

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 30 September 2014 is set aside.**
- b. **The applicant is to be reinstated to her weekly payments at the rate applicable prior to 7 January 2015.**
- c. **The payments are to be back-dated to 7 January 2015 or the date payments ceased (whichever is applicable).**
- 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 30 September 2014. The decision informed the applicant that her weekly payments of compensation would cease on 7 January 2015. The applicant sought internal review and the Internal Review Decision was dated 24 November 2014.
2. The Internal Review Decision maintained the decision in so far as the applicant's payments of compensation would cease however the cessation date was extended to 28 February 2015. The decision also conceded that the "*suitable employment*" of a TESOL (teacher of English to speaker of other languages) referred to in the work capacity decision "*is not currently a suitable employment option.*"
3. The insurer then issued a document titled "*Amended Notification of an Internal Review Decision*" dated 5 January 2015. That document attempted to amend the Internal Review Decision which had advised the applicant of "*incorrect pre-injury average weekly earnings*" (PIAWE). The insurer also informed the applicant that her weekly payments would cease on 7 January 2015 as set out in the original notice.

4. In the interim, on 22 December 2014, the applicant applied for merit review by the Authority. The Authority issued a Merit Review recommendation dated 29 January 2015 finding that in accordance with Section 37(3) of the *Workers Compensation Act 1987* (the 1987 Act) the applicant was entitled to weekly payments of compensation in the “*amount of \$0.00.*”
5. The applicant then made application to this office on 26 February 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
6. The applicant sustained psychological injury as a result of bullying and harassment in the workplace. The accepted date of injury is 6 December 2011. However, the applicant did not consult her nominated treating doctor until August 2012 and she ceased work on 15 November 2012. The applicant was certified as having no capacity for work from 28 November 2012.
7. The applicant completed some voluntary and paid tutoring work from 22 April 2013 to 6 May 2013 and attempted a graded return to work with the insured commencing 11 June 2013. The insured made the applicant redundant on 27 August 2013. Since that time the applicant has worked various short periods for different employers on a casual basis. She has been in receipt of weekly payments of compensation from in or about November 2012.
8. 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

9. 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.

10. The applicant provided 2 pages of submissions with her application which included a useful chronology of correspondence between herself and the insurer. The relevant submissions in respect of procedural review include being advised of different dates for the cessation of payments, legislation not being explained and that her experience and qualifications is limited to a highly specialised area which limits her prospects of finding employment. The last of these submissions is not relevant for procedural review.

Submissions by the Insurer

11. The Insurer has provided submissions in response to the application. They have also provided a chronology of relevant correspondence.

The Decision

12. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.

13. The work capacity decision dated 30 September 2014 advised the applicant that a work capacity assessment was completed on 8 September 2014. As a result of the assessment a work capacity decision was made. This is in accordance with Guideline 5.3.2.

14. The insurer informed the applicant that they had made a decision that she had the capacity to work 20 hours per week and that she had not returned to work. The employment which the insurer had deemed suitable was that of *“Teachers of English to speaker of other languages.”*

15. The applicant’s pre-injury average weekly earnings (PIAWE) were determined to be \$1,086.25 per week and the amount it was determined that the applicant was able to earn in suitable employment was \$921.77 per week.

16. As the applicant had received 95 weeks’ worth of compensation payments her ongoing entitlement is to be determined by reference to Section 37(3) of the 1987 Act. This was correctly and adequately explained by the insurer. After using the algorithm provided in that

section the applicant's entitlement to ongoing weekly payments of compensation was calculated to be nil.

17. The insurer informed the applicant that her payments of weekly compensation would cease on 7 January 2015. This is the correct notice period taking into account the provisions of Section 54(2)(a) of the 1987 Act and Section 76(1)(b) of the *Interpretations Act 1987*.
18. In the Internal Review Decision dated 24 November 2014 the insurer informed the applicant that her PIAWE was subject to Schedule 6 Part 19H Division 1 Clause 1 of the 1987 Act and were deemed to be \$972.90 per week.
19. It is recorded in the work capacity decision that the applicant's capacity has alternated between no capacity and partial incapacity for work since 31 October 2012. The Internal Review Decision notes that the applicant ceased work on 15 November 2012 and was certified as having no capacity for work from 28 November 2012.
20. For Schedule 6 Part 19H Division 1 Clause 1 of the 1987 Act to apply the applicant must be an *existing recipient* of compensation as at 1 October 2012. This is clearly not the case and the insurer has made a demonstrable error.
21. The Internal Review Decision informs the applicant that upon review, they agree with the applicant's submission, that a TESOL is not currently suitable employment as she requires certification that she did not have at the time. Instead the appropriate vocational options were now deemed to be Jewish Studies Teacher, Private Tutor, School Learning Support Officer and Teacher's Aid. The amount the applicant was able to earn in this suitable employment remained at \$921.77.
22. The insurer has then used the appropriate algorithm set out in Section 37(3) of the 1987 Act to calculate that the applicant's ongoing entitlement to be nil. The insurer has also advised the applicant that pursuant to Section 54(2)(a) of the 1987 Act and Section 76(1)(b) of the *Interpretations Act 1987* her weekly payments of compensation will now cease on 28 February 2015. No reason is provided for the change of date to the cessation of payments. If the date change was as a result of

the insurer altering the original decision then the new notice period provided is insufficient given the date of the Internal Review Decision. The Insurer has not complied with the legislation.

23. The Insurer then issued an “*Amended Notification of an Internal Review Decision*” dated 5 January 2015. That decision informed the applicant that the PIAWE used in the Internal Review Decision was incorrect and it was in fact \$1,086.25. This amount was calculated using the applicant’s pre-injury earnings of \$1077.84 per week and indexing that rate from April 2014.
24. The insurer maintained the original decision in that the applicant’s entitlement to ongoing payments of compensation was nil. This letter informed the applicant that her payments would cease 7 January 2015. This was the date in the original work capacity decision.
25. Had the insurer maintained the original work capacity decision, there might have been no problem. However in respect of the date of cessation of payments they varied the original decision purporting to change the last date on which payments would be received. The variation was internally inconsistent (being both an extra 3 months and 3 days and in the next decision reverting back to the original notice period). The applicant, who relies on these weekly payments, is entitled to be told the correct information in a non-misleading way.
26. The next issue is that the insurer has initially informed the applicant that her PIAWE was based upon her pre-injury earnings, then it was based upon the “*transitional rate*” (which was incorrect as the applicant was not an existing recipient) and then in the final decision the PIAWE reverts back to the applicant’s pre-injury earnings. The insurer has provided confusing and conflicting information to the applicant. The insurer has failed to comply with the Guidelines and with the legislation.
27. The insurer also conceded that the suitable employment option in the original work capacity decision was in fact, not suitable employment, and never was. This error in itself is sufficient to make the work capacity decision invalid.

28. The work capacity decision, Internal Review Decision and amended notification of an Internal Review Decision establish that the insurer's decision making process in this case was confused and flawed and did not comply with Guideline 5.3.2 or the legislation.
29. The non-compliance with the Guidelines referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 30 September 2014.

FINDING

30. 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

31. The work capacity decision of the Insurer dated 30 September 2014 is set aside.
32. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 7 January 2015.
33. The payments are to be back-dated to 7 January 2015 or the date payments ceased (whichever is applicable).
34. 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
9 April 2015