

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 30 June 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 1 October 2014.**
- c. The payments are to be back-dated to 1 October 2014.**
- 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 30 June 2014. The decision informed the applicant that his weekly payments of compensation would cease on 1 October 2014. The applicant sought internal review on a date not specified in the documentation and the Internal Review Decision was dated 27 February 2015. That decision is alleged to be a "*fresh decision*" however, it remains titled a "*work capacity review decision*".
2. The applicant applied to the Authority for Merit Review on 9 March 2015 and they delivered findings and recommendations dated 13 April 2015. The Authority made a finding that the applicant falls within the second entitlement period and is entitled to weekly payments of compensation in accordance with Section 37(2) of the *Workers Compensation Act 1987* (the 1987 Act). The applicant's entitlement to weekly compensation is calculated at nil.
3. The applicant then made application to this office on 28 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 December 2013 the applicant sustained injury to his left wrist in the course of his employment as a truck driver. The applicant underwent surgery on 20 December 2013 and was off work for three months. He returned to his pre-injury employer however, there were no suitable duties available. The applicant was placed in a placement program and is currently working 22.5 hours per week as an administration and loan management specialist.
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 the insurer has failed to:
 - Correctly reference the legislation;
 - Advise that any documents or information that have not already been provided to the worker on request to the insurer;
 - Advise that the legislation provides for 3 months’ notice prior to the cessation of the weekly benefit;
 - Advise of the date the entitlements to weekly benefits may stop.
8. I have addressed the applicant’s submissions in the paragraphs below.

Submissions by the Insurer

9. The Insurer has not provided submissions in response to the application.

The Decision

10. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.

11. Section 44(1) of the 1987 Act states:

“(1) An injured worker may refer a work capacity decision of an insurer for review:

(a) by the insurer (an "internal review") in accordance with the WorkCover Guidelines within 30 days after an application for internal review is made by the worker, or

(b) by the Authority (as a merit review of the decision), but not until the dispute has been the subject of internal review by the insurer, or

(c) to the Independent Review Officer (as a review only of the insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer in making the decision), but not until the dispute has been the subject of internal review by the insurer and merit review by the Authority”.

12. The insurer made a work capacity decision dated 30 June 2014. The applicant applied for an internal review. The insurer made an internal review decision dated 27 February 2015. The insurer has purported to have made a new decision with this document. The internal review is not a separate work capacity decision. It remains a review of the first decision. After internal review the applicant then requested a merit review from the Authority which delivered a decision dated 13 April 2015. In accordance with Section 44(1) of the 1987 Act the applicant applied to this office for merit review. The only document which can be reviewed by this office is the work capacity decision.

13. The work capacity decision was dated 30 June 2014. Guideline 5.3.2 requires the insurer to advise the applicant of the date of the work capacity assessment. The insurer has failed to advise the applicant of the date and has therefore not complied with the Guideline.

14. The same Guideline requires the insurer to advise the applicant of the date that the decision will take effect. The insurer has informed the applicant that his weekly payments will cease on 1 October 2014.

15. 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)(b) of the *Interpretation Act 1987*. The correct notice period should have been 4 October 2014. The insurer has failed to comply with both the legislation and the Guidelines.
16. Guideline 5.3.2 requires the insurer to reference the relevant legislation. Whilst the insurer has informed the applicant that his entitlement to medical and related treatment expenses will cease 12 months after his weekly payments cease it has failed to refer to Section 59A(2) of the 1987 Act. The insurer has failed to comply with the Guidelines.
17. The Guideline also requires the insurer to outline the evidence considered in making the decision, noting the author, the date and key information. The insurer has failed to reference any evidence or documentation within the decision.
18. The insurer has listed the documents which it considered in making the decision at page 2 of the work capacity decision. The insurer not only failed to refer to the documents within the decision but also failed to inform the applicant that any documents or information that has not already been provided can be requested from the insurer. The insurer has failed to comply with the Guidelines.
19. The insurer has stated at page 2 of the work capacity decision that "*the decision maker has satisfied the requirements of the legislation when making this work capacity decision.*" In this circumstance this statement is incorrect.
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 30 June 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 30 June 2014 is set aside.
23. The applicant is to be reinstated to his weekly payments at the rate applicable as at 1 October 2014.
24. The payments are to be back-dated to 1 October 2014.
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
3 June 2015