

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*.

1. The injured worker is the applicant for a review of a work capacity decision made by a scheme agent of the Workers Compensation Nominal Insurer ("Insurer").
2. The applicant suffered injury to his lower back on or about 4 May 2002 in the course of his employment as a boilermaker/welder with the Insured.
3. As a result of the injury the applicant resigned from his position with the insured and undertook a variety of roles between 2003 and 2009. He has not worked in any capacity since 2009. For all periods of incapacity the insurer accepted liability to make weekly payments of compensation and accordingly the applicant was an existing recipient of weekly payments immediately before 1 October 2012.
4. On 12 June 2013 the Insurer advised the applicant in writing of a work capacity decision which had been made on that date. He was advised that his entitlement to ongoing weekly payments of workers compensation would be terminated on 19 September 2013.
5. The applicant was advised that his ongoing entitlements to medical, hospital, rehabilitation, and travel expenses would not be affected.
6. The applicant requested an internal review of the Insurer's decision. That review was responded to by the Insurer in writing on 23 July 2013. The review confirmed the original work capacity decision.
7. On 21 August 2013 the applicant made an application to the WorkCover Authority of New South Wales for a merit review of the Insurer's work capacity decision. That merit review application was received within the 30 day period. A WorkCover merit review was completed and a Statement of Reasons issued on 28 November 2013. The merit reviewer upheld the original decision of the Insurer. The merit reviewer found that the applicant had no entitlement to weekly benefits in accordance with Section 38 of the 1987 Act.

8. On 23 December 2013 the applicant requested the Independent Review Officer to undertake a review of the decision of the Insurer pursuant to Section 44(1)(c) of the 1987 Act. I am satisfied that the applicant has made the application within the time provided by that section and on the correct form.

Applicant's Stated Grounds for seeking Procedural Review

9. The applicant's grounds for seeking procedural review are as follows:
- (i) The insurer failed to explain and assist the applicant through the work capacity decision process;
 - (ii) The insurer failed to take into account evidence provided by the applicant;
 - (iii) The insurer failed to provide copies of documents requested by the applicant;
 - (iv) The applicant asserts that as soon as he discloses his injury his opportunity to be employed significantly diminishes.

Submissions by the Insurer

10. The Insurer made no submissions in response to the application.

Legislation

11. Section 44(1)(c) of the 1987 Act limits the scope of procedural review to a review only of:

The insurer's procedures in making the work capacity decision and not of any judg[e]ment or discretion exercised by the insurer in making the decision.

Therefore while it remains the case that no discretion is unreviewable¹, the Insurer's discretion when making a work capacity decision appears only to be reviewable in the course of merit review or Judicial review.

12. The procedures to be followed by the Insurer are set out in the *WorkCover Work Capacity Guidelines* and *WorkCover Review*

¹ See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997

Guidelines. Both sets of *Guidelines* should be complied with in order for a work capacity decision to be validly made.

13. The relevant version of the *Guidelines* is the one dated 28 September 2012 and which applied to all claims from 1 January 2013. That publication provides that the *Guidelines* provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessment.

The Process of the Insurer

14. It is difficult to determine if the decision reached by the Insurer was within the range of available decisions given the abject lack of information in the original work capacity decision. I note the decision was upheld by the merit review service.
15. The important consideration on procedural review is not *why* a decision is made, but *how* it is made.

My Reasons:

16. The grounds upon which the applicant seeks to rely can be dealt with shortly. Ground (iv) is not a procedural ground. Grounds (i) to (iii) are procedural grounds and discussed later in this decision.
17. The Insurer has made no submissions about compliance with the relevant statutory provisions and guidelines.
18. Since procedural review requires a scrutiny of the decision-making processes of the Insurer, including examination of compliance with legislation and *Guidelines* rather than a consideration of submissions made by either party, the review process may proceed despite the absence of relevant submissions from either party. Any demonstrable error on the part of the Insurer may invalidate the decision.
19. There are in my view breaches of the *Guidelines* which are sufficient to invalidate the work capacity decision made by the Insurer.
20. Breaches of the *Guidelines* include that the work capacity decision fails to clearly explain to the applicant that as an existing recipient of workers compensation payments he is required to be 'transitioned' under Section

38 of the *Workers Compensation Act 1987* ("the 1987 Act"). In fact the work capacity decision does not reference Section 38 at all.

21. An ineffective attempt to clarify the Insurer's position is made in the Internal Review letter directed to the applicant dated 23 July 2013. Although this letter references the 'transitional amount' it again fails to explain to the applicant all relevant entitlement periods and that he is to be transitioned.
22. *Guideline 5.4.2* states that the work capacity decision notice must clearly reference the relevant legislation and explain the line of reasoning for the decision. The Insurer has failed to do so.
23. Further, the above *Guidelines* also state that the work capacity decision notice must advise the applicant that any documents or information that have not already been provided to him can be provided on request to the Insurer. The Insurer has failed to so advise the applicant.
24. Both the work capacity decision and Internal Review letter advise the applicant that the work capacity decision does not affect his entitlement to reasonably necessary medical and travel expenses. This is clearly incorrect. The applicant is not advised of Section 59A of the 1987 Act and that his entitlement to such expenses will terminate 12 months after the cessation of his weekly payments of compensation. This is also in breach of *Guideline 5.4.2*.
25. The work capacity decision does not convey coherent reasons to the applicant for the decision. One such 'reason for decision' to terminate the applicant's weekly payments of compensation is stated as:

"Rehabilitation Services Progress Report dated 08.05.2013 showed (the applicant) ability to contact employment prospects and would market the Jobcover Placement Program to a local kennel and a local quarry.

"The above information demonstrate that (the applicant) have the ability to return to suitable employment"
26. I find that the work capacity decision is accordingly not effective and the weekly payments amendments do not as yet apply to the applicant.



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My Recommendation:

27. For the reasons set out above I recommend that the Insurer make another work capacity decision, according to the *Guidelines*.
28. Since the applicant was an existing recipient as at 1 October 2012, he remains entitled to receive his pre-transition rate of weekly benefits until such time as he is validly transitioned under the Act. The applicant should have his payments restored from 19 September 2013.
29. Noting the binding nature of these recommendations I recommend that the Insurer takes my views into account, and I recommend that the Insurer immediately gives effect to them.

Tracey Emanuel
Delegate of WorkCover Independent Review Officer
30 January 2014