

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*.

1. The injured worker applies for procedural review of a work capacity decision made by the employer which is self-insured (the Insurer).
2. The applicant was employed as a store person in or about November 1995. On 27 March 2011 the applicant suffered injury to his lower back. After an unsuccessful return to work the applicant's employment was terminated on 17 September 2012. The applicant has not returned to employment and was in receipt of weekly payments of compensation. Accordingly, he was an existing recipient of weekly payments of workers compensation immediately before 1 October 2012.
3. On 20 September 2013 the Insurer advised the applicant in writing of a work capacity decision which had been made on that date. He was advised that his entitlement to ongoing weekly payments would be terminated on 29 December 2013.
4. The applicant was not advised that his ongoing entitlements to medical and other expenses would be affected.
5. The applicant requested an internal review of the work capacity decision which was completed 7 November 2013. The original decision was confirmed.
6. On 29 November 2013 the applicant made an application to the WorkCover Authority of New South Wales for a merit review of the Insurer's work capacity decision. That merit review application was received within the 30 day period. The WorkCover merit review was completed and a Statement of Reasons issued on 20 February 2014. The decision confirms the work capacity decision.
7. On 19 March 2014 the applicant requested the Independent Review Officer to undertake a review of the decision of the Insurer pursuant to Section 44(1)(c) of the *Workers Compensation Act 1987* ("the 1987 Act").

I am satisfied that the applicant has made the application within the time provided by that section and on the correct form.

Applicant's Stated Grounds for seeking Procedural Review

8. The applicant's grounds for seeking procedural review are as follows:
- (i) That he does not have the transferrable skills to obtain the type of employment referred to in the work capacity decision;
 - (ii) His age is a barrier to seeking entry level alternate employment positions;
 - (iii) He has pre-existing Parkinson's disease and that this should have been considered when the work capacity decision was being made.

Submissions by the Insurer

9. The Insurer made no submissions in response to the application.

Legislation

10. Section 44(1)(c) of the 1987 Act limits the scope of procedural review to a review only of:

The insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer in making the decision.

Therefore while it remains the case that no discretion is unreviewable¹, the Insurer's discretion when making a work capacity decision appears only to be reviewable in the course of merit review or Judicial review.

12. The procedures to be followed by the Insurer are set out in the *WorkCover Work Capacity Guidelines* and *WorkCover Review Guidelines*. Both sets of *Guidelines* should be complied with in order for a work capacity decision to be validly made.
13. The relevant version of the *Guidelines* is the one dated 9 August 2013. That publication provides that the *Guidelines* provide instructions and

¹ See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997

guidance to Insurers regarding the appropriate and consistent application of work capacity assessment.

The Process of the Insurer

15. The important consideration on procedural review is not why a decision is made, but how it is made.

My Reasons:

16. The grounds upon which the worker seeks review are not specifically procedurally related.
17. The Insurer has made no submissions about compliance with the relevant statutory provisions and guidelines.
18. Since procedural review requires a scrutiny of the decision-making processes of the Insurer, including examination of compliance with legislation and *Guidelines* rather than a consideration of submissions made by either party, the review process may proceed despite the absence of relevant submissions from either party. Any demonstrable error on the part of the Insurer may invalidate the decision.
19. There are in my view breaches of the *Guidelines* which are sufficient to invalidate the work capacity decision made by the Insurer.
20. *Guideline 5.3.2* notes that the work capacity decision must state the 'impact of the decision on the worker in terms of their entitlement to weekly payments, entitlement to medical and related treatment expenses and return to work obligations.'
21. The work capacity decision does not refer at all to the worker's entitlement to medical or treatment expenses. The applicant is not advised of the implications of Section 59A of the 1987 Act and that his entitlement to such treatment expenses will terminate 12 months after the cessation of his weekly payments of compensation. This is a demonstrable error and in clear breach of the *Guideline*.
22. This *Guideline* also provides that the applicant be advised 'that any documents or information that have not already been provided to the



worker can be provided to the worker on request to the insurer.' The insurer has failed to so advise the applicant accordingly and this is yet another breach of the *Guidelines*.

23. I find that the work capacity decision is accordingly not effective and the weekly payments amendments do not as yet apply to the applicant.

My Recommendation:

24. For the reasons set out above I recommend that the Insurer make another work capacity decision, according to the *Guidelines*.
25. Since the applicant was an existing recipient as at 1 October 2012, he remains entitled to receive his pre-transition rate of weekly benefits until such time as he is validly transitioned under the Act. The applicant should have his payments restored from 29 December 2013.
26. Noting the binding nature of these recommendations I recommend that the Insurer takes my views into account, and I recommend that the Insurer immediately gives effect to them.

Tracey Emanuel
Delegate of WorkCover Independent Review Officer
17 April 2014