

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 22 December 2014 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable as at 31 March 2015.**
- c. The payments are to be back-dated to 31 March 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 22 December 2014. The decision informed the applicant that her weekly payments of compensation would cease on 31 March 2015. The applicant sought internal review and the Internal Review Decision was dated 12 February 2015. That decision confirmed the work capacity decision.
2. The applicant applied to the Authority for Merit Review on 23 February 2015. On 11 March 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 19 March 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 14 November 2011 the applicant sustained injury to her neck and right arm during the course of her employment as a registered nurse. The applicant was on and off work for varying periods and underwent

arthroscopic surgery to her right shoulder on 23 March 2012. The applicant was performing suitable duties up until October 2013 when they were withdrawn. She has not worked since that time.

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 related to whether the applicant was qualified to perform the suitable duties selected by the insurer, failing to consider the applicant’s age, education, skills and work experience and an incorrect interpretation of Section 38 of the 1987 Act. Apart from the last of these submissions they were primarily not relevant to procedural review.

Submissions by the Insurer

8. The Insurer has provided submissions dated 24 March 2015 in response to the application. The insurer submits that the work capacity decision was upheld by merit review and therefore “*believes*” that the decision meets procedural fairness.

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 reference the relevant legislation, outline the evidence considered in making the decision and clearly explain the line of reasoning.

11. At page 3 of the work capacity decision the insurer has cited Section 38(3) of the 1987 Act which comprised of subsections (a), (b) and (c). The insurer then informed the applicant that she must comply with the *“three provisions under Section 38(3).”* This is an error.
12. As the applicant was an existing recipient as defined in Schedule 6 Part 19H Division 1 Clause 1 of the 1987 Act Section 38(3)(a) does not apply. The applicant was not required to comply with all three provisions as stated in the work capacity decision. The only provisions relevant to this applicant were Section 38(3)(b) and (c).
13. The insurer has failed to properly explain the legislation and has failed to comply with the Guidelines.
14. Guideline 5.1 maintains that the insurer should evaluate all available and relevant material and relevant considerations and seek any additional information that is required to ensure the worker’s current capacity for work is fully understood.
15. At page 11 of the work capacity decision the insurer relies upon a discussion between Dr K and the applicant’s nominated treating doctor, Dr T. The decision notes that the *“following points were covered:”*
 - *That you had no “red flag” and no neurological deficit and that was no reason why you could not work full time.*
 - *Dr [T] stated that he had certified you to have capacity for 6 hours 4 days per week and he found upgrading difficult.*
 - *It was noted the most recent fall and Dr [K] advised Dr [T] that any incapacity as a result of this should be treated as a separate issue with separate certificate.*
 - *Dr [T] agreed. It was agreed that you are fit for suitable duties and suitable duties full hours was recommended.*
 - *Dr [T] agreed to attempt to upgrade your capacity at the next review.*
16. It is unclear from the work capacity decision whether the above information was obtained by the insurer from a report from Dr K, a conversation or file notes from the insurer’s file. It is noted that the list of documents purported to be relied upon by the insurer at pages 11 and

12 of the decision does not refer to any type of document or record dated 2 December 2014.

17. This information used by the insurer in the work capacity decision is not medical evidence and it does not come within the definition of Section 44B of the 1987 Act or Guideline 4.

18. This is another case¹ where Dr K has alleged that an NTD will agree “to attempt” an upgrade of a worker’s capacity. There is no subsequent report or verification from Dr [T] that he has agreed with the propositions raised in the work capacity decision. It is surprising that the insurer has elected to rely upon this evidence when no effort was made to corroborate the conversation.

19. This procedural review is not a review of any judgement or discretion exercised by the insurer in making the decision.² However it cannot be within the discretion of a party to rely upon evidence which has been obtained in a way conducive of procedural error. It is incumbent upon the insurer to provide the NTD (in this case Dr [T]) with the opportunity to confirm or dispute the recollection of the conversation relied upon before making a decision which is adverse to the applicant.

20. The insurer has relied upon the “discussion” between Dr [K] and Dr [T] under the heading “Reasons for the Decision”. Therefore it has formed part of the decision making process. Therefore the work capacity decision must be set aside on the basis of the way in which the “evidence” was obtained and lack of corroboration.

21. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 22 December 2014.

FINDING

¹ See case reported and numbered 23214

² Section 44(1)(c) of the Workers Compensation Act 1987



22. 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

23. The work capacity decision of the Insurer dated 22 December 2014 is set aside.

24. The applicant is to be reinstated to her weekly payments at the rate applicable as at 31 March 2015.

25. The payments are to be back-dated 31 March 2015.

26. 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
29 April 2015