



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 20 June 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 30 September 2014.**
- c. The payments are to be back-dated to 30 September 2014 (or the date payments ceased, whichever is the later date).**
- 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 20 June 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 29 October 2014 confirming the work capacity decision.
2. The applicant then sought Merit Review from the Authority on or about 24 November 2014. The Authority made recommendations and findings dated 17 December 2014 that in accordance with Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) the applicant was not entitled to weekly payments of compensation. As a result of the recommendations and findings the Insurer made a further work capacity decision dated 31 December 2014.
3. The applicant made application to this office on 12 January 2015 for a procedural review of the work capacity decision dated 20 June 2014.
4. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

5. The applicant suffered injury to his knee on 22 November 2007 when he stepped down from a forklift in the course of his employment. The applicant performed suitable duties until November 2008 when they were withdrawn. The applicant's employment was terminated in April 2009. Since that time the applicant found alternate duties as a delivery driver.
6. 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.
7. *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

8. 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 that out of date medical evidence was relied upon when making the decision and that no consideration was given to the more recent certificates of the nominated treating doctor.

Submissions by the Insurer

9. The Insurer has provided submissions in response to the application dated 18 January 2015 submitting that all relevant procedures were followed.

The Decision

10. The work capacity decision which is the subject of this review is dated 20 June 2014. The relevant WorkCover Capacity Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.

11. *Guideline 5.3.2* requires the Insurer to state the impact of the decision on the worker in terms of his entitlement to weekly payments and medical and related treatment expenses. The Insurer is also to advise of the date that the decision will take effect.
12. Initially the Insurer informed the applicant that *“your entitlement to further weekly compensation benefits will cease as from 30 September 2014.”*
13. The work capacity decision was dated 20 June 2014. This notice period was in accordance with Section 54(2)(a) of the 1987 Act. The insurer has taken into account the notice period of three months and four working days (having regard to Section 76(1)(b) of the Interpretation Act).
14. Two paragraphs later in the decision the Insurer advised the applicant:

“As a result of this work capacity decision to cease your weekly compensation benefits entitlements as from 7/6/14, in accordance with Section 59A(2) of the Workers Compensation Act 1987 – your entitlements to compensation for medical, hospital and rehabilitation expenses etc will also cease 12 months from the date of cessation of your weekly benefits unless you again become entitled in the future to weekly benefits in accordance with section 59(A)3 as shown below.”
15. The Insurer initially advised the applicant that his payments of weekly compensation would cease on 30 September 2014. The Insurer has then advised the applicant that his payments would cease on 7 June 2014 (which pre-dates the work capacity decision). These statements are confusing and contradictory.
16. The applicant was informed that his medical expenses would cease 12 months from the *“date of cessation of your weekly benefits.”* As a result of the aforementioned error the applicant would not know the date upon which his weekly payments cease let alone his medical expenses. This is a breach of the Guidelines.
17. The procedural error in advising the applicant of two different dates for the cessation of his weekly payments is sufficient to set aside the work capacity decision dated 20 June 2014.



FINDING

18. 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

19. The work capacity decision of the Insurer dated 20 June 2014 is set aside.
20. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 30 September 2014.
21. The payments are to be back-dated to 30 September 2014 (or the date payments ceased, whichever is the later date).
22. 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
2 March 2015.