

## **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.**

1. The injured worker is the applicant for a review of a work capacity decision made by a self-insurer licensed by the WorkCover Authority of NSW("Insurer").
2. The applicant suffered injury to her left hand on or about 30 March 2007 in the course of her employment as a delicatessen manager.
3. As a result of the injury the applicant was unable to return to her pre injury duties. The applicant obtained alternative employment working in a pie shop. She was engaged in this employment at the time the work capacity decision was made. That employment ceased as at 23 August 2013. According to the applicant's grounds for review she commenced casual employment working '25 hours plus' per week on 6 December 2013.
4. The applicant has been paid weekly payments for all relevant periods and was an existing recipient of weekly payments of compensation immediately prior to 1 October 2012.
5. On 6 June 2013 the Insurer advised the applicant in writing of a work capacity decision. She was advised that her entitlement to ongoing weekly payments would be reduced to nil from 14 September 2013.
6. At the time of the work capacity decision the applicant was working on average 27 hours per week in a pie shop earning in the order of \$570.00 per week. The insurer determined in the work capacity assessment that the worker was fit to perform suitable duties on a full time basis. This determination was in accordance with an assessment from Dr D L. The Insurer did not particularise the certificate or report from which this assessment of capacity arises.
7. The notice also refers to two earning capacity assessments which have been undertaken. However, for the purposes of calculation of the applicant's entitlement to weekly payments the Insurer preferred to use the applicant's 'probable full time earnings' in her employment at the pie

shop. This was calculated to be \$802.00 gross per week. The applicant was advised that pursuant to Section 38(7) of the 1987 Act her entitlement to weekly compensation was calculated as follows:

\$750.64 pw (\$938.30 x 80%) less \$802.00 pw (the applicant's ability to earn) equals an entitlement to Nil pw.

8. The applicant requested an internal review of the Insurer's decision. That review was responded to by the Insurer in writing on 1 August 2013. The review confirmed the original work capacity decision.
9. On 20 August 2013 the applicant made an application to the WorkCover Authority of New South Wales for a merit review of the Insurer's work capacity decision. That merit review application was received within the 30 day period. A WorkCover merit review was completed and a Statement of Reasons issued on 12 November 2013. The merit reviewer upheld the original decision of the Insurer. The merit reviewer found that the applicant had no entitlement to weekly benefits in accordance with Section 38 of the 1987 Act.
10. On 4 December 2013 the applicant requested the Independent Review Officer to undertake a review of the decision of the Insurer pursuant to Section 44(1)(c) of the 1987 Act. I am satisfied that the applicant has made the application within the time provided by that section and on the correct form.

### **Applicant's Stated Grounds for seeking Procedural Review**

11. The applicant's grounds for seeking procedural review are as follows:
  - (i) The review was made under false pretences – indications that review was for a job opportunity;
  - (ii) The insurer has not stated the impact of their decision nor explained the relevant entitlement periods regarding medical expenses see S59A(2), (3);
  - (iii) There is reference to a non-existent work capacity best practice decision-making guide;
  - (iv) Page 2 of the review refers to 'entitlements reduced to nil' with no explanation or reference to relevant legislative information;

- (v) The applicant has obtained employment since 6 December 2013;
- (vi) The employer failed to offer the applicant alternative employment which the applicant alleges was available at the time;
- (vii) The applicant's medical expenses will not be paid after one year and the applicant requires such treatment to be able to stay at work.

## Submissions by the Insurer

12. The Insurer made no submissions in response to the application.

## Legislation

13. Section 44(1)(c) of the 1987 Act limits the scope of procedural review to a review only of:

The insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer in making the decision.

Therefore while it remains the case that no discretion is unreviewable<sup>1</sup>, the Insurer's discretion when making a work capacity decision appears only to be reviewable in the course of merit review or Judicial review.

14. The procedures to be followed by the Insurer are set out in the *WorkCover Work Capacity Guidelines* and *WorkCover Review Guidelines*. Both sets of *Guidelines* should be complied with in order for a work capacity decision to be validly made.
15. The relevant version of the *Guidelines* is dated 28 September 2012 and applies to all claims from 1 January 2013. That publication provides that the *Guidelines* supply instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessments.

## The Process of the Insurer

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<sup>1</sup> See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997

16. The decision reached by the Insurer was certainly within the range of available decisions. The decision was upheld by the merit review service.
17. The important consideration on procedural review is not why a decision is made, but how it is made.

### **My Reasons:**

18. The grounds upon which the applicant seeks to rely can be dealt with shortly. Grounds (i), (v), (vi) and (vii) are not procedural grounds. Grounds (ii), (iii) and (iv) are valid procedural grounds and discussed below.
19. The Insurer has made no submissions about compliance with the relevant statutory provisions and guidelines.
20. Since procedural review requires a scrutiny of the decision-making processes of the Insurer, including examination of compliance with legislation and *Guidelines* rather than a consideration of submissions made by either party, the review process may proceed despite the absence of relevant submissions from either party. Any demonstrable error on the part of the Insurer may invalidate the decision.
21. There are in my view breaches of the *Guidelines* sufficient to invalidate the work capacity decision made by the Insurer.
22. The one major difficulty which faced the Insurer in making its work capacity decision is the requirement contained in Clauses 5 and 5.1 of the *Guidelines*. That was in the following terms:

#### **“Clause 5**

***Work capacity decisions should be made in line with the Best Practice Decision-Making Guide.”***

and then:

#### **“Clause 5.1**

***When making a work capacity decision the insurer should follow the Best Practice Decision Making Guide.”***

23. That Guide did not exist and has never existed or been published by WorkCover.
24. I find the Insurer has failed to follow the procedure as set out in the *Guidelines* in making the work capacity decision of 6 June 2013 as it did not ( through no fault of its own) comply with the requirements of Clauses 5 and 5.1.
25. *Guideline 5.4.2* states that the work capacity decision notice must clearly reference the relevant legislation and explain the line of reasoning for the decision. The Insurer has failed to do so.
26. In the work capacity decision the Insurer advised the applicant that payment of reasonably necessary treatment expenses will continue to be made until 13 September 2014. The Insurer has failed to advise the applicant that her entitlements to such payments will actually cease at that time unless she becomes entitled again under Section 59A(3) of the 1987 Act.
27. The work capacity decision fails to clearly explain to the applicant the relevance of Section 38 of the 1987 Act, how the transitional rate is applied and the impact the assessment of the applicant’s work capacity has on her entitlements to weekly payments.
28. The Insurer fails to outline, as required by *Guideline 5.4.2*, the evidence considered in making the work capacity decision, by not noting the author, the date and the key information. The Insurer refers to a conclusion by Dr D L as to the applicant’s capacity. The Insurer fails to state whether the assessment is contained in a report or certificate and the date upon which the assessment was made.
29. An ineffective attempt by the Insurer to clearly explain the work capacity decision and the relevant legislation relied upon in making that decision is made in the Internal Review letter directed to the applicant dated 1 August 2013.

30. Further, the above *Guidelines* also state that the work capacity decision notice must advise the applicant that any documents or information that have not already been provided to her can be provided on request to the Insurer. The Insurer has failed to so advise the applicant.
31. Finally, the fair notice provisions referred to in *Guideline 5.2* have not been referred to in the work capacity decision. In this case the Insurer does not identify when the work capacity assessment was undertaken so it is not possible for me to easily determine whether the work capacity decision was made as soon as practicable and whether the notice provisions to the applicant have been complied with.
32. I find that the work capacity decision is accordingly not effective and the weekly payments amendments do not as yet apply to the applicant.

**My Recommendation:**

33. For the reasons set out above I recommend that the Insurer make another work capacity decision, according to the *Guidelines*.
34. Since the applicant was an existing recipient as at 1 October 2012, she remains entitled to receive her pre-transition rate of weekly benefits until such time as she is validly transitioned under the Act. The applicant should have her payments restored from 14 September 2013.
35. Noting the binding nature of these recommendations I recommend that the Insurer takes my views into account, and I recommend that the Insurer immediately gives effect to them.

Tracey Emanuel  
Delegate of WorkCover Independent Review Officer  
20 January 2014