



Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

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 27 February 2015 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 3 June 2015.**
- c. The payments are to be back dated to 3 June 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 27 February 2015. The decision informed the applicant that his weekly payments of compensation would be discontinued on 3 June 2015. The applicant sought internal review on 29 June 2015. By letter dated 30 July 2015 the Insurer declined to proceed with the Internal Review and advised the applicant of the following reason:
 - *"You are fit for pre-injury duties."*
2. The applicant applied to the Authority for Merit Review on 31 August 2015 and they delivered findings and recommendations dated 30 September 2015. The Authority made a finding that the insurer was to calculate the applicant's entitlement to weekly payments of compensation in accordance with the formula in Section 37(3) *Workers Compensation Act 1987* (1987 Act) in accordance with their findings.



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3. The applicant then made an application to this office dated 30 October 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 24 January 2015 the applicant suffered a fracture to his left ankle as the result of an altercation with a co-worker. The applicant underwent surgical repair of the ankle. At the time of the work capacity decision the applicant was not working and was 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 making an application for procedural review the applicant has made the following submission:

“Decisions were made without all relevant information and insufficient, unrealistic amount of time of notifications given. The stalling tactics for dates to expire and the many blatant lies, too many to list in this short space.”

8. I am unable to review any discretion exercised by the Insurer in making decisions in respect of capacity to work. My review is limited to ensuring that the Insurer has followed proper procedures in making the work capacity decision.

Submissions by the Insurer

9. The Insurer has not made submissions in response to this application.



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The Decision

10. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
11. Guideline 5.3.2 requires the Insurer to explain the relevant entitlement periods. The Insurer informed the applicant that he had received 57 weeks of compensation payments and as a result his ongoing entitlements were assessed under Section 37 of the 1987 Act. The Insurer did not specify the relevant subsection.
12. The Insurer has made a work capacity decision in accordance with Section 43(1)(a) that the applicant has current work capacity of 8 hours per day, 5 days per week. The Insurer has based this decision upon a certificate of capacity from the nominated treating doctor.
13. The Insurer then made a decision in accordance with Section 43(1)(b) that hardware assistant, sales representative and garden maintenance worker constituted suitable employment. In accordance with Section 43(1)(c) the Insurer determined that the applicant was able to earn \$921.40 per week in such suitable employment. The Insurer relied upon a capacity to earn assessment to make both of these decisions.
14. The Insurer has failed to particularise the subsection of Section 37 which is applicable in calculating the applicant's entitlement to weekly payments of compensation. Upon review I note that the applicant has been assessed as having current work capacity and he has not returned to work and therefore his entitlements are calculated by reference to Section 37(3) of the 1987 Act. It is noted that the Insurer has used the correct subsection when calculating the applicant's entitlements despite failing to reference it. Overall the Insurer has for the most part complied with the Guidelines at this stage.
15. The Insurer has purported to make a decision under Section 43(1)(d) about the applicant's pre-injury average weekly earnings and his current weekly earnings. At page 2 of the decision the Insurer states:



- “your pre-injury average weekly earnings (PIAWE) amount is \$760.00, your current weekly earnings are \$608.00”

16. The abovementioned statement from the Insurer causes confusion and is an error. The applicant has not returned to work and therefore does not have any “current weekly earnings”. The Insurer has calculated the figure of \$608.00 using the formula in Section 37(3)(a) which is 80% of the applicant’s average weekly earnings which were previously determined to be \$760.00. Whilst the calculation mathematically is correct the Insurer has erred in informing the applicant that this figure is his current weekly earnings.

17. Furthermore, in attempting to explain the formula at page 3 of the decision the Insurer has stated:

- “Under Section 37 the formula used to calculate your benefit is:
 $\$760.00 \times 80\% = \608.00 – earnings or deemed earnings
Your deemed earnings are \$921.40 gross per week, therefore the following formula is applied in this decision.
 $\$760.00 \times 80\% = \$608.00 - \$921.40 = \text{NIL}$ ”

18. As previously indicated the mathematics is correct however, the explanation by the Insurer is incorrect. The ‘D’ referred to in Section 37 is not ‘deemed earnings’ as stated by the Insurer. The definition is provided in Section 35 of the 1987 Act and it is actually a ‘deductible amount.’ This applicant has a capacity to earn and thus an “amount he is able to earn in suitable employment” (Section 35(1) of the 1987 Act) which is \$921.40. This is the figure used in the calculation not ‘deemed earnings’.

19. The errors made by the Insurer in attempting to explain the applicant’s entitlement are sufficient to set aside the work capacity decision. The Guidelines require the Insurer to clearly explain the line of reasoning for the decision. In this instance the Insurer has incorrectly referred to the applicant as having current weekly earnings and referred to ‘deemed



earnings' which is something that is not referred to in the relevant section or the 1987 Act.

20. As required by the Guideline 5.3.2 and Section 54(2) of the 1987 Act the Insurer has informed the applicant that three months notice is required prior to the cessation of payments. The Insurer has informed the applicant that they have extended the notice period by a further week to allow for delivery in accordance with Section 76(1)(b) of the *Interpretations Act 1987*. Technically that Section notes that service is *"taken to have been effected on the fourth working day after the letter was posted"*. The Insurer is able to provide notice in addition to that required by the legislation.
21. In this instance, despite the above statement of allowing three months and one week notice the Insurer has informed the applicant that his payments will cease on 3 June 2015. This notice period is three months and two business days.
22. Guideline 5.3.2 requires the Insurer to advise the applicant of the impact that the decision has on his entitlement to medical and related treatment expenses. The Insurer has correctly referred to Section 59A(2) of the 1987 Act and informed the applicant that his entitlement to medical and related treatment expenses will cease twelve months after his entitlement to weekly payments cease.
23. However, the Insurer has failed to reference Section 59A(3) of the 1987 Act. This section is important in that it informs the applicant that the cessation of his entitlement to medical expenses is not irretrievable or finite. If it should be that at some time in the future the applicant returns to work for not less than 15 hours per week and is earning at least \$173 per week, or the appropriately indexed amount at the time, and the Insurer again commences weekly payments of compensation the applicant may become entitled to payment of medical and related treatment expenses.
24. The explanation of the aforementioned Sections is important in conveying the effect that the work capacity decision has on the applicant's entitlements both presently and in the future. It is more than the proffering of legal advice in that the Insurer is required to advise of



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the effect of the decision and to ensure that the applicant is of the understanding that should his situation alter in the future he has the tangible prospect of regaining his entitlement to medical and related treatment expenses. An incomplete explanation of Section 59A of the 1987 Act is no explanation.

25. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 27 February 2015.

Finding

26. 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

27. The work capacity decision by the Insurer dated 27 February 2015 is set aside.
28. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 3 June 2015.
29. The payments are to be back dated to 3 June 2015.
30. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.

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