



**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 15 September 2014 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 21 December 2014.**
- c. The payments are to be back-dated to 21 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 15 September 2014. The insurer informed the applicant that her weekly payments of compensation would be reduced to nil from 21 December 2014. The applicant sought internal review and the Internal Review Decision was dated 30 October 2014. That decision confirmed that original decision. She then sought Merit Review on or about 12 November 2014 and the Authority issued the Merit Review recommendation on 9 December 2014.
2. The Merit Review made a recommendation that *"the insurer is to determine Ms [K]'s entitlement, if any under section 37(3) of the 1987 Act. The Insurer is to make weekly payments of compensation, if any, to Ms [K] in accordance with section 37(3) of the 1987 Act, based upon that calculation."* It is not known whether the Insurer has complied with this recommendation.
3. The applicant made application to this office on 9 January 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. As a result of the nature and conditions of the applicant's employment over a three year period she suffered injury to her right shoulder. In addition, in October 2010 she was lifting heavy electrical equipment and pushing a trolley when she developed pain in her right shoulder. The deemed date of injury has been agreed at 17 December 2010. Since that time the applicant was performing 'light duties' until 22 July 2013 when she was made redundant. The applicant has been in receipt of weekly payments of compensation for at least 78 weeks up until the time of the work capacity decision.

Submissions by the applicant

5. 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's submissions include that the insurer failed to reference the legislation correctly, failed to advise the applicant of the commencement of the work capacity assessment, failed to advise the applicant her payments were terminated rather than reduced to \$0, failed to advise that any documents not produced could be provided upon request and failed to provide the worker with copies of documents requested.

Submissions by the Insurer

6. The Insurer provided submissions in response to the application which were received on 13 January 2015. The Insurer submitted that the correct legislation had been referenced and all sections adequately explained, that the applicant was advised of the work capacity assessment during the fair notice phone call, that section 37(3) of the 1987 Act had the outcome of \$0 per week and there was no practical distinction between payments ceasing and being reduced to nil, the applicant was advised that documents would be provided upon request and that to date a section 126 request for documents had not been made.

The Decision

7. The relevant version of the *WorkCover Work Capacity Guidelines* (Guidelines) came into effect on 11 October 2013.
8. At page 4 of the decision under the heading “*Pre-injury average weekly earnings*” the Insurer has advised the applicant “*Under the 1987 Act schedule 6 Part 19H clause 9(3) when applying the weekly payments amendments to an existing recipient of weekly payments the AWE is deemed to be equal to the transitional amount which is currently \$948.50.*”
9. The next line reads “*Therefore, your AWE is equal to \$960.50.*”
10. The above statements are contradictory and would be very confusing to the applicant. One of them may well be correct, but the applicant can have no way of knowing which. It may even be the case that at different times each of the above statements were correct, but they cannot have been both correct at the same time. This is a demonstrable error and is sufficient grounds to set aside the work capacity decision.
11. The Insurer has failed to comply with Guideline 5.3.2 in that it has failed to correctly reference the legislation and clearly explain the line of reasoning for the decision.

FINDING

12. 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

13. The work capacity decision of the Insurer dated 15 September 2014 is set aside.
14. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 21 December 2014.
15. The payments are to be back-dated to 21 December 2014.
16. Such payments are to continue until such time as a further work capacity decision comes into effect.



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