

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 7 November 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 16 February 2015.**
- c. The payments are to be back-dated to 16 February 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 7 November 2014. The decision informed the applicant that his weekly payments of compensation would cease on 16 February 2015. The applicant sought internal review on 14 January 2015 and the Internal Review Decision was dated 13 February 2015. That decision confirmed the work capacity decision.
2. The applicant applied to the Authority for Merit Review on 9 March 2015 and they delivered findings and recommendations dated 10 April 2015. The Authority made a finding that the worker did not meet the special requirements for the continuation of weekly payments after the second entitlement period contained in Section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act).
3. The applicant then made application to this office on 24 April 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. On 13 January 2005 the applicant suffered injury to his left shoulder whilst performing his duties as a tyre fitter. The applicant was not able to return to his pre-injury duties and has been in receipt of weekly payments of compensation from the insurer 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. I have reviewed the applicant’s submissions and they are not relevant to procedural review.

Submissions by the Insurer

8. The Insurer has provided submissions dated 1 May 2015 in response to the application. The insurer responded to the applicant’s submissions and provided a useful chronology of the correspondence to date.

The Decision

9. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
10. The insurer has informed the applicant that as he was in receipt of weekly payments of compensation immediately before 1 October 2012 he is considered to be an “*existing recipient*”. As an existing recipient the applicant’s pre-injury average weekly earnings (PIAWE) is deemed to be the transitional amount in Schedule 6, Part 19H, Division 1 Clause 2(1) and (2) of the 1987 Act. This is correct. However, the insurer has informed the applicant that the relevant amount at the time of the work capacity decision was \$778.32 per week. This is an error. The correct amount, as at 7 November 2014, was \$972.90 per week.

11. The insurer has failed to comply with Guideline 5.3.2 and has incorrectly referenced the legislation.

12. In accordance with the aforementioned Guideline the insurer has informed the applicant that he has received 511 weeks' worth of weekly compensation payments and the insurer has advised the applicant that if he is to be entitled to weekly payments of compensation after the second entitlement period he must meet the special requirements of Section 38(3) of the 1987 Act.

13. At page 3 of the work capacity decision the insurer has cited Section 38(3) of the 1987 Act as follows:

"A worker who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if:

(a) the worker has applied to the insurer in writing (in the form approved by the Authority) no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payments after the second entitlement period, and

(b) the worker has returned to work (whether in self-employment or other employment) for a period of not less than 15 hours per week and is in receipt of current weekly earnings (or current weekly earnings together with a deductible amount) of at least \$155 per week, and

(c) the worker is assessed by the insurer as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker's current weekly earnings."

14. The insurer then informed the applicant that it had determined that he had not complied with all the requirements to be entitled to ongoing weekly payments of compensation after the cessation of the second entitlement period. The insurer gave three reasons for non-compliance the first being:

“You have not applied to the insurer in writing no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payments after the second entitlement period.”

15. The insurer may be correct and the applicant may not have complied with Section 38 (3) (a) and may not have applied in writing for the continuation of weekly payments. However, as the applicant was an existing recipient of weekly payments of compensation this section did not apply to him. The applicant was not obliged to write to the insurer for the continuation of weekly payments. It is an error by the insurer to advise the applicant that he should have done so.
16. The insurer was correct in informing the applicant that he did not comply with Section 38(3) (b) and (c).
17. The non-compliance with the Guidelines and legislation referred to in the paragraphs 10 and 15 above is sufficient to set aside the work capacity decision dated 7 November 2014.

FINDING

18. 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

19. The work capacity decision of the Insurer dated 7 November 2014 is set aside.
20. The applicant is to be reinstated to his weekly payments at the rate applicable as at 16 February 2015.
21. The payments are to be back-dated to 16 February 2015.



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22. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.

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Delegate of the WorkCover Independent Review Officer
1 June 2015