

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*.

1. the applicant seeks for a review of the decision made by the Insurer.
2. There is no dispute that the applicant was injured in the course of his employment on 28 September 1994. The applicant returned to suitable employment in a variety of jobs. The applicant currently works on a casual basis at approximately 30 hours per week. The Insurer has made weekly payments for the earnings differential as required under the then provisions of the *Workers Compensation Act 1987* (1987 Act).
3. The NSW Government introduced significant reforms to the Workers Compensation Scheme in June 2012 including to the calculation of weekly payments.
4. As the applicant was in receipt of compensation by way of weekly payments as at 1 October 2012. Clause 8 of Part 19H of Schedule 6 to the 1987 Act required the Insurer to conduct a work capacity assessment for the purpose of facilitating the application of the amended weekly benefits to the applicant.
5. Section 44A of the 1987 Act provided that a work capacity assessment is an assessment of the injured worker's current work capacity and must be conducted in accordance with the *WorkCover Work Capacity Guidelines (the Guidelines)*.
6. The relevant version of the *Guidelines* is the one published on 27 September 2012 which applied to all claims from 1 January 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.
7. Once the Insurer has conducted an assessment then the Insurer is required to make a work capacity decision. Where that decision involves a reduction in the weekly payments payable to the injured worker then the Insurer is required to give proper notice to the worker (Section 54 of the 1987 Act).
8. The applicant has been in receipt of weekly payments for 658 weeks as at the date of the decision and therefore Section 38 of the 1987 Act applies.

9. The decision is dated 9 May 2013.
10. The applicant referred the decision for an internal review and then a Merit Review pursuant to section 44 of the 1987 Act. The Merit Review is dated 18 October 2013. Section 44(3) states:

The following provisions apply to the review of a work capacity decision when the reviewer is the Authority or the Independent Review Officer:

- (a) *an application for review must be made within 30 days after the worker receives notice in the form approved by the Authority of the insurer's decision on internal review of the decision (when the application is for review by the Authority) or the Authority's decision on a review (when the application is for review by the Independent Review Officer),*

11. The applicant referred the Merit Review for procedural review on 8 December 2013. This is beyond the 30 day time limit. The Merit Review was sent by email. The *Guidelines for work capacity decision Internal Reviews by Insurers and Merit Reviews by the WorkCover Authority* states at Part 2.4 that "...delivery to an address for service is taken to be effected at the following times:...2.4.4 in the case of an email address..." Those *Guidelines* allow for service by email and service by email was appropriate. However, the applicant states that at that time he was having problems with his email and that he did not receive the Review. In his application for procedural review he states that he has not at that date seen the Review.

12. I accept the statement of the applicant that he had not by 8 December 2013 received the Review. His application for Procedural Review is therefore not out of time.

13. Further, section 44(3) states:

- (3) *The following provisions apply to the review of a work capacity decision when the reviewer is the Authority or the Independent Review Officer:*
 - (a) *an application for review must be made within 30 days after the worker receives notice in the form approved by the Authority of the insurer's decision on internal review of the decision (when the application is for review by the Authority) or the Authority's decision on a review (when the application is for review by the Independent Review Officer),*

14. The Authority's decision (the Merit Review) may be reviewed within 30 days after the worker receives notice in the approved form. There is no approved form in relation to a Merit Review. As such, the 30 day time limit has not begun. The applicant cannot be out of time.
15. Part 5.2 of the *Guidelines* provide that the Insurer must communicate to the applicant preferably by telephone a review is taking place. The Insurer undertook this very well. The *Guidelines* then require that "*This information should also be confirmed in writing*". The Insurer has failed to confirm the advice in writing.
16. There is one major difficulty which faced the Insurer in making its work capacity decision and that is the requirement contained in Clauses 5 and Clause 5.1 of the *Guidelines*. That was in the following terms:

"Clause 5

Work capacity decisions should be made in line with the Best Practice Decision- Making Guide."

and then:

"Clause 5.1

When making a work capacity decision the insurer should follow the Best Practice Decision-Making Guide."

That Guide did not exist and has never existed or been published by WorkCover.

FINDING

17. I find that the Insurer has failed to follow the procedure as set out in the WorkCover *Guidelines* which is required by Section 44A of the 1987 Act. The Insurer has also failed to follow the 1987 Act.

RECOMMENDATION

18. I recommend that the Insurer conduct a new work capacity assessment and make a new work capacity decision in accordance with the WorkCover *Guidelines*.



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19.I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 7 June 2013 until such time as he is properly transitioned. Those payments should continue from 15 September 2013 being the date on which they ceased.

BRIAN HATCH
Delegate of the WorkCover Independent Review Officer

8 January 2014