

**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 25 July 2013.
2. There is no dispute that the applicant was injured in the course of her employment on 3 September 2008. The applicant returned to suitable employment with the Employer until July 2009. In July 2010 the applicant returned to suitable duties with a different 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 215.6 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. The decision does not reveal any part of the assessment.

10. In this case the applicant cannot know the date of the assessment and therefore whether the decision was made as soon as practicable after the assessment was made.

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 “any entitlement you may have to payment of pre-approved reasonable and necessary medical and other expenses, until 2 November 2014, will not be affected”. This statement is true, but fails to advise that such payments will cease on 2 November 2014. Such a statement is in breach of the *Guidelines*.

12. The description of the effect of section 54(2)(a) in the decision misrepresents the notice provision and incorrectly states that payments “must cease within 3 months” of the work capacity decision. The true effect of the section is to say that the payments **may not cease** until three months have elapsed following the provision of notice. That is, the Insurer has styled the section as a maximum payment provision, rather than a minimum notice provision.

13. The decision states that the current rate of pay will continue until 2 November 2013, but not what the rate of pay will be after that. The decision accurately sets out section 38 in relation to payments after 1340 weeks of weekly payments. An insurer should not assume that an applicant could understand that section 38 in this case means that weekly payments would become nil. A basic piece of information is what the rate of pay will be. The applicant has been denied procedural fairness.
14. 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**

15. 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**

16. 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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17.I recommend that the Insurer pay the applicant the weekly benefit to which she was entitled prior to 25 July 2013 until such time as he is properly transitioned. Those payments should continue from 2 November 2013 being the date on which they ceased.

BRIAN HATCH  
Delegate of the WorkCover Independent Review Officer

9 January 2014