

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 28 November 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 9 March 2015.**
- c. The payments are to be back-dated to 9 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 28 November 2014. The decision informed the applicant that his weekly payments of compensation would cease on 9 March 2014 (*sic*)¹. The applicant sought internal review on 24 December 2014 and the Internal Review Decision was dated 19 January 2015. That decision confirmed the work capacity decision.
2. The applicant applied to the Authority for Merit Review on 18 February 2015 and they delivered findings and recommendations dated 12 March 2015. The Authority made a finding 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 10 April 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

¹ The first of what can only be described as a regrettable series of typographical, grammatical and interpretative errors.

4. On 19 November 2009 the applicant suffered injury to his cervical spine when he walked into a closed glass door whilst in the course of his employment. The applicant underwent surgery in January 2010 and February 2011. The applicant returned to work with the employer performing suitable duties. Those duties were withdrawn on 23 December 2010 and the applicant's employment ceased. The applicant obtained employment in or about 2012 as a relief facilities manager on a casual basis. The applicant was in this employment at the time the work capacity decision was made. The applicant was also 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 applicant has submitted that: Section 59A does not apply as he has been assessed at and paid compensation for 27% WPI pursuant to Section 66 of the 1987 Act; reasons have not been provided for why the applicant does not satisfy Section 32A (b) or (c); and the applicant has not been accorded the benefit of the stay provided for in clause 30 of schedule 8 to the *Workers Compensation Regulation 2010* (presumably because payments ceased on 16 March 2015, despite ongoing review under section 44).

Submissions by the Insurer

8. The Insurer has provided submissions dated 17 April 2015 in response to the application. The insurer responded to the applicant's submissions on Section 59A and Section 32A (b) and (c) as well as providing a useful chronology of correspondence.

The Decision

9. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
10. In accordance with Guideline 5.3.2 the insurer has informed the applicant that he has received 258 weeks' worth of weekly compensation payments.
11. At page 2 of the decision the insurer informs the applicant that his pre-injury average weekly earnings are deemed to be \$972.90 based on the evidence that the applicant was an existing recipient of weekly compensation immediately prior to 1 October 2012.
12. The insurer then informed the applicant that his pre-injury average weekly earnings (PIAWE) have been calculated in accordance with Sections 35(1) and Sections 44C to 44I of the 1987 Act, and a decision to use that amount has been made in accordance with Section 43(1)(d) of the 1987 Act. The applicant is then invited to provide any additional information regarding the calculation of his PIAWE. This is an error.
13. Guideline 5.3.2 requires the insurer to reference the relevant legislation. As the applicant was an existing recipient the PIAWE is taken to be the transitional rate in accordance with Schedule 6 Part 19H Clause 9(3) of the 1987 Act. This amount is indexed annually and at the relevant time of making the decision was \$972.90 per week.
14. Whilst the insurer informed the applicant of the correct amount for the PIAWE an error was made referring the applicant to the incorrect legislation as well as inviting him to provide further information in respect of his earnings when in effect his PIAWE was deemed by the 1987 Act. The insurer has failed to comply with the Guidelines and legislation.
15. 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.
16. The insurer has informed the applicant that in accordance with Section 59A(2) his medical expenses will cease 12 months after his entitlement

to weekly compensation ceases. Effectively, this is 12 months from the date weekly payments cease. The insurer has provided an explanation of Section 59A(3) noting that the applicant may become entitled to payment of medical expenses should he again become entitled to weekly payments of compensation.

17. A review of the documentation reveals that the applicant has been assessed, and received compensation payment in respect of 27% whole person impairment pursuant to Section 66 of the 1987 Act. As a result of Clause 28 Schedule 8 of the *Workers Compensation Regulations 2010* a worker is exempt from the application of Section 59A if the worker's injury has resulted in a permanent impairment greater than 20%.
18. The insurer has erred in advising the applicant that his entitlement to medical and related treatment expenses will cease 12 months after the cessation of payments. The insurer has submitted that as the error did not impact upon the applicant in that his entitlement to medical and treatment expenses had not ceased prior to the error being corrected it does not affect the work capacity decision.
19. This is a procedural review conducted on the processes of the insurer in making the work capacity decision. The insurer had not complied with the Guideline or legislation when they incorrectly advised the applicant that his entitlement to medical treatment expenses would cease. Therefore, this is a procedural error.
20. Furthermore, under the heading "*required notice period*" the insurer has informed the applicant that "*you will only continue to be entitled to weekly compensation payments until 9 March 2014.*" While it would be open to the Insurer to argue that this is a mere typographical error and likely to be read by a reasonable person as "9 March 2015," this is unsatisfactory as the applicant is completely reliant upon the insurer advising him of the correct timeframes and is entitled to believe that the Insurer has checked its correspondence for errors prior to sending such an important letter.

21. By informing the applicant of the incorrect date of the cessation of payments the insurer has failed to comply with Section 54(2)(a) of the 1987 Act and the Guidelines.
22. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 28 November 2014.

FINDING

23. 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

24. The work capacity decision of the Insurer dated 28 November 2014 is set aside.
25. The applicant is to be reinstated to his weekly payments at the rate applicable as at 9 March 2015.
26. The payments are to be back-dated 9 March 2015.
27. 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 May 2015