



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*.

Applicant: Elizabeth Eveleigh
Employer: Wingham Beef Exports P/L
Insurer: Allianz Australia Workers' Compensation (NSW) Limited

SUMMARY:

- a. The work capacity decision of the insurer dated 15 November 2013 is set aside.
- b. The applicant is to be reinstated to her weekly payments at the rate applicable immediately prior to 23 February 2014, as adjusted by her earnings in her new employment from time to time.
- c. The payments are to be back-dated to 23 February 2014.
- d. The 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 dated 15 November 2013. This decision reduced the worker's weekly benefits from \$1232.23 to \$758.80 effective 23 February 2014. An internal review was conducted on 14 January 2014, which altered the original decision and reduced the worker's weekly payments to nil. The applicant sought merit review. Following receipt of the Merit Review Service (MRS) recommendation dated 22 August 2014, the applicant made an application to this office dated 1 September 2014.
2. I am satisfied that the applicant has made the application for review in the proper form and within time.
3. The applicant injured her left leg in the course of her employment as a meat slicer on 1 February 2011. She ceased working for the employer on 12 April 2013 and according to the MRS recommendation obtained alternative employment as a supervisor of people with disabilities commencing in January 2014.

4. The applicant was in receipt of weekly payments immediately before 1 October 2012. Accordingly *Clause 8 of Part 19H of Schedule 6 to the Workers Compensation Act 1987 (1987 Act)* required the Insurer to conduct a work capacity assessment.
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)*.
6. The relevant version of the *Guidelines* came into effect on 11 October 2013. That publication stated that the *Guidelines* provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessments and decisions.
7. Once the Insurer has conducted an assessment then the Insurer is required to make a work capacity decision¹. Where that decision involves a reduction or cessation in the weekly benefits payable to the injured worker then the Insurer is required to give proper notice to the worker pursuant to *Section 54(2)(a)* of the 1987 Act.

Submissions by the applicant

8. The applicant's submissions addressed the merits of the decision. A procedural review may not consider matters of merit nor review the decision of the MRS. *Section 44(1)(c)* which circumscribes procedural review as follows:

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 decision²

Submissions by the Insurer

9. The Insurer made no submissions.

CONSIDERATION

10. *Clause 5.3.2* of the *Guidelines* set out the twelve requirements of a written advice of a work capacity decision and its outcome.
11. *Guideline 5.3.2* requires the insurer to "*reference the relevant legislation*". The decision advised the worker that her "claim must

¹ Schedule 8, Clause 22 of the *Workers Compensation Regulation 2010*

² See *Workers Compensation Act 1987* Section 44(1)(c)..

transition to the new benefits system.” The insurer’s decision does not state that the assessment was required pursuant to *Clause 8 of Part 19H of Schedule 6* to the 1987 Act. This constitutes a breach of the Guideline.

12. *Guideline 5.3.2* requires the insurer to “explain the relevant entitlement periods.” The decision advised the applicant’s entitlement under Section 37 was calculated at 80% of the transitional amount “as you have current work capacity but have not returned to work.” This is an incomplete description of the relevant test within Section 37 of the 1987 Act. The insurer does not explain the distinction between Section 37(2) and Section 37(3). Workers with current work capacity are entitled to weekly benefits at different rates during the second entitlement period, depending on whether or not they have returned to work for at least 15 hours per week. The insurer’s explanation gives the impression the only reason the applicant could return to work for less than 15 hours per week and her weekly payments would be assessed at a different rate, which is not the case. This constitutes a breach of the *Guideline*.

FINDING

13. I find that the Insurer has failed to follow the procedures as set out in the legislation and the WorkCover Guidelines. Therefore the work capacity decision is invalid.

RECOMMENDATION

14. I recommend that the Insurer conduct a new work capacity assessment in accordance with the WorkCover Guidelines and make a new work capacity decision.
15. I recommend that the Insurer pay the applicant the weekly benefit to which she was entitled prior to 23 February 2014, as adjusted by her earnings in new employment until such time as she is properly transitioned.
16. The applicant is not required to produce work capacity certificates for the period from 23 February to date by virtue of the operation of Section 44B(2) of the 1987 Act.
17. These recommendations are binding on the Insurer: see Section 44(3)(h) of the 1987 Act.



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