

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 of the Insurer dated 25 June 2014 is set aside.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable at 25 June 2014.**
- c. **The payments are to be back-dated to 1 October 2014 in accordance with Clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.**
- 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 June 2014. The decision advised the applicant that his weekly payments of compensation would cease on 1 October 2014. The applicant sought internal review and Internal Review Decision (IRD) was dated 14 July 2014. He then sought Merit Review on or about 29 July 2014 and the Authority issued the Merit Review recommendation on 18 August 2014. The applicant made application to this office on 23 September 2014.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. On 17 October 2001 the applicant sustained injury to his neck during the course of his employment as a mechanic. The applicant has been in receipt of weekly payments of compensation from the Insurer. At the time of the work capacity decision the applicant was self-employed working on average 25 hours per week.
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 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 a first assessment then the Insurer is required to make a work capacity decision. Where that decision involves a reduction in the weekly benefits payable to the injured worker then the Insurer is required to give proper notice to the worker (*Section 54(2)(a)* of the *Workers Compensation Act 1987*).

Submissions by the applicant

8. *Section 44(1)(c)* of the *Workers Compensation Act 1987* (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 provided several submissions which are not relevant to procedural review.

Submissions by the Insurer

9. The Insurer has not provided submissions in response to the application.

The Decision

10. The relevant *WorkCover Work Capacity Guidelines* with respect to making this work capacity decision came into effect on 11 October 2013.
11. *Guideline 5.1* notes that any work capacity decision should be logical, rational and reasonable. It should be a decision that is more likely than not to be correct.
12. This decision, according to the Insurer, has taken into account the following documents:

- WorkCover Certificate of Capacity from Dr W dated 30 May 2014 which states that the applicant has the capacity to work 5 hour per day / 5 days per week;
- WorkCover Certificate of Capacity from Dr S dated 10 March 2014 which states the applicant has capacity to work 5 hours per day/ 5 days per week;
- Payslips dated 30/05/2014; 23/05/14 and 9/05/14 revealing that the applicant's current earnings average \$181.67 per week; and
- Email from Procure (BV) dated 29 May 2014 "confirming" that the worker informed Procure on 29 May 2014 that he was "unable to attend an Earning Capacity Assessment as he was working **up to** full time hours."¹

13. The email mentioned above refers to a telephone call between the worker and Procure where the worker advised he was unable to attend an earning capacity assessment as he was required to be in 'the workshop' from 7.30am to 5.00pm.

14. Based upon this conversation, an email was drafted and the Insurer advises it *'has therefore concluded, based on the information available, that you have the capacity to work 38 hours per week'*.

15. *Sections 44A and 44B* of the 1987 Act limit the nature of the evidence that can be used in assessing work capacity. In the present decision the relevant evidence according to the 1987 Act would be the WorkCover Certificates of Capacity.

16. The Insurer has not accepted the contents of the certificates, which are both unanimous in that the applicant can work 5 hours per day for 5 days per week and instead has accepted the contents of an email purporting to record a conversation with the applicant. It is not clarified whether the author of the email is the person with whom the applicant had the conversation.

17. The Insurer has not complied with the 1987 Act by failing to accept the only relevant evidence pursuant to *Sections 44A and 44B*.

18. On 3 September 2014 the *Workers Compensation Amendment (Existing Claims) Regulation 2014* (the Amendment Regulation) was published.

¹ Oddly, no confirmation from the worker was sought by the Insurer of the "confirmation" from Procure, nor was "up to" full time hours anywhere explained. I assume he was not exceeding full time hours, which would be a logical impossibility in any event. Of more interest might be that the Insurer excused itself from conducting an "earning capacity assessment" at any other time on this unexplained pretext. So the obvious query arises as to whether or not the Insurer has conducted a proper assessment in the circumstances.

Clause 26 of the Amendment Regulation provides that Part 2 “takes effect on and from 1 October 2012.”

19. Clause 30 of the Amendment Regulation, which is in part 2 and therefore is deemed to have been in effect since 1 October 2012, is in the following terms:

30 Stay of work capacity decisions

- (1) A review under section 44 (Review of work capacity decisions) of the 1987 Act of a work capacity decision made in respect of an existing claim operates to stay the decision that is the subject of the review and prevents the taking of action by an insurer based on the decision while the decision is stayed.
- (2) This clause applies to an internal review under section 44 (1) (a) of the 1987 Act only if the application for internal review is made by the worker within 30 days after the worker receives notice from the insurer of the work capacity decision to be reviewed.
- (3) The stay under this clause operates from the time the application for review is made until the worker is notified of the findings of the review (or the application for review is withdrawn).
- (4) This clause applies despite section 44 (4) of the 1987 Act, which is deemed to be amended to the extent necessary to give effect to this clause.

20. It must follow that the applicant is entitled to the full benefit of the Amendment Regulation and therefore the Insurer should restore the applicant to the payments being received immediately prior to the payments ceasing as a result of the original decision.

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 has been a breach of the *Guidelines* which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

RECOMMENDATION



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23. The applicant is to be reinstated to his weekly payments at the rate applicable at 25 June 2014.
24. The payments are to be back-dated to 1 October 2014 in accordance with Clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.
25. 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 WorkCover Independent Review Officer
28 October 2014