

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 a review of the decision made by the Insurer on 11 June 2013.
2. There is no dispute that the applicant was injured in the course of her employment on 24 August 2009. The applicant returned to suitable employment with the Employer. Following surgery the applicant returned to suitable duties with another employer. The Insurer made weekly payments for the earnings differential as required under the provisions of the then *Workers Compensation Act 1987* (1987 Act).
3. The NSW Government introduced significant reforms to the Workers Compensation Scheme in June 2012 including the calculation of weekly payments.
4. 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 208.8 weeks as at the date of the decision and therefore Section 38 of the 1987 Act applies.

9. The decision states that a work capacity assessment has been made but does not give a date of the assessment. The insurer is required to make a decision “as soon as practicable” after the assessment is made: *Clause 23, Schedule 8, Workers Compensation Regulation 2010*. There does not appear to be any legislative requirement to notify the applicant of the outcome. However, the *Guidelines* at Part 5.4.2 state that the decision must;
- *State the decision and give brief reasons for making the decision;*
 - *Outline the evidence considered in making the decision, noting the author, the date and any key information. All evidence considered should be referred to, regardless of whether or not it supports the decision;*
 - *Clearly explain the reasoning for the decision.*

My finding is that the Guidelines result in the insurer being compelled to reveal the outcome of the assessment.

10. In this case the applicant cannot know the date of the assessment. The insurer is required to make a decision “as soon as practicable” after the assessment is made: *Clause 23, Schedule 8, Workers Compensation Regulation 2010*. However a fair notice call was made on 10 May 2013. This call is required by the *Guidelines*. The applicant could reasonably assume that the assessment had begun at about that time and ended just prior to the decision being issued.
11. The *Guidelines* at Part 5.4.2 require the Insurer “to state the impact of the decision on the worker in terms of their entitlement to weekly payments, entitlement to medical and related treatment expenses and return to work obligations”. Section 59A of the 1987 Act states that payment of treatment expenses cease 12 months after weekly payments cease. The decision says “Your entitlement to reasonable and necessary medical and related treatment will also continue...”. Such a statement is in breach of the *Guidelines* and misrepresents section 59A.
12. While the fair work call occurred, the *Guidelines* in Part 5.2 states that the “information should also then be confirmed in writing to the worker.” That letter was not sent and as such is a breach of the *Guidelines*.
13. The decision refers to the transitional amount. The transitional amount is the AWE for existing recipients of compensation prior to 1 October 2012. The *Guidelines* at Part 5.4.2 require that the legislation be referenced. The AWE is defined in section 35 of the 1987 Act, but for existing

recipients of compensation prior to 1 October 2012 the AWE is altered by Clause 9(3), Part 19H, Schedule 6 of the 1987 Act (the transitional amount). These provisions are not referenced in the decision.

14. The decision sets out the calculation for the amount that the applicant will be paid but refers to section 37 of the 1987 Act. The correct reference is to section 38 of the 1987 Act. The legislation has not been properly referenced as required by the *Guidelines*.
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.”

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

FINDING

16. I find that the Insurer has failed to follow the procedures 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

17. I recommend that the Insurer conduct a new work capacity assessment and make a new work capacity decision in accordance with the WorkCover *Guidelines*.
18. I recommend that the Insurer pay the applicant the weekly benefit to which she was entitled prior to 7 June 2013 until such time as she is



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properly transitioned. Those payments should continue from 18 September 2013 being the date on which they ceased.

BRIAN HATCH
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8 January 2014