

**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 29 August 2014 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 8 December 2014.**
- c. The payments are to be back-dated to 8 December 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 29 August 2014. The insurer informed the applicant that her weekly payments of compensation would cease from 8 December 2014. The applicant sought internal review and the Internal Review Decision was dated 20 October 2014. That decision confirmed that the applicant's weekly payments of compensation would cease. She then sought Merit Review on or about 16 November 2014 and the Authority issued the Merit Review recommendation on 9 December 2014. The Merit Review found that the applicant was not entitled to payments of weekly compensation.
2. The applicant made application to this office on 6 January 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. On 19 January 2008 the applicant was lifting a patient in the course of her employment and suffered an injury to her back. She returned to light duties for a period of time however her employment was terminated in or about March 2009. The applicant has been in receipt of weekly payments since that time.

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* (the 1987 Act) required the Insurer to conduct a work capacity assessment.

### **Submissions by the applicant**

5. 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’s submissions were extensive however they were largely not relevant to procedural review. Furthermore the applicant’s submissions were partially in respect of a review of the Merit Review recommendations. I am not permitted under the legislation to perform such a review.

### **Submissions by the Insurer**

6. The Insurer provided submissions in response to the application which were received on 15 January 2014. The Insurer’s submission included a useful chronology.

### **The Decision**

7. The relevant version of the *WorkCover Work Capacity Guidelines* (Guidelines) came into effect on 11 October 2013.
8. Section 44B of the 1987 Act deals with evidence as to work capacity. That section states that a worker must provide an insurer a certificate of capacity in respect of the period that the worker is entitled to weekly payments. The certificate is to certify the worker’s current work capacity during the period not exceeding 28 days.
9. The applicant complied with this section and provided the Insurer with Certificates of Capacity from her nominated treating doctor, Dr V.
10. On 10 July Dr V certified the applicant to have partial capacity with the following restrictions:
  - 25 hours per week
  - Lifting/carrying 3 kg not repetitively
  - Sitting/Standing 30 mins
  - Pushing/pulling – minimal repetitive pushing and pulling

- *Bending /twisting/squatting minimal*

11. A certificate dated August 2014 certified the applicant to have partial capacity up until 26 September 2014 with the following restrictions:

- *9 hours per week*
- *Lifting/carrying - 3kg*
- *Sitting/Standing 30 mins*
- *Pushing/Pulling – minimal repetitive pulling and pushing*
- *Bending/Twisting/squatting – minimal*

The Insurer noted the August 2014 certificate (i.e. the later certificate) had the additional diagnosis of right shoulder tendonitis and cervical disc herniation.

12. Two days prior to the work capacity assessment being completed the Insurer wrote to Dr V requesting a '*rationale*' for the downgrade from 25 hours to 9 hours and the additional diagnosis. At the time of making the work capacity decision the Insurer had not received a response and advised the applicant that until the '*rationale*' for the downgrade was clarified her work capacity assessment would be based on the *previous* certificate of capacity, which certified her for 25 hours per week.

13. Section 44B of the 1987 Act requires a worker to submit monthly work capacity certificates. They have currency for only 28 days. There is no section which allows Insurers to "prefer" an older certificate if a more recent one (which is current) has been submitted and the former certificate has expired (as happened here). Clearly this is irregular and unsatisfactory.

14. In addition, Guideline 5.1 requires the Insurer to evaluate all available and relevant material and relevant considerations. The Insurer must consider the certificate which the applicant has submitted. On this basis, the Insurer is not able to ignore the certificate as though it does not exist because they prefer the content of the earlier (and expired) certificate.

15. Clearly at the time the Insurer purported to have completed the work capacity assessment there were still investigations which were outstanding. The Insurer had not complied with Guideline 2.3 which requires all decisions in relation to a worker's work capacity to be timely, informed and evidence based. On this occasion the assessment was completed too early and the work capacity decision was made prior to all information being gathered.

## **FINDING**



16. 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 Guidelines which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

### **RECOMMENDATION**

17. The work capacity decision of the Insurer dated 29 August 2014 is set aside.
18. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 8 December 2014.
19. The payments are to be back-dated to 8 December 2014.
20. Such payments are to continue until such time as a further work capacity decision comes into effect.

Tracey Emanuel  
Delegate of the WorkCover Independent Review Officer  
13 February 2015