



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 17 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 17 June 2015. The decision informed the applicant that his weekly payments of compensation would cease on 22 September 2015. The applicant sought internal review and the Internal Review Decision was dated 13 August 2015.
2. The applicant applied to the Authority for Merit Review on 14 August 2015 and they delivered findings and recommendations dated 7 October 2015. The Authority made a finding that the applicant did not satisfy the special requirements in Section 38(3) of the *Workers Compensation Act 1987* (1987 Act) in order to be entitled to ongoing payments of compensation.
3. The applicant then made an application to this office dated 5 November 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 28 August 2012 the applicant suffered injury to his left shoulder in the course of his employment as a self-employed courier. Since that time the applicant has undergone two surgical procedures. He has not



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worked since the injury and at the time of the work capacity decision he was in receipt of weekly payments of compensation from the Insurer.

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. The applicant’s grounds for review are as follows:

“We ask for you to reconsider the Merit Review Services decision and reinstate the workers entitlements to weekly benefits.”

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. Therefore I am not in a position to review the recommendations and findings of the Merit Review Service. The submissions by the applicant are not relevant to this procedural review.

Submissions by the Insurer

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

The Decision

10. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
11. Section 43(1)(a) of the 1987 Act allows the Insurer to make a work capacity decision about ‘*a worker’s current work capacity.*’ At page 2 of the decision the Insurer has set out the medical evidence which assesses the applicant’s work capacity. The nominated treating doctor



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assessed the applicant to have a current capacity of 5 hours per day, 5 days per week; the Independent Medical Examiner assessed the applicant to have a current capacity of 6 to 7 hours a day, 5 days a week; the functional capacity evaluation assessed the applicant to have a current capacity of 8 hours per day, 5 days per week.

12. At page 2 of the work capacity decision the Insurer makes a work capacity decision that the applicant has the capacity to work 32.5 hours per week as a (light) courier earning \$25.95 per hour.
13. At page 3 of the work capacity decision the Insurer makes a different work capacity decision that the applicant is able to work 38 hours per week as a light courier driver.
14. In this instance the Insurer has made two different work capacity decisions in respect of the applicant's current work capacity. This is an error sufficient to set aside the work capacity decision.
15. Guideline 5.3.2 requires the Insurer to state the decision and give brief reasons for making the decision. In supporting both of the above decisions the Insurer has made a sweeping statement of '*based on the evidence considered.*' This statement is not sufficient to comply with the Guidelines.
16. I do note that none of the medical practitioners referenced or '*considered*' assessed the applicant to have capacity of either 32.5 hours or 38 hours per week. Therefore, reasons as to how the Insurer came to the decisions should have been provided. In this instance the Insurer has failed to comply with the legislation and the Guidelines.
17. The same Guideline requires the Insurer to advise the applicant of the date when the decision will take effect. Section 54(2)(a) of the 1987 Act requires the Insurer to provide three months notice if the applicant's payments of weekly compensation are to be reduced or terminated. In addition an allowance of 4 working days is to be made in accordance with Section 76(1)(b) of the *Interpretations Act 1987*.
18. In this instance, the Insurer has correctly referenced both sections of the legislation. The Insurer has informed the applicant that his weekly



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payments will cease on 22 September 2015. This notice period is incorrect. The Insurer has failed to comply with the Guidelines and the legislation.

19. 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) and (3) 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. As the Insurer has provided the incorrect notice period for the weekly payments it therefore follows that the incorrect date of 22 September 2016 has been cited for the cessation of medical and related treatment expenses.
20. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 17 June 2015.

Finding

21. 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

22. The work capacity decision by the Insurer dated 17 June 2015 is set aside.
23. 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.



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27 November 2015