



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 22 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 22 May 2015. The decision informed the applicant that his weekly payments would cease on 29 August 2015. The applicant requested an internal review and the internal review decision was dated 24 July 2015 and confirmed the original work capacity decision.
2. The applicant applied to the Authority for Merit Review on 26 August 2015 and they delivered findings and recommendations dated 24 September 2015. The Authority made a finding that the applicant satisfied the special requirements for continuation of weekly payments pursuant to Section 38 of the *Workers Compensation Act 1987* (the 1987 Act). In accordance with that section the applicant's entitlement to weekly compensation was calculated to be nil.
3. The applicant then made application to this office dated 21 October 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. The applicant had previously sought procedural review of work capacity decisions dated 8 May 2013 and 5 November 2014. The applicant was



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successful and the work capacity decisions were set aside by earlier recommendations of this office¹.

5. The facts and circumstances concerning the background of this claim are set out in the aforementioned recommendations and need not be repeated.
6. 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

7. 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.
8. The applicant has made submissions that he remains an injured worker and cannot perform his pre-injury duties as a result of his injuries and he cannot make up for lost earnings.
9. As I am only able to review the procedures undertaken by the Insurer in making the work capacity decision I am not in a position to consider the personal circumstances of the applicant. The specific submissions made by the applicant are not relevant to procedural review.

Submissions by the Insurer

10. The Insurer has not provided submissions in response to the application.

The Decision

11. The relevant WorkCover Work Capacity 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 state the decision and give brief reasons for making the decision.

¹ Reported and numbered as 11114 and 6215



13. At page 1 of the work capacity decision the Insurer informed the applicant of the following work capacity decision:

- *“Under subsection 43(1)(a), I have determined that you have a current work capacity of 38 hrs per week x 5 days per week. You have restrictions lifting up to 10kgs and you were fit to perform overtime. You are to avoid repetitive bending and twisting.*
- *Under subsection 43(1)(b), I have determined the following role constitutes suitable employment for you which is the role you are performing for [name of employer withheld] as a Warehouse Operator/Serviceman.*
- *Under subsection 43(1)(c), you are able to be (sic) earn \$1385.81 gross per week in suitable employment being your role as a Warehouse Operator / Serviceman.*
- *Under subsection 43(1)(f). I have determined that you have demonstrated that you are earning greater than the transitional pre injury average weekly earnings (PIAWE) rate and therefore you do not meet the special requirements of Section 38(3)(b)(c) and you are therefore not entitled to weekly benefits.”*

14. The Insurer notes within the decision that the applicant has returned to suitable duties working 38 hours per week and earning \$1385.82 per week.

15. Section 38(3)(b) and (c) of the 1987 Act states:

(3) A worker who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if:

(a) the worker has applied to the insurer in writing (in the form approved by the Authority) no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payments after the second entitlement period, and



(b) the worker has returned to work (whether in self-employment or other employment) for a period of not less than 15 hours per week and is in receipt of current weekly earnings (or current weekly earnings together with a deductible amount) of at least \$155 per week, and

(c) the worker is 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.

16. The Insurer has correctly noted that Section 38(3)(a) does not apply to the applicant in the present circumstances. However, the Insurer has then informed the applicant that he has not complied with Section 38(3)(b) and (c). This is clearly incorrect and an error.
17. Section 38(3)(b) of the 1987 Act requires the applicant to have returned to work for a period of not less than 15 hours per week. In this particular instance the applicant has returned to work for 38 hours per week. The section also requires the applicant to be earning at least \$173 (as indexed) per week. In this instance the applicant is earning \$1385.81 per week.
18. Section 38(3)(c) of the 1987 Act requires the applicant to be assessed by the Insurer as being incapable of undertaking additional employment to increase his current weekly earnings. The applicant in this instance has returned to work in accordance with the hours specified in the Insurer's work capacity decision. The applicant is working to his maximum capacity.
19. The applicant has complied with the special requirements of Section 38(3)(b) & (c). The Insurer has made a demonstrable error in advising the applicant that he has not complied. This error is sufficient to set aside the work capacity decision.
20. The applicant is entitled to weekly payments of compensation. As pointed out in the Merit Review decision after using the algorithm set out in Section 38(7) of the 1987 Act the applicant's ongoing entitlement to weekly payments is calculated at nil.



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21. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 22 May 2015.

Finding

22. 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

23. The work capacity decision by the Insurer dated 22 May 2015 is set aside.

24. 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
17 November 2015