

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 6 August 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 15 November 2014.**
- c. The payments are to be back-dated to 15 November 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 6 August 2014. The decision advised the applicant that his weekly payments of compensation would cease on 15 November 2014. The applicant sought internal review and the Internal Review Decision was dated 24 September 2014. The original decision was affirmed. He then sought Merit Review on or about 20 October 2014 and the Authority issued the Merit Review recommendation on 11 November 2014. Once again the original decision was left undisturbed. The applicant made application to this office for procedural review on 2 December 2014.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. On 15 April 2003 the applicant suffered injury to his left knee and lower back in the course of his employment as a process worker with the employer. The applicant returned to duties for a short period of time. The applicant performed suitable duties for various periods up until 8 March 2006 when suitable duties were withdrawn by the employer. At the time of the work capacity decision the applicant was working as a delivery driver for 36 hours per week.

4. As the applicant was in receipt of weekly payments immediately before 1 October 2012 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).

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 which are not relevant to procedural review.

Submissions by the Insurer

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

The Decision

8. The Guidelines relevant to making this work capacity decision came into effect on 11 October 2013.
9. Guideline 2.3 requires decisions to be soundly based. Guideline 5.3.2 requires the insurer to reference the relevant legislation and state the decision and give brief reasons for making the decision.
10. Section 38(3) of the 1987 Act states “*a worker who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if:*
 - (a) *The worker has applied to the insurer in writing (in the form approved by the Authority) no earlier than 52 weeks before the end of the second entitlement period for the continuation of weekly payments after the second entitlement period, and*
 - (b) *The worker has returned to work (whether in self-employment or other employment) for a period of not less than 15 hours per week and is in receipt of current weekly earnings (or current weekly earnings together with a deductible amount) of at least \$155 per week, and*

(c) The worker is assessed by the insurer as being, and is likely to continue to indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker's current weekly earnings."

11. Section 38(3)(a) of the 1987 Act is not relevant to this applicant as he is an existing recipient.
12. At page 11 of the decision the insurer informed the applicant *"We note that you are currently working 36 hours per week, earning \$600.00 per week in your current role as a Delivery Driver (sole trader) for [name of employer]. Considering the functional requirements of the role as advised by yourself and [name of vocational assessor], and with the confirmation from Dr N that the role is not functionally suitable for you to complete; we do not consider that this role is suitable for you as you are unable to engage in further work in this role without significant risk of further injury."*
13. The most critical breach appearing in the decision is when the Insurer advises the applicant *"We believe that suitable employment has been identified for you in the roles of Construction Project Manager, Construction Estimator and Program or Project Administrator; and as you are not currently working at least 15 hours per week and are not earning at least \$173 per week within these suitable employment options, we consider that you do not meet the requirements of Section 38(3)(b) of the 1987 Act."*
14. The minimum requirements of Section 38(3)(b) were at the relevant time (i) 15 hours of work and (ii) \$173 per week. Nowhere in the legislation is the Insurer given a power of veto preventing a worker from undertaking paid work on the basis that the Insurer believes there is an unacceptable risk of injury, despite the worker's belief to the contrary. The intention of the legislature was to encourage injured workers to return to work, not to empower insurers to terminate or reduce benefits on the basis that they have a view that the injured person is working too hard. The Insurer has in this case misconstrued the legislation and wrongly applied section 38(3)(c). That section is not designed to allow insurers to tell workers to stop working in heavy or dangerous work. It is only there to allow an insurer to rely on their assessment that the worker would not be capable of undertaking further additional employment or work to increase their income. If the insurer believes that further or additional work of the type currently being performed by the worker would lead to injury, that is a point in favour of the worker retaining benefits, not the contrary.



15. It is clear that the insurer has taken into account irrelevant considerations and applied the incorrect test when assessing whether the applicant has or has not fulfilled the relevant requirements of Section 38(3)(b). This error is sufficient to set aside the work capacity decision.

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 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

17. The work capacity decision of the Insurer dated 6 August 2014 is set aside.

18. The applicant is to be reinstated to his weekly payments at the rate applicable at 15 November 2014.

19. The payments are to be back-dated to 15 November 2014.

20. 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
30 December 2014