

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 11 September 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 18 December 2014.**
- c. The payments are to be back-dated to 18 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 11 September 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 19 November 2014 confirming the work capacity decision.
2. The applicant then sought Merit Review from the Authority on or about 4 December 2014. The Authority made recommendations and findings dated 6 January 2014 that in accordance with Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) the applicant was entitled to weekly payments of compensation in the amount of nil.
3. The applicant made application to this office on 4 February 2015 for a procedural review. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. The applicant suffered injury to his right knee on 23 November 2002 during the course of his employment as a straddle driver. Liability was accepted and the applicant was in receipt of weekly payments of compensation. At the time of the work capacity decision the applicant

was working as a delivery driver performing duties for 32 hours per week.

5. 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.
6. *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

7. 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 however they are not relevant to procedural review.

Submissions by the Insurer

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

The Decision

9. The work capacity decision which is the subject of this review is dated 11 September 2014. The relevant WorkCover Capacity Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
10. *Guideline 5.3.2* requires the Insurer to reference the relevant legislation and explain the relevant entitlement periods.
11. The Insurer has informed the applicant that he has received 589 weeks of weekly payments of compensation. He is also informed “*under the new legislation you are considered to be in the “special requirements” entitlement period*” and further “*This is considered the new Section 38 of the Workers Compensation Act 1987. This period is subject to special conditions which must be met to be entitled to ongoing benefits.*”

12. Despite informing the applicant that he is in the “*special requirement*” entitlement period and he is subject to “*special conditions*” the Insurer has failed to explain and disclose those “*special*” conditions and requirements.

13. The Insurer has informed the applicant that his entitlements are subject to Section 38 of the 1987 Act and that his future benefits have been assessed as follows:

$$\$960.50 \times 80\% = \$768.40 - \text{less ability to earn } \$797.54 = \$0.00$$

14. The Insurer has failed to explain to the applicant which sub section of Section 38 has been applied. Further, the Insurer has failed to explain why the figure of \$960.50 has been used. The Insurer has not referred to *pre-injury average weekly earnings* nor the *transitional amount* as described in Schedule 6 Part 19H Clause 2 of the 1987 Act. The applicant would be confused as to why the figure of \$960.50 has been used in the algorithm.

15. It is noted that the Insurer attempted to rectify this omission by offering an explanation in the Internal Review decision dated 19 November 2014. However this is not sufficient to validate the work capacity decision.

16. Guideline 5.3.2 also requires the Insurer to state the impact of the decision on the worker in terms of his entitlement to medical and related treatment expenses. We note that the Insurer has referred to Section 59A(2) of the 1987 Act and has informed the applicant that his entitlement to medical and related treatment expenses will cease on 18 December 2015. However, the Insurer has failed to reference Section 59A(3) and inform the applicant that he may again become entitled to medical expenses under certain circumstances.

17. It is noted with interest that the Insurer has again attempted to rectify this omission by referring to the Section 59A(3) in the Internal Review decision. Again this is not sufficient to validate the work capacity decision.

18. The Insurer has failed to comply with the Guidelines and the errors are sufficient to set aside the work capacity decision.

FINDING

19. 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

20. The work capacity decision of the Insurer dated 11 September 2014 is set aside.

21. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 18 December 2014.

22. The payments are to be back-dated to 18 December 2014.

23. 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
3 March 2015.