



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 19 November 2014 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 25 February 2015.**
- c. The payments are to be back-dated to 25 February 2015.**
- d. Such 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 on 19 November 2014. The decision informed the applicant that her weekly payments of compensation would reduce to \$33.85 per week on 25 February 2015. The applicant sought internal review on 23 July 2015.
2. The Insurer made an Internal Review Decision dated 24 August 2015. That letter informs the applicant *"The earlier work capacity decision dated 19/11/2014 resulted in you having no entitlement to weekly benefits and this decision came into effect on 25/2/2015."* The Insurer then advises further *"The result of my review confirms the earlier work capacity decision as being correct. As a result, you remain unentitled to weekly benefits."*
3. I note that I am not in a position to review the Internal Review Decision of the Insurer but I do point out the inconsistency in the two documents. This would only have served to confuse the applicant.
4. The applicant applied to the Authority for Merit Review and they delivered findings and recommendations dated 25 September 2015.



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The Authority made a finding that in accordance with Section 37(3) of the *Workers Compensation Act 1987* (“the 1987 Act”) the applicant’s entitlement to weekly payments of compensation was calculated at nil.

5. The applicant then made an application to this office dated 19 October 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
6. As a result of the nature and conditions of the applicant’s employment she suffered injury to her cervical and lumbar spines. The date of injury was deemed to be 8 June 2011. The applicant was unable to return to her pre-injury duties and her employment was terminated on 28 June 2013. The applicant obtained subsequent employment as a kitchen hand however that employment was terminated as a result of the financial difficulties of the employer.
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. In addition to requesting a procedural review the applicant has submitted:
 - The Insurer has failed to explain the effect the work capacity decision has on the applicant’s entitlement to medical and related treatment expenses;
 - The Guidelines require a work capacity decision to be considerate of the worker’s primary language, cultural background and literacy skills and the Insurer has failed to comply with this guideline; and
 - The insurer failed to advise the applicant that job seeking support was available during the notice period.



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Submissions by the Insurer

10. The Insurer sent an email to WIRO attaching documents from the initial decision and internal review. The Insurer advised at that stage it had no submissions to make.

The Decision

11. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
12. Guideline 5.3.2 requires the Insurer to reference the relevant legislation and explain the relevant entitlement periods. The Insurer has informed the applicant that she has received 93.6 weeks of compensation payments and therefore her ongoing entitlement to weekly compensation payments is subject to Section 37 of the 1987 Act.
13. In calculating the applicant's weekly entitlements on page 3 of the decision the Insurer has used the *'transitional rate.'* In doing so the Insurer has failed to cite the legislation referring to the transitional rate (*Schedule 6 Part 19H Clause 2 of the Workers Compensation Act 1987*) and more importantly fails to explain why the transitional rate is being used, how it applies to this applicant and that this figure is deemed by the legislation to be the applicant's pre-injury average weekly earnings. The omission by the Insurer to explain this in the work capacity decision is a procedural error and sufficient to set aside the decision.
14. I note that at paragraph 34 of the *'Statement of Reasons for Decision of the Internal Review Team in Relation to an Application for Internal Review of a Work Capacity Decision'* from the Insurer does provide an adequate explanation of the *'transitional rate'* however, this is not sufficient to validate the original work capacity decision.
15. After the Insurer has calculated the applicant's ongoing entitlement using the algorithm contained in Section 37(2) of the 1987 Act the Insurer informed the applicant that her *"wage will be reduced to \$33.85 gross per week."*



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16. The above reduction would be quite a shock to the applicant who was working in excess of 15 hours per week at the time that the work capacity decision was made. The application of Section 37(2) of the 1987 Act has no effect on the applicant's wage. The Insurer should have informed the applicant that her weekly payments of compensation would be reduced, NOT her wage.
17. Guideline 5.3.2 requires the Insurer to advise the applicant of the impact the work capacity decision has on her entitlement to medical and related treatment expenses. At page 4 of the work capacity decision the Insurer has cited Section 59A (2) of the 1987 Act. However, the Insurer has not provided an explanation of the section nor informed the applicant of the impact that section has on her entitlement.
18. As the applicant will continue to be in receipt of weekly payments of compensation she remains entitled to ongoing payment of medical and related treatment expenses. In this particular instance Section 59A of the 1987 Act does not come into effect. The Insurer failed to advise the applicant.
19. The applicant has submitted that the Insurer failed to advise that job seeking support would remain available during the notice period. I do note that as the applicant will remain in receipt of ongoing weekly payments of compensation her ongoing access to job seeking support remained in place.
20. Guideline 5.3.2 requires the Insurer to advise the applicant that any documents or information that have not already been provided to the worker can be provided to the worker on request to the Insurer. The Insurer has inserted a table at page 4 of the work capacity decision listing the documents which it has '*relied upon*' in making the work capacity decision. Underneath the table the Insurer has inserted "*I have already provided you with copies of these documents on 1/10/14.*"
21. This assertion by the Insurer is significant in that one of the documents relied upon is a Labour Market report dated 23/10/14. Quite simply a copy of that document could not have been provided to the applicant as asserted by the Insurer. The Insurer has failed to comply with the Guidelines.



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22. In respect of the applicant's remaining submission that she is from a non-English speaking background and the effect of the work capacity decision was not explained sufficiently. I do note that Guideline 5.3.1 requires the Insurer to provide the applicant with plain language communication and adapting a communication style to meet the worker's needs.
23. I am more concerned with the lack of explanation of the basic principles in the work capacity decision. The Insurer failed to inform the applicant of the reason the '*transitional rate*' was being applied in her case and also failed to advise of the effect the decision has on the applicant's medical expenses.
24. Whilst I do accept that the Insurer must tailor a work capacity decision to each particular worker and take into account issues such as background and competency in English I am also mindful that the worker would be able to obtain some assistance within the community and from the Insurer in respect of translation of the document.
25. In this instance however, such translation would not have assisted as quite simply the Insurer has failed to adequately explain the decision and the effect it has on the applicant.
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 19 November 2014.

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



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30. The payments are to be back-dated to 25 February 2015.
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Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
11 November 2015