

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 25 August 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 25 August 2014.**
- c. The payments are to be back-dated to the date payments ceased.**
- 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 25 August 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 1 December 2014. That decision confirmed the work capacity decision.
2. The applicant applied to the Authority for Merit Review on 29 December 2014. On 11 February 2015 the Authority made findings and a recommendation that in accordance with Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) the applicant was not entitled to weekly payments of compensation.
3. The applicant then made application to this office on 12 March 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 5 June 2000 the applicant sustained injury to his right knee when he fell from a chair. He subsequently developed symptoms in his left knee. The applicant performed intermittent modified duties until he was

medically discharged in 2006. As at the time of the work capacity decision the applicant was working as a security guard. The insurer accepted liability for the claim and the applicant was in receipt of weekly payments of compensation.

5. 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

6. 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.
7. The submissions provided by the applicant including an inability to increase hours of work 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 relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
10. Guideline 5.3.2 provides that the insurer 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. They also must advise of the date the decision will take effect.
11. Section 54(2)(a) of the 1987 Act requires at least three months and four working days’ notice be given if payments are being reduced or ceased having regard to Section 76(2)(a) and (b) of the *Interpretation Act 1987*. In this decision the Insurer has failed to reference these sections and failed to explain the legislation. As a result the insurer did not advise the

applicant of the date his weekly payments of compensation would cease.

12. In respect of the cessation of payments the only information provided to the applicant is at page 6 of the decision under the heading *“What happens during the three month notice period?”* The applicant is informed that during the *“three month and seven day notice period”* his weekly payments will be processed. This notice period is incorrect. The correct notice period is three months and four business days as discussed above. The applicant is not advised when the notice period commences and more importantly the last date payments will be made.
13. The insurer has referred to Section 59A(2) of the 1987 Act. The insurer has informed the worker that he will be no longer entitled to medical expenses *“12 months after he ceases to be entitled to weekly payments”*. As the applicant has not been advised of the date that his weekly payments cease he has effectively not been advised of the date that his entitlement to medical expenses will cease. Furthermore the insurer has failed to advise the applicant that he may again become entitled to medical expenses at some time in the future should he satisfy the requirements of Section 59A(3) of the 1987 Act.
14. The insurer has failed to comply with the legislation and the Guidelines.
15. Guideline 5.3.2 requires the insurer to explain the relevant entitlement periods. The applicant has been advised that he has received in excess of 260 weeks' worth of compensation payments. The applicant was informed that *“your weekly payments have transitioned into the post 260 week period which is for workers that have been in receipt of weekly payments in excess of 260 weeks.”*
16. The applicant is then informed that in order to continue to be entitled to weekly payments he must be working 15 hours or more per week and earning at least \$173.00 per week. The insurer has not referred to any legislation.
17. The only section in the 1987 Act which refers to workers receiving weekly payments post 260 weeks is Section 39. The requirement for the applicant to be working 15 hours per week and earning in excess of

\$173.00 per week is Section 38(3) which is the special requirements for workers who have received in excess of 130 weeks of payments.

18. The algorithm used by the insurer on page 6 of the decision to determine the applicant's ongoing entitlement to weekly payments of compensation is in accordance with Section 38(7) of the 1987 Act however, the insurer has not referred to any of the legislation.
19. In the algorithm used by the insurer the figure of \$960.50 is used as the "deemed rate." The insurer has failed to explain to the applicant what the "deemed rate" is and that it is actually being used as his pre-injury average weekly earnings in accordance with Schedule 6 Part 19H Division 1 Clause 1 of the 1987 Act. The insurer has also failed to advise the applicant that this Schedule applies as the applicant was an *existing recipient* of compensation as at 1 October 2012.
20. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 25 August 2014.

FINDING

21. 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 legislation and the Guidelines which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

RECOMMENDATION

22. The work capacity decision of the Insurer dated 25 August 2014 is set aside.
23. The applicant is to be reinstated to his weekly payments at the rate applicable as at 25 August 2014.
24. The payments are to be back-dated to the date payments ceased.



WorkCover **independent** review office

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

25. 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
15 April 2015