

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 1 August 2014 is set aside.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable prior to 7 November 2014.**
- c. **The payments are to be back-dated to 7 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 1 August 2014. The decision informed the applicant that his weekly payments of compensation would cease. The applicant sought internal review and the Internal Review Decision was dated 14 November 2014. He then sought Merit Review on or about 12 December 2014 and the Authority issued the Merit Review recommendation on 9 January 2015 upholding the decision. The applicant made application to this office on 27 January 2015.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. The applicant suffered injury to his knees whilst employed as a motor mechanic. The agreed date of injury is 15 January 2007. The applicant's employment was terminated in 2008. The applicant was in receipt of weekly payments of compensation.
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.

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 made submissions which were 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 work capacity decision which is the subject of this review is dated 1 August 2014. The relevant WorkCover Capacity Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
9. Section 43 of the 1987 Act sets out what constitutes a work capacity decision by an Insurer. It includes a decision about the worker’s **current** work capacity, a decision about what constitutes suitable employment for a worker and a decision about the amount an injured worker is able to earn in suitable employment.
10. In this work capacity decision the Insurer has informed the applicant:

“We note that you have been successfully employed with [name withheld] since 18 February 2013. Based on the payslips you provided to us, it is our opinion that you are able to earn \$1,147.15 per week in suitable employment as defined by Section 32A of the Workers Compensation Act 1987.”

The Insurer has not described the nature of the duties performed by the applicant, nor how many hours per week such duties were performed.

11. In the next paragraph of the work capacity decision the Insurer concedes that at the time of making the decision the applicant was in fact unemployed and that his previous employment was terminated on 23 May 2014. A reason for the termination was not provided.
12. The Insurer has made a **current** work capacity decision based upon payslips that were a minimum 10 weeks old and based upon duties the applicant was no longer performing. There was no evidence cited by the Insurer supporting the proposition that those duties which were being performed prior to the making of the work capacity decision remained suitable.
13. Section 44B of the 1987 Act refers to certificates of capacity being used as evidence of current work capacity. Guideline 4 lists the nature of the evidence which can be considered in making a work capacity decision. It includes reports from the treating doctor, treating specialist, independent medical reports, injury management consultant reports and reports from rehabilitation providers. The list is not exhaustive. However in this particular decision the Insurer has not referred to any evidence particularised in either the legislation or Guidelines. The Insurer has therefore failed to comply.
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. At page 7 of the decision under the heading "*4. Evidence considered in making the decision*" the Insurer has listed the following documents:
 1. *WorkCover certificate dated 28/11/13 from Dr L*
 2. *Earning Capacity Assessment dated 02/12/13*
 3. *Fax Agreement dated 12/12/13 from Dr L*
 4. *Payslips of various dates supplied by applicant*

5. *Email dated 11/06/14 from the applicant advising the he is seeking employment*

16. The only document within this list which the Insurer has referred to is a payslip of which the date is not provided. The Insurer has therefore failed to comply with the Guideline.

FINDING

17. 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

18. The work capacity decision of the Insurer dated 1 August 2014 is set aside.

19. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 7 November 2014.

20. The payments are to be back-dated to 7 November 2014.

21. 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
25 February 2015.