

**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 3 July 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 13 October 2014.**
- c. The payments are to be back-dated to 13 October 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 3 July 2014. The decision advised the applicant that his weekly payments of compensation would cease on 13 October 2014. The applicant sought internal review and the Internal Review Decision (IRD) was dated 26 August 2014. He then sought Merit Review on or about 19 September 2014 and the Authority issued the Merit Review recommendation on 15 October 2014. The applicant made application to this office on 29 October 2014.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. On 27 March 2011 the applicant suffered injury to his right knee when he slipped on gravel whilst chasing sheep. The applicant underwent surgery on 28 November 2011 and 25 July 2012. Further surgery has been recommended. The applicant returned to suitable duties however in June 2013 his employment was terminated as suitable duties were no longer available. The applicant has not worked since that time.
4. The applicant was in receipt of weekly payments immediately before 1 October 2012 and according to *Clause 8 of Part 19H of Schedule 6 of*

the *Workers Compensation Act 1987* (the 1987 Act) the Insurer is required 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)*. The relevant version of the *Guidelines* came into effect on 11 October 2013.

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 made submissions including documents not being provided under ‘*fair notice*’ letter and inconsistent suitable employment decisions. These submissions have been considered.

Submissions by the Insurer

7. The Insurer has provided submissions in response to the application which were received by this office on 5 November 2014. These submissions as well as the documents attached were reviewed.

The Decision

8. The insurer concluded at page 2 of the decision that suitable employment for the applicant was a forklift driver. The amount the insurer assessed the applicant to be able to earn was \$1003 per week. No particulars of the position such as the duties performed, medical restrictions or number of hours were described.
9. At page 4 of the decision the insurer notes that *WHSM* prepared a vocational assessment report dated 13 March 2013. The positions of HR Truck Driver and Mobile Plant Operator were identified as suitable employment.
10. The insurer advised “*[the Insurer] have determined that you currently have current capacity to work 6 hours per day, 3 days per week in the suitable employment role of HR Truck Driver, however you have not returned to any form of employment at this time.*”

11. In support of this conclusion the insurer has relied upon a further report from WHSM dated 30 April 2013 which states *“that Dr Islam agreed to the vocational goal of HR Truck Driver.”*
12. The issue in this sentence is the phrase *“vocational goal”* attributed to Dr Islam. It is not stated that Dr Islam agreed that truck driving duties are suitable to the applicant at this time but rather, he agrees with the *vocational goal*. From this statement it would appear the insurer has confused return to work planning with work capacity assessment. The important issue for this decision is the current work capacity that *currently* exists not the vocational goal which may be achieved at a time in the future.
13. The work capacity decision made by the insurer is inconsistent and contradictory. At the beginning of the decision the insurer has advised the applicant that suitable employment is that of a fork lift driver in a full time capacity whereas two pages later the insurer has concluded that suitable employment is that of a HR Truck Driver working 18 hours per week.
14. *Guideline 5.3.2* requires the insurer to *“state the decision and give brief reasons for making the decision and outline the evidence considered in making the decision, noting the author, the date and key information. All evidence considered should be referred to, regardless of whether or not it supports the decision.”*
15. In respect of the decision that a forklift driver is a suitable employment option the insurer has failed to provide any reasons for that decision and it has not cited any evidence supporting the decision. That decision does not comply with the *Guidelines*.
16. In respect of the decision that a HR Truck Driver is a suitable employment option we refer to paragraphs 10-13 above. When the IRD is considered it becomes obvious that not all of the evidence that was available at the time of making the work capacity decision was considered by the insurer and disclosed to the applicant.
17. At page 5 of the IRD the insurer advises *“Due to inconsistent medical information on file in relation to your functional capacity [WHSM] conducted a Functional Capacity Evaluation, and their report was dated 28 March 2014. It was reported you were capable of performing sedentary work for 5 hours per day, 5 days per week and once a return to work was achieved, a graded return to full time hours could be achieved. [WHSM] concluded in this report that you would not be able to operate pedals in a Heavy Rigid Truck and you would not be capable*

of climbing the 3 to 4 steps required to enter the truck as well as the steps required to enter the mobile excavator that would be part of the Mobile Plant Operator position. The option of modifying the truck pedals was considered however deemed unreasonable to proceed considering you would not be capable of climbing into the truck.”

18. The WHSM report dated 28 March 2014 was not referred to in the work capacity decision nor was it provided to the applicant despite that fact that it would have been available given that the work capacity decision was dated 3 July 2014.
19. The IRD then identifies a forklift driver working 6 hours per day 3 days per week with the capacity to earn \$364.68 per week as suitable duties for the applicant. This decision is inconsistent with the work capacity decision.
20. The insurer has failed to comply with the *Guidelines* in that it did not “evaluate all available and relevant material and relevant considerations” (*Guideline 5.1*). Furthermore, the same *Guideline* requires any work capacity decision should be “logical, rational and reasonable. It should be a decision that is more likely than not to be correct.”
21. The insurer, on its own admission in the IRD, has made an incorrect work capacity decision. It failed to consider all the available evidence at the time of making the work capacity decision. The insurer has attempted to rectify this in the IRD however that is not sufficient. Therefore, the work capacity decision is invalid.

FINDING

22. 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

23. The work capacity decision of the Insurer dated 3 July 2014 is set aside.
24. The applicant is to be reinstated to his weekly payments at the rate applicable at 13 October 2014.



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25. The payments are to be back-dated to 13 October 2014.
26. 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
9 December 2014