



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 application for procedural review is dismissed.

Introduction and background

1. The Insurer made a work capacity decision dated 10 February 2015 which informed the applicant that his weekly payments of compensation would cease on 17 May 2015. That decision was the subject of both internal review and merit review. Those reviews confirmed the work capacity decision.
2. As a result of new information the Insurer made a work capacity decision dated 9 June 2015. That decision determined that the applicant was not entitled to ongoing payments of weekly compensation. The applicant sought internal review on 15 July 2015 and the Internal Review Decision was dated 12 August 2015. That decision confirmed the work capacity decision.
3. The applicant applied to the Authority for Merit Review on 17 August 2015 and they delivered findings and recommendations dated 16 September 2015. The Authority made a finding that the applicant did not satisfy the special provisions under Section 38 of the *Workers Compensation Act 1987* (1987 Act) in order to be entitled to ongoing weekly payments of compensation.
4. The applicant then made an application for procedural review to this office dated 9 November 2015. Section 44(3)(a) of the 1987 Act requires the application for procedural review to be made within 30 days after the worker receives the Authority's decision. In this instance the Authority's decision is dated 16 September 2015 and the application for procedural review was dated 9 November 2015. The application was not made within the 30 day period.



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5. On 27 November 2015 the applicant telephoned this office and advised that the reason his application was submitted out of time was that he was overseas for his daughter's wedding. We were provided with email correspondence by the Insurer that confirmed that the applicant would be overseas for his daughter's wedding. In the absence of any other submission I accept that the reason for the late application for review was that the applicant was overseas at the time the Authority made and sent its decision. The applicant would not have received the Authority's decision until his return and at that time he made the application for procedural review. Given these circumstances I accept that the application for review was made in the proper form and within the time frame allowed.
6. On 20 January 2009 the applicant suffered injury to his back and right knee when he slipped and fell down stairs whilst carrying panels for a security door. At the time of the incident the applicant was self-employed. He returned to work on reduced hours but ceased working when his business went bankrupt. In or about 2010 the applicant obtained part time employment selling and measuring blinds and screen doors.
7. In or about September 2013 the applicant was involved in a motor vehicle accident which was unrelated to this compensation claim. As a result the applicant was unable to perform the duties required for his position and his employment was terminated on or about 8 December 2013.
8. In October 2014 the applicant returned to the employer working 10 hours per week. In or about July 2015 the applicant was performing duties for 15 hours per week.
9. 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



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10. 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.

11. In addition to requesting the procedural review the applicant has made the following submission:

“I was working 15 hours a week and then increased this to 25 hours a week. The insurance company put surveillance on me and took photos, claiming I was dishonest about working 25 hours a week. I may have worked more hours to make up for shorter hours the week before. I want to see proof to show that I worked more than 25 hours a week. I am appealing/seeking a review to get paid what I am owed.”

12. I am unable to review any discretion or judgment exercised by the Insurer in making decisions in respect of capacity to work. I am also unable to review the Internal Review Decision and recommendations and findings made by the Authority at Merit Review. My review is limited to ensuring that the Insurer has followed proper procedures in making the work capacity decision.

13. If the applicant is not satisfied with the evidence relied upon and recommendations and findings made at Internal Review and Merit Review then his remedy does not lie with procedural review but perhaps judicial review.

Submissions by the Insurer

14. The Insurer made a submission that the applicant had failed to make the application for procedural review within the required time frame. I note that I have dealt with this submission at paragraphs 4 and 5 above.

The Decision

15. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.



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16. As stated above the Insurer had previously made a work capacity decision on 10 February 2015 which resulted in the applicant ceasing to be entitled to weekly payments of compensation from 17 May 2015. Upon receipt of new information on 18 May 2015 a new work capacity decision was made dated 9 June 2015.
17. In this work capacity decision the Insurer informed the applicant that in accordance with Section 43(1)(a) of the 1987 Act it has made a decision that he has capacity to work in suitable employment for 38 hours per week. In making this decision the Insurer has preferred the medical opinion of the Independent Medical Examiner and an Injury Management Consultant over the nominated treating doctor who assessed the applicant to have 10 – 12 hours per week capacity to work.
18. It is within the discretion of the Insurer to prefer one medical opinion over another. I am not in a position to review any discretion or judgment exercised by the Insurer. I am only able to review the procedure used by the Insurer and in this instance the Insurer has followed the Guidelines and legislation.
19. The next decision made by the Insurer was in accordance with Sections 32A and 43(1)(b) of the 1987 Act that sales representative, light retail sales manager and retail sales manager constituted suitable duties. The Insurer relied upon both medical evidence and the report of the rehabilitation provider in coming to this decision.
20. Again I am not in a position to review any discretion or judgment used by the Insurer in determining what constitutes suitable employment. I note that the Insurer has complied with the legislation and the Guidelines.
21. In determining the amount the applicant is able to earn in suitable employment pursuant to Section 43(1)(c) the Insurer has used the hourly amount the applicant is presently earning and multiplied it by 38 hours to total \$653.60 per week. The Insurer has complied with the legislation.
22. In complying with Guideline 5.3.2 the Insurer has informed the applicant that he had received 310 weeks of compensation payments and as a



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result his ongoing entitlement is assessed in accordance with Section 38(3) of the 1987 Act. The special provisions of Section 38(3) are set out at page 9 of the work capacity decision. The Insurer has correctly noted that the amount in Section 38(3)(b) has been indexed to \$173.00 per week.

23. The Insurer then explained to the applicant that as he had not been assessed as being incapable of undertaking further additional employment as required by Section 38(3)(c) he is not entitled to ongoing payments of weekly compensation.

24. At the time of making this work capacity decision the applicant's weekly payments of compensation had already ceased on 17 May 2015. Therefore, there is no requirement to provide any notice period in respect of the cessation of payments.

25. In respect of the impact this decision has on the applicant's entitlement to medical and related treated expenses the Insurer has correctly referred to Sections 59A(2) and (3) of the 1987 Act and informed the applicant that his entitlement to medical and related treatment expenses would cease twelve months after his entitlement to weekly payments ceased. As those payments ceased on 17 May 2015 the applicant's entitlement to medical and related treatment expenses would cease on 17 May 2016. The Insurer provided the applicant with the correct explanation of the legislation in force at the time of the decision.

26. The decision of the Insurer dated 9 June 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation.

Finding

27. There are no procedural errors identifiable in the decision. The insurer has complied with the Guidelines and relevant legislation.

RECOMMENDATION



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28. The application for procedural review is dismissed.

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Independent Review Officer
7 December 2015