

**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 18 September 2014 is set aside.**
- b. **The applicant is to be reinstated to her weekly payments at the rate applicable prior to 24 December 2014.**
- c. **The payments are to be back-dated to 24 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 18 September 2014. The decision informed the applicant that her weekly payments of compensation would cease on 24 December 2014.
2. The applicant applied for merit review by the Authority. The Authority issued a Merit Review recommendation dated 13 February 2015.
3. The applicant then made application to this office on 25 February 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. Section 44A of the *Workers Compensation Act 1987* (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

5. 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.
6. The applicant’s submissions were that the insurer failed to:
 - correctly reference the legislation;
 - advise the applicant that a legal practitioner cannot be paid for assistance provided to a worker with respect to work capacity reviews; and
 - attach a copy of the application for internal review.

In addition the date of injury and claim number in the work capacity decision were incorrect.

Submissions by the insurer

7. On 9 March 2015 the Director of Work Capacity Reviews sent an email to the insurer requesting the following documents:
 - work capacity decision;
 - internal review decision;
 - recommendations and findings on merit review from the Authority;

In addition the insurer was invited to make submissions in response to the application for procedural review and to also clarify the date of injury and claim number referred to in the work capacity decision.

8. As at the date of this recommendation the insurer has not responded to the email.

The Decision

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

10. The work capacity decision dated 18 September 2014 informed the applicant that she had received 692 weeks' worth of compensation payments. The decision also advised the applicant that the date of injury was 28 August 2014. This is clearly inconsistent, incorrect and confusing to the applicant.
11. The applicant has also submitted that the claim number on the work capacity decision is incorrect. In the absence of any submissions from the insurer the applicant's submission is accepted.
12. Guideline 5.3.1 requires the insurer to communicate a clear message to the applicant and present concise information. The insurer has not complied with that Guideline.
13. The insurer informed the applicant that her weekly payments of compensation would cease on 24 December 2014. In respect of the applicant's entitlement to medical and related treatment expenses the insurer informed the applicant "*Section 59A(2) of the 1987 Act states that you are entitled to claim treatment and service costs for up to 12 months after weekly payments of compensation has ceased.*"
14. Guideline 5.3.2 requires the insurer to 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.
15. In the work capacity decision the insurer failed to inform the applicant that her entitlement to medical and treatment expenses will actually cease 12 months after her weekly payments of compensation cease unless she fulfils certain criteria outlined in Section 59A(3) of the 1987 Act.
16. Furthermore, the insurer has advised the applicant that in order for the insurer to be able to consider requests for treatment she must continue to submit current "*WorkCover certificates of capacity, which confirms your recommended treatment plan.*" This is incorrect.
17. A WorkCover certificate of capacity is evidence as to work capacity in accordance with Section 44B of the 1987 Act. It is not a requirement of

the WorkCover Guidelines for *Claiming Compensation Benefits* which came into effect on 11 October 2013.

18. The insurer has failed to comply with Guideline 5.3.2. This non-compliance with the Guidelines referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 18 September 2014.

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 18 September 2014 is set aside.
21. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 24 December 2014.
22. The payments are to be back-dated to 24 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
14 April 2015