



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 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 19 June 2015. The decision informed the applicant that his weekly payments of compensation would cease on 17 September 2015. The applicant sought internal review on 22 July 2015.
2. The 'internal' review was outsourced to [name withheld] an entity which is not the self-insured employer. Section 44(1)(a) of the *Workers Compensation Act 1987* (1987 Act) states that an injured worker may refer a work capacity decision of an insurer for review by **the insurer**. The very nature of an internal review would infer that it is performed by the Insurer which made the original decision. It is unclear from the documents provided to WIRO as to the reason for the delegation of the internal review to an outside source. In any event the Internal Review Decision dated 17 August 2015 confirmed the applicant's entitlement to ongoing weekly payments to be nil.
3. The applicant then applied to the Authority for Merit Review on 3 September 2015 and they delivered findings and recommendations dated 8 October 2015. The Authority made a finding that the applicant



did satisfy the special provisions under Section 38(3) of the 1987 Act however his ongoing entitlement to weekly payments of compensation was nil.

4. The applicant then made an application to this office dated 28 October 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
5. On 2 August 2001 the applicant suffered injury to his left elbow whilst in the course of his employment as a pool maintenance-labourer. The applicant returned to alternative suitable duties with the pre-injury employer and at the time of the work capacity decision he was also in receipt of weekly payments in the sum of \$290.00 which were the subject of Heads of Agreement in the Workers Compensation Commission dated 5 May 2005.
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. In addition to requesting a procedural review the applicant has submitted that “*the \$1,174.78 figure is incorrect as it includes my \$290.00 weekly compensation payment.*” I have reviewed the work capacity decision and I am unable to ascertain where the Insurer has referred to this figure. I do note that the Insurer has correctly used the ‘*transitional rate*’ of \$972.90 as the applicant’s pre-injury average weekly earnings and have calculated that the applicant has the capacity to earn \$1258.20 per week.
9. The Applicant has also submitted the “*job description referred to is not or has ever been my job description.*” There are no further submissions



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as to what the appropriate job description is or the impact the incorrect description has on the decision.

10. I cannot review any discretion or judgment exercised by the insurer when they are making a decision in respect of the applicant's capacity to work. I can only review the procedures undertaken by the Insurer when making the work capacity decision.

Submissions by the Insurer

11. The Insurer has not made any submissions in respect of this application.

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 date that the decision takes effect. In accordance with Section 54(2)(a) of the 1987 Act the Insurer must provide the applicant with 3 months notice when the decision results in reduction or termination of the applicant's weekly payments. The effect of Section 76(1)(b) of the Interpretation Act 1987 allows for an additional four business days to be added to the notice period. These notice period requirements are correctly pointed out by the insurer at page 3 of the work capacity decision.
14. However, I note that the work capacity decision is dated 19 June 2015 and despite the correct reference to the notice periods by the Insurer, which I have referred to in the preceding paragraph, the Insurer has informed the applicant that his weekly payments of compensation will cease on 17 September 2015. This is less than the required notice period and makes the work capacity decision invalid. The Insurer has failed to comply with both the legislation and the Guidelines.
15. In accordance with Guideline 5.3.2 the Insurer has informed the applicant that he has received 510 weeks of compensation payments. As a result his ongoing entitlements are subject to the special provisions of Section 38(3) of the 1987 Act. The Insurer has reproduced the



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relevant section at page 3 of the decision and advised the applicant that he must comply with subsections (a), (b) and (c).

16. The Insurer has then informed the applicant that as they have not received an application in writing seeking a continuation of weekly payments after the second entitlement period he has not complied with Section 38(3)(a) of the 1987 Act. As the applicant was an *'existing recipient'* within the definition of Schedule 6 Part 19H Division 1 Clause 1 of the 1987 Act Section 38(3)(a) does not apply. The Insurer made an error in advising the applicant that he had not complied with this subsection.
17. It is noted that the 'Internal' Review Decision attempts to correct the basic errors referred to above. The Internal Review Decision even went so far as providing the applicant with the correct notice period. However, this is not sufficient to validate the work capacity decision.
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 19 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 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

20. The work capacity decision by the Insurer dated 19 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



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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
23 November 2015