



RECOMMENDATION FOLLOWING AN APPLICATION FOR REVIEW OF THE INSURER'S WORK CAPACITY DECISION PURSUANT TO SECTION 44BB(1)(c) OF THE *WORKERS COMPENSATION ACT 1987*.

SUMMARY:

- a. The work capacity decision by the Insurer dated 25 May 2015 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 1 September 2015.**
- c. The payments are to be back-dated to 1 September 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 25 May 2015. The decision informed the applicant that her weekly payments of compensation would cease on 1 September 2015. The applicant sought internal review on 17 August 2015 and the internal review decision dated 15 September 2015 confirmed the work capacity decision.
2. The applicant then applied to the Authority for Merit Review on 26 September 2015 and they delivered findings and recommendations dated 29 October 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)* and is not entitled to ongoing weekly payments of compensation.
3. The applicant then made an application to this office dated 23 November 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. The applicant was the subject of bullying and harassment during the eight year period of her employment as a nurse. On 14 November 2012



the applicant went to the Director of Nursing and had an emergency session with a psychologist. The applicant has not returned to her pre-injury employment since that time and was unfit for work for an extended period. In or about the end of 2013 the applicant obtained casual employment. At the time of the work capacity decision the applicant remained in that casual employment and 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. In addition to applying for a procedural review the applicant has made the following submissions:
 - *The Insurer only provided two documents in the fair notice letter being the vocational assessment report and a spreadsheet calculation of average hours;*
 - *The Insurer did not provide an acknowledgement of the internal review application within 7 days.*
8. In addressing the applicant’s submissions I note that the only additional documents relied upon by the Insurer, other than those provided in the fair notice letter, were a certificate of capacity from the nominated treating doctor and payslips. The applicant would have already had access to these documents as same would have had to have been provided to the Insurer by the applicant.
9. The applicant concedes that she did receive a brief phone call from the Insurer after she sent in her request for a review on 17 August 2015 however she did not receive any formal acknowledgment until 31 August 2015. As the applicant did receive a phone call from the Insurer she



would have been satisfied that the Insurer was in possession of her application for review.

Submissions by the Insurer

10. The Insurer did not make any submissions in response to the application.

The Decision

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

12. Guideline 5.3.2 requires the Insurer to advise of the date of the work capacity assessment. The applicant was informed that a work capacity assessment was performed on 17 April 2015 and completed on 25 May 2015. The applicant was advised of the resulting work capacity decision by letter dated that day.

13. The Insurer has informed the applicant that in accordance with Section 43(1)(a) it had determined that the applicant had current capacity to work 40 hours per week. The Insurer based this decision upon a certificate of capacity from the nominated treating doctor dated 13 May 2015.

14. In accordance with Section 43(1)(b) the Insurer determined the vocations of enrolled nurse and drug/alcohol tester were suitable employment. Again this decision was based upon the certificate of capacity of the nominated treating doctor. The only restriction placed upon the applicant was that she was not to return to her pre-injury employer.

15. The Insurer then determined in accordance with Section 43(1)(c) the amount the applicant could earn in suitable employment was \$1,011.56 per week as an enrolled nurse. The Insurer based this decision upon the vocational assessment report dated 17 April 2015.

16. The Insurer has displayed an adequate understanding of the Guidelines and legislation in making the above decisions.



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17. Guideline 5.3.2 requires the Insurer to explain the relevant entitlement periods to the applicant. In this case the Insurer has informed the applicant that she has received 123 weeks of compensation payments. Therefore, her entitlements are subject to Section 37 of the 1987 Act.
18. However, when making the work capacity decision the Insurer informed the applicant that as she had not returned to work for not less than 15 hours per week she had not complied with Section 38(3)(b) of the 1987 Act. In addition the Insurer had assessed that the applicant was not working to her full capacity and therefore had the capacity to increase her earnings and as a result she had not complied with Section 38(3)(c) of the 1987 Act.
19. The Insurer had informed the applicant that she falls within the entitlement period in which Section 37 is applicable and has then proceeded to assess her ongoing entitlement to weekly compensation pursuant to Section 38 of the 1987 Act.
20. I do note that at the time of the work capacity decision the applicant had received 123 weeks of compensation payments placing her in the entitlement period where Section 37 applies. By the time the work capacity decision takes effect the applicant will have received at least 135 weeks of compensation payments making the applicant post the second entitlement period where Section 38 was applicable.
21. The issue in this instance is that Section 43 of the 1987 Act notes that a work capacity decision by an insurer is a decision about a workers **current** work capacity. At the time of the work capacity assessment and the making of the work capacity decision the applicant was in the entitlement period in which Section 37 was applicable.
22. Making a decision about the applicant's capacity when the work capacity decision becomes effective is incorrect. The Insurer in those circumstances is making a decision about the applicant's **future** capacity and whether or not she will be complying with special requirements in the future. This is an error made by the Insurer.
23. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 25 May 2015.



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Finding

24. 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

25. The work capacity decision by the Insurer dated 25 May 2015 is set aside.

26. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 1 September 2015.

27. The payments are to be back-dated to 1 September 2015.

28. 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
16 December 2015