



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 10 September 2014 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 17 December 2014.**
- c. The payments are to be back-dated to 17 December 2014.**
- d. Such payments are to continue until such time as a further work capacity decision comes into effect.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 10 September 2014. The decision advised the applicant that her weekly payments of compensation would cease from 17 December 2014. The applicant sought internal review of the decision and the Internal Review Decision was dated 15 October 2014. The applicant then sought Merit Review from the Authority on 17 October 2014 and they delivered a decision dated 20 November 2014 upholding the work capacity decision. The applicant then applied to this office for procedural review on 11 December 2014.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. The applicant sustained a tenosynovitis injury to both upper arms as a result of the nature and conditions of her employment. The date of injury was 6 March 2009. The applicant was certified fit for pre-injury duties for varying periods. The remaining periods she was certified unfit. The applicant eventually underwent surgery to her right arm on 2 March 2011. The applicant was certified unfit for pre-injury duties but was upgraded to being fit for suitable duties on 16 May 2011. The

applicant's employment was terminated on 26 September 2011. The applicant has not worked since that time.

4. The applicant was in receipt of weekly payments immediately before 1 October 2012. Accordingly Clause 8 of Part 19H of Schedule 6 to the *Workers Compensation Act 1987* (the 1987 Act) required the Insurer to conduct a work capacity assessment.
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).
6. The relevant version of the Guidelines came into effect on 11 October 2013. That publication stated that the Guidelines provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessments and decisions.

Submissions by the applicant

7. 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 requested a procedural review. The applicant's submissions are that the insurer has failed to reference the legislation and failed to advise the applicant that documents are available upon request.

Submissions by the Insurer

8. The Insurer has not made submissions in response to this application.

The Decision

9. The applicant's first submission is that the Insurer failed to correctly reference the legislation.
10. Guideline 5.3.2 requires the insurer to advise the date of the work capacity decision. The insurer advised the applicant that the work capacity assessment was completed on 9 September 2014 and that a work capacity decision was made. The applicant was notified of the work capacity decision by letter dated 10 September 2014.

11. The Insurer has complied with Schedule 6 Part 19H Division 2 Clause 9 of the 1987 Act and Schedule 8 Clause 22(1) of the *Workers Compensation Regulation 2010* (the Regulation) by providing the above information to the applicant. The Insurer has also complied with the Guideline.
12. 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(1)(a) and (b) of the *Interpretation Act 1987*. In this decision the insurer has referenced and explained both sections of each piece of legislation. As a result the applicant was advised that her payments would cease from 17 December 2014 which is the required notice period. The Insurer has complied with the legislation.
13. Guideline 5.3.2 requires the insurer to explain the relevant entitlement periods. The insurer has informed the applicant that she has received 236 weeks' worth of compensation payments. Therefore her ongoing entitlements would be assessed pursuant to Section 38 of the 1987 Act. The insurer has explained the special requirements of Section 38(3)(a), (b) and (c) which must be fulfilled for the applicant to be entitled to ongoing weekly payments. The insurer has also noted that the amount referred to in subsection (3)(b) has been indexed to \$173 per week by virtue of indexation on 27 June 2014.
14. The insurer has determined that the applicant has a current work capacity. At the time the work capacity decision was made the applicant was not working. The applicant's ongoing entitlements are to be determined by Section 38(3). For the applicant to be entitled to ongoing weekly payments one of the pre-conditions is that she must be working "*not less than 15 hours per week.*" In this case the applicant is not working at all and therefore fails to meet this precondition. The Insurer has complied with the Guideline by referencing the legislation and evidence relied upon.
15. The same guideline also requires the insurer to advise the applicant of the impact the decision has on her entitlement to medical and related treatment expenses. In this decision the insurer has referenced and explained Section 59A(1)(2) and (3). The applicant was advised that payment of pre-approved reasonable and necessary medical and other expenses will be limited for up to 12 months after your entitlement to weekly payments cease. It was also explained that the applicant may again become entitled to payment of medical expenses by virtue of Section 59A(3) of the 1987 Act. The Insurer has complied with the Guideline.

16. In respect of the applicant's first submission for procedural review I note the Insurer has referenced the relevant legislation and Guidelines throughout the work capacity decision. The Insurer has also properly explained the legislation as well as explaining the impact on the applicant's entitlements. The applicant's submission is not accepted.
17. The applicant's next submission is that the insurer has not advised the applicant that any documents or information that have not already been provided to her can be provided upon request to the Insurer.
18. Guideline 5.3.2 requires the Insurer to *"advise that any documents or information that have not already been provided to the worker can be provided to the worker on request to the Insurer."*
19. The Guidelines state that *"the written work capacity decision advice must comply with any requirements of the 1987 Act and Review Guidelines."*
20. A review of the work capacity decision reveals that the Insurer did fail to advise the applicant of the above and as a result the Insurer has not complied with the Guideline. As a result the decision is invalid.

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 has been a breach of 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 10 September 2014 is set aside.
23. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 17 December 2014.
24. The payments are to be back-dated to 17 December 2014.



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25. Such payments are to continue until such time as a further work capacity decision comes into effect.

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Delegate of the WorkCover Independent Review Officer
16 January 2015