

**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 15 August 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 22 November 2014.**
- c. The payments are to be back-dated to 22 November 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 15 August 2014. The decision informed the applicant that his weekly payments of compensation would cease on 22 November 2014. The applicant sought internal review and the Internal Review Decision was dated 14 October 2014. He then sought Merit Review on or about 29 October 2014 and the Authority issued the Merit Review recommendation on 2 December 2014 upholding the original decision. The applicant made application to this office on 16 December 2014.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. On 3 May 2010 the applicant suffered injury to his back whilst in the course of his employment as a tyre fitter. The applicant returned to work performing suitable duties shortly after the injury. His employment was terminated on 20 December 2010. Liability for his claim was accepted and he has been in receipt of weekly payments of compensation.

4. As the applicant was in receipt of weekly payments immediately before 1 October 2012 Clause 8 of Part 19H of Schedule 6 to the *Workers Compensation Act 1987* (the 1987 Act) required the Insurer to conduct a work capacity assessment.
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 made submissions which are not relevant to procedural review.

### **Submissions by the Insurer**

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

### **The Decision**

8. The Guidelines relevant to making this work capacity decision came into effect on 11 October 2013.
9. Guideline 5.3.2 states the written work capacity decision must comply with any requirements of the 1987 Act and Review Guidelines and “*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.*”
10. The Insurer has cited Section 59A(2) of the 1987 Act in the decision. The Insurer has explained to the applicant “*this means that if there are no changes to your circumstances, your entitlement to reimbursement of medical expenses will cease on 22/11/15.*” This is correct in the circumstances of this claim.

11. The Insurer has then advised the applicant that if he were to require treatment because of a “*recurrence*” of his injury Section 60(2A) of the 1987 Act requires him to “*seek approval before any services are provided*” to him. This is incorrect as it causes a “*recurrence*” of the applicant’s injury to be a prerequisite for the entitlement to treatment when it could just be that the applicant requires ongoing medical treatment.
12. Section 60(2A) of the 1987 Act declares that the employer is not liable to pay the cost of treatment or service if such treatment or service is given or provided without prior approval of the Insurer. The section does not require the treatment to be as a result of a “*recurrence*” as suggested by the insurer in the work capacity decision. The section only requires the pre-approval of any related medical or treatment expenses. It is also not relevant to the working of Section 59A of the 1987 Act.
13. Further, the Insurer has failed to inform the applicant of Section 59A(3) of the 1987 Act in that his rights to medical and related expenses might once again be revived during the course of any period of further entitlement to weekly payments which may arise in the future. The Insurer has referred to Section 59A(3) in the Internal Review Decision however this cannot validate the original decision. The Insurer has failed to comply with the Guideline.
14. The same Guideline requires the Insurer to explain the relevant entitlement periods. The applicant has been informed that he has received “*over 130 weeks*” of weekly benefits and that his entitlements will be assessed pursuant to Section 38 of the 1987 Act. The applicant has not been informed of the exact number of weeks’ worth of compensation he has received. The Insurer attempts to rectify this issue by informing him in the Internal Review Decision that he has received 209 weeks of compensation payments. This however is not sufficient to overcome the omission in the original decision.

## FINDING



15. 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 Guidelines which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

### **RECOMMENDATION**

16. The work capacity decision of the Insurer dated 15 August 2014 is set aside.

17. The applicant is to be reinstated to his weekly payments at the rate applicable at 22 November 2014.

18. The payments are to be back-dated to 22 November 2014.

19. 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

20 January 2015.