the Authority for Merit Review on 21 August 2015 and they delivered findings and recommendations dated 17 September 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 13 October 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 11 December 2001 the applicant suffered injury to her left knee in the course of her employment as a spare parts driver. Her employment



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was terminated in 2007. Since that time the applicant commenced working as a sales assistant. She continues to work on a part time basis. At the same time the applicant has been 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. In addition to requesting a procedural review the applicant has submitted that she has not received any paperwork from the insurer in respect of the work capacity decision. I do note however that the applicant has been able to request both an internal review of the work capacity decision by the insurer and merit review by the Authority within the time limits prescribed by the 1987 Act. I can assume from this that the applicant has received some documentation from the insurer which has allowed her to participate in the review process without being prejudiced.
8. The applicant has submitted that she is working to the best of her ability and most recently increased her working hours by 6 hours per week.
9. I am unable to review any discretion exercised by the Insurer in making decisions in respect of suitable duties and capacity to work. My review is limited to ensuring that the Insurer has followed proper procedures in making the work capacity decision.
10. If a circumstance of the applicant has changed in respect of capacity then this is an issue which should be referred to the Insurer.
11. The applicant has submitted that she is in receipt of a medical report which assesses her to be 31% whole person impairment. This is not an issue which can be dealt with at procedural review.



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12. The applicant's present submissions are not relevant to procedural review.

### **Submissions by the Insurer**

13. The Insurer has made submissions in respect of this application dated 19 October 2015. The insurer has noted that they sent an '*Outcome of Merit Review*' letter to the applicant on 23 September 2015.

14. The insurer has submitted that the applicant is not presently working to her capacity. It has also advised that the applicant has been compensated pursuant to Section 66 for 40% loss of use of the left leg at or above the knee. This has not yet been converted to a whole person impairment assessment.

### **The Decision**

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

16. Guideline 5.3.2 requires the Insurer to explain the relevant entitlement periods. At page 2 of the work capacity decision the Insurer has advised the applicant that she has received 605 weeks of compensation payments. As a result any ongoing entitlement is subject to the special provisions in Section 38(3) of the 1987 Act. The Insurer has set out the special provisions at page 3 of the decision.

17. Section 43(1) of the 1987 Act allows the Insurer to make a work capacity decision about the applicant's '*current work capacity*', '*suitable employment*' and '*the amount an injured worker is able to earn in suitable employment.*'

18. In this particular case the Insurer has noted on page 1 of the decision that the applicant has the capacity to work 15 hours per week. At page 2 of the decision suitable employment is noted as sales assistant, customer service and assistant manager – retail. Also at page 2 the Insurer has determined the applicant has the capacity to earn \$352.60 per week. The Insurer has complied with the Guidelines.



19. The Insurer commences its *'Reasons for the Decision'* at page 4 of the work capacity decision. At page 6 of the decision the Insurer attempts to explain to the applicant the reasons why she does not comply with Section 38(3) of the 1987 Act why she is not entitled to ongoing weekly compensation.

20. In attempting to convey the above the Insurer advises the applicant at page 6 of the decision:

*"You have received 699 which places you in after the second entitlement period, in order to continue to be entitled to weekly payments of compensation pursuant to Section 38(3)(b) you are required to be working at least 15 hours per week and earning at least \$173.00 per week. As demonstrated above you have work 15 hours or more in 9 of the last 11 weeks, as such, you are not considered to be meeting the requirement to work 15 hours per week."*

21. This paragraph does not make sense and is incorrect. 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.

22. The first line conflicts with previous information provided in the decision. If one is to assume the '699' refers to payments of weekly compensation received we note that at page 2 of the decision the applicant was advised that she had received 605 weeks of payments. Whilst this does not impact upon the relevant entitlement period at least one figure provided to the applicant is incorrect. Alternatively if the figure does not refer to weekly payments then the paragraph contains an error which does not make sense.

23. As to the last sentence of the abovementioned paragraph the Insurer has informed the applicant that she has worked *'15 hours or more in 9 of the preceding 11 weeks'*. The insurer then informs the applicant that she is not entitled to weekly payments of compensation. This is incorrect. If the applicant had in fact worked 15 hours or more as the Insurer has stated the applicant would be entitled to weekly payments of compensation.



24. However, if one reviews the table in the work capacity decision referred to in the line '*demonstrated above*' I note that the applicant actually did NOT '*work 15 hours or more in 9 of the last 11 weeks*'. In advising the applicant that she had worked '*15 hours or more*' the Insurer has provided the applicant with incorrect and contradicting information.

25. The Insurer has failed to succinctly explain to the applicant how she has not complied with Section 38(3) of the 1987 Act and why she is not entitled to ongoing payments of weekly compensation. The Insurer has failed to comply with the Guidelines in that it has failed to:

- Communicate a clear message;
- Present concise information;
- Use plain language communication; and
- Clearly explain the line of reasoning for the decision.

26. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 29 May 2015.

### **Finding**

27. 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**

28. The work capacity decision by the Insurer dated 29 May 2015 is set aside.

29. 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



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Compensation Act 1987 and any period of notice given therein has expired.

Tracey Emanuel  
Delegate of the Workers Compensation  
Independent Review Officer  
9 November 2015