

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 10 October 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 17 January 2015.**
- c. The payments are to be back-dated to 17 January 2015.**
- 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 10 October 2014. The decision informed the applicant that his weekly payments of compensation would cease on 17 January 2015. The applicant sought internal review and the Internal Review Decision was dated 26 November 2014. This review confirmed the work capacity decision.
2. The applicant then sought Merit Review from the Authority on or about 23 December 2014. The Authority issued the Merit Review recommendation on 23 January 2015 making recommendations and findings that the applicant did not meet the requirements of Section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act) and the applicant is not entitled to weekly payments of compensation.
3. The applicant then made application to this office on 23 February 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. The applicant sustained injury to his cervical spine on or about 22 May, 26 May or 29 May 2009. There is a dispute about the date of injury.

However it is noted that liability for the incident has been accepted and weekly payments of workers compensation made. The applicant's employment with the insured was terminated in March 2014. Since that time the applicant obtained employment as a telemarketer and more recently was self-employed initially selling insurance but in or around October 2014 switched to selling window furnishings.

5. The applicant previously sought procedural review of a work capacity decision dated 25 September 2013. The applicant was successful and the work capacity decision was set aside by an earlier decision of this office¹.
6. The facts and circumstances concerning the background of the claim are set out in the aforementioned recommendation and need not be repeated.

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 applied for a procedural review.
8. The applicant's main submission is that the insurer's work capacity decision was not timely, informed or evidence based as it has relied upon a report obtained over a year prior to the work capacity decision.

Submissions by the Insurer

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

The Decision

10. In accordance with Guideline 5.3.2 the applicant was informed that his work capacity assessment was completed on 10 October 2014 and that a work capacity decision was made on that day. The work capacity decision was that the applicant had current work capacity to work 38 hours per week and that he was able to earn up to \$1,434.00 per week.

¹ Reported and numbered as 10814

The effect of this work capacity decision was that the applicant's entitlement to weekly payments of compensation was reduced to "*\$Nil per week.*"

11. The applicant was informed that he had been paid 272 weeks of compensation and as a result he was subject to the provisions of Section 38 of the 1987 Act.
12. Financial information provided by the applicant to the insurer indicated that between 5 August 2014 and 8 September 2014 the applicant earned on average \$559.60 per week.
13. The applicant was informed that as he had been paid in excess of 130 weeks of compensation payments there was no requirement for him to comply with Section 38(3)(a). The applicant had demonstrated that he was working at least 15 hours per week and earning in excess of \$173.00 per week (as indexed) and had satisfied Section 38(3)(b).
14. The insurer informed the applicant that they had determined that he had the ability to earn in excess of his current weekly earnings and that it was considered that he had failed to meet the requirements of Section 38(3)(c) in that the insurer was not satisfied he is and would be "*likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase your current weekly earnings.*"
15. The insurer told the applicant: "*Based on information received, you have the ability to earn up to \$1,434.00 per week...*"
16. Guideline 5.3.2 requires the insurer to "*outline the evidence considered in making the decision, noting the author, the date and any key information. All evidence considered should be referred to, regardless of whether or not it supports the decision.*"
17. The term used by the insurer "*based on information received*" is non-specific and is unable to be scrutinised or verified. It is not known upon which report, if any, the insurer has relied to make the decision.
18. Further, the insurer has failed to provide an explanation to the applicant as to how the figure \$1,434.00 per week was calculated. The only other reference to the figure is on the first page of the decision. The insurer

stated *“Under Subsection 43(1)(c) of the NSW Workers Act 1987 you are able to earn up to \$1,434.00 per week in suitable employment.”*

19. The insurer has not set out within the work capacity decision the specific information used to calculate this amount. There is reference to three employment options being a sales representative, insurance consultant and sales clerk. The information provided to the applicant is that he is fit for suitable employment for 38 hours per week and the hourly rate for the various options (sales representative \$37.74 per hour/insurance consultant \$28.71 per hour/ sales clerk \$27.00 per hour) is provided.
20. If the applicant were to sit down and calculate the hours of his work capacity being 38 hours multiplied by the hourly rate of the provided options he may calculate for himself his work capacity. This process is not compliant with the Guidelines which provide for the insurer having to *“clearly explain the line of reasoning for the decision.”*
21. The insurer has failed to comply with the Guidelines by not particularising the reports and evidence relied upon in making the decision and by also failing to inform the applicant of the process undertaken to calculate his earning capacity.
22. In respect of the applicant’s submission that the insurer has not complied with Guideline 2.3 I consider the applicant has raised a valid issue. The Guidelines do require the insurer to make a work capacity decision which should be *“timely, informed and evidence based”* and the insurer has relied upon an Earning Capacity Assessment report dated 22 February 2013. This report was at least 20 months old at the time of the decision. The insurer, in this case cannot be said to have acted in a *“timely”* manner. However, as against this the insurer has relied upon a certificate of capacity dated 1 October 2014 which is more in keeping with the Guidelines and Section 44B of the 1987 Act.
23. The non-compliance with the Guidelines referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 10 October 2014.

FINDING



24. 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

25. The work capacity decision of the Insurer dated 10 October 2014 is set aside.

26. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 17 January 2015.

27. The payments are to be back-dated to 17 January 2015

28. 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
31 March 2015