

**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 ("applicant") has requested a review of the decision made by the Insurer.
2. The applicant was the subject of a work capacity decision on 18 June 2013. He sought an internal review of that decision which upheld the original decision and then a review by the WorkCover Authority of the merits of the decision. He has now within the prescribed time sought a review by me of the procedures of the Insurer in making the original decision.
3. There is no dispute that the applicant was injured in the course of his employment on 4 March 1997. The applicant has received in excess of 130 weeks of compensation. The applicant was in receipt of weekly payments immediately before 1 October 2012 and is therefore an existing recipient of weekly payments<sup>1</sup>.
4. Clause 8 of Part 19H of Schedule 6 to the *Workers Compensation Act 1987 Act* ("1987 Act") required the Insurer to conduct a work capacity assessment of the applicant for the purpose of facilitating the application of the weekly payments amendments<sup>2</sup> to the applicant.
5. Section 44A(2) of the 1987 Act provides 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 Guidelines.
6. The relevant version of the WorkCover Work Capacity Guidelines is the one dated 28 September 2012 and which applied to all claims from 1 January 2013. That publication provides that the Work Capacity Guidelines provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessments.

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<sup>1</sup> Clause 1 of Part 19H of Schedule 6 to the *Workers Compensation Act 1987* defines existing recipient of weekly payments.

<sup>2</sup> Weekly payments amendments are defined in Clause 1 of Part 19H.

7. Having conducted a work capacity assessment as required by the 1987 Act, the Insurer is required to make a work capacity decision as soon as practicable<sup>3</sup>.
8. In this case, the Insurer does not identify when the work capacity assessment was undertaken so it is not possible for me to easily determine whether the work capacity decision was made as soon as practicable. However I am prepared to assume that it was conducted after 8 May 2013 and before 18 June 2013 because of the telephone call made to the applicant on 8 May 2013 notifying him of the intention to make a work capacity assessment and decision.
9. There is no reference in the letter dated 18 June 2013 from the Insurer to the applicant of the date of or the outcome of that assessment. There does not appear to be any legislative requirement to notify the applicant of the outcome.
10. Clause 9 of Division 2 of Part 19H to Schedule 6 of the 1987 Act provides that the weekly payments amendments apply to the compensation due to the applicant on the expiration of a period of 3 months after an Insurer first conducts a work capacity assessment of an existing recipient of weekly payments. This is irrespective of the outcome of that assessment.
11. However Clause 22 of Schedule 8 to the Workers Compensation regulation 2010 provides that the weekly payments amendments apply to the compensation payable to applicant three months after the Insurer makes a work capacity decision arising from the first work capacity assessment.
12. No reference is made in that clause as to it replacing Clause 9 and it may not be relevant as no change may occur to the weekly payments to the applicant until proper notice is given to him of that change pursuant to Section 54(2)(a) of the 1987 Act.
13. In the letter dated 18 June 2013, the Insurer informed the applicant that a work capacity decision had been made on 18 June 2013. Yet the Insurer states that the decision had been reviewed the day before (17

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<sup>3</sup> Clause 23 of Schedule 8 to the Workers Compensation Regulation 2010.

June 2013). There is no requirement for the Insurer to review its decision prior to notifying the applicant.

14. I recognise that the Insurer has correctly concluded that Section 38 of the 1987 Act applies to the applicant and that he does not satisfy the requirements for compensation by way of weekly payments once the weekly payments amendments apply.

15. 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.”***

16. 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 in making the work capacity decision of 18 June 2012 as it did not (and through no fault of its own could not) comply with the requirements of Clauses 5 and 5.1 of the Guidelines.

18. I find that the work capacity decision is accordingly not effective and the weekly payments amendments do not as yet apply to the applicant.



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## RECOMMENDATION

17. I recommend that the Insurer make a new work capacity decision in accordance with the current version of the WorkCover Work Capacity Guidelines.
  
18. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 26 September 2013 until such time as he is properly transitioned. Those payments should continue from 26 September 2013 being the date on which they ceased.

KA GARLING  
WorkCover Independent Review Officer

8 January 2014