

**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 6 February 2014 is set aside.**
 - b. The applicant is to be reinstated to his weekly payments at the rate applicable immediately prior to 10 May 2014.**
 - c. The payments are to be back-dated to 10 May 2014.**
 - d. The payments are to continue until such time as a further work capacity decision is made and comes into effect.**
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1. The applicant seeks procedural review of a work capacity decision (decision) made by the Insurer on 6 February 2014. The decision stated that payments were to cease on 10 May 2014. The applicant sought internal review. The Internal Review Decision (IRD) was issued on 12 March 2014. The applicant sought Merit Review by the Authority. That decision issued on 21 May 2014.
 2. The applicant was injured on 17 January 2001. He suffered an injury to his left shoulder. The applicant returned to suitable employment in self-employment. The Insurer made weekly payments as required under the provisions of the *Workers Compensation Act 1987* (1987 Act).
 3. The applicant was in receipt of compensation by way of weekly payments immediately before 1 October 2012. Accordingly 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 provisions to the applicant's claim. Clause 17 of Schedule 8 to the *Workers Compensation Regulation 2010* (the *Regulation*) required the assessment process to be completed "within 18 months" of 1 October 2012.

4. The relevant version of the *WorkCover Work Capacity Guidelines (Guidelines)* is the one dated 4 October 2013, which came into effect on 11 October 2013. The *Guidelines* provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessments and decisions.
5. Where the work capacity decision involves a reduction in or cessation of the weekly benefits payable to the injured worker then the Insurer is required to give proper notice to the worker (see section 54(2)(a) of the 1987 Act).

Submissions by the applicant

6. The applicant raised various issues in the Application for Procedural Review. 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’s submissions went to the merits of his matter, that is, the judgement or discretion of the Insurer and are therefore not relevant.

Submissions by the insurer

7. The Insurer made no submissions.

The Decision

8. The assessment was completed on 6 February 2014. There does not appear to be any legislative requirement to notify the applicant of the outcome of the assessment. However, *Guideline 5.3.2* states 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 line of reasoning for the decision.*

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

9. The decision does not state that an assessment must be made within 18 months of the commencement of the 2012 amendments pursuant to Clause 17 of Schedule 8 of the Regulation and that the amendments commenced on 1 October 2012.
10. The decision states that the weekly payments will cease on 10 May 2014. It is stated that the applicant will be provided with 3 months notice with an additional allowance of 1 week to allow for service of the notice. As the decision is dated 6 February 2014 an allowance of 1 week would mean 3 months later would be 13 May 2014. In any event, section 76(1)(b) of the *Interpretation Act* 1987 states that service by post is deemed to have occurred on the 4th working day after the day of posting. A working day means a day that is not a Saturday or Sunday, or a public holiday or a bank holiday in the place to which the letter was addressed: section 76(2) of the *Interpretation Act* 1987. The 4th working day after 6 February is 12 February 2014. Three months after that date is 12 May 2014. The Insurer has therefore not given the correct period of notice.
11. The decision sets out the first and second entitlement periods. *Guideline* 5.3.2 requires the Insurer to “reference the legislation.” The decision does not refer to the definition of these terms in section 32A of the 1987 Act. The next reference is to “*Special Requirements – Greater than 130 weeks of weekly payments*”. The applicant is not referred to section 38 of the 1987 Act. The decision sets out the special requirements in section 38, particularly the requirement to be working at least 15 hours and earning at least \$168 per week. Had the Insurer referred to section 38 it would have been necessary to point out that the figure of \$168 is indexed as the figure in the section is \$155.
12. The applicant is then advised that the next period is “*Post 5 Years – Greater than 260 weeks of weekly payments*” and that no weekly payments after 260 weeks will be paid unless the applicant has more than 20% whole person impairment. As the applicant was injured 13 year ago it is likely that he has received more than 260 weeks of weekly payments. The applicant should have been told that pursuant to Clause 4 of Schedule 8 of the *Regulation* the weekly payments made before 1 January 2013 are not to be counted toward the 260 weeks and that

therefore the effluxion of more than five years prior to that date is irrelevant to the current decision to terminate payments.

13. The decision states that the transition rate is \$948.50 *“as prescribed by WorkCover”* pursuant to *“Clause 9(3) of Schedule 12[1] of the Workers Compensation Legislation Amendment Bill 2012.”* The correct reference is to clause 1 (the definition of pre-existing recipient of weekly payments), clause 2(1) (the transitional amount and the current indexed amount), and clause 9(3) (the deeming provision) of Part 19H of Schedule 6 to the 1987 Act. The applicant should not be expected to have extensive knowledge of the making of legislation in order to know that a reference to a “Bill” leads (or may lead) to part of the 1987 Act.
14. The figure of \$948.50 is not *“as prescribed by WorkCover.”* It is a figure in clause 2(1) (the transitional amount and the current indexed amount), of Part 19H of Schedule 6 to the 1987 Act.
15. The decision states that the deemed pre-injury figure, that is, the transition figure, applies to *“all injuries received before 1 October 2012.”* While it is true that the injury must have been sustained before that date the test is whether the applicant was in receipt of weekly payments immediately before 1 October 2012.
16. The decision states that the assessment took place pursuant to sections 32A and 44A of the *“Workers Compensation Legislation Amendment Act 2012.”* Whether this legislation is related to the 2012 Bill is not stated. Were the applicant to refer to that Act he would not find either of these sections as the relevant parts of that Act have been repealed. Those sections now reside in the 1987 Act.
17. The decision states that it has *“no effect on your entitlement to receive, and have paid, reasonably necessary medical treatment as allowed by the Act”*. Reference is made to sections 59 and 60 of the 1987 Act. Those sections are helpful but do not provide the full picture as to treatment expenses. *Guideline 5.3.2* requires 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(2) of the 1987 Act provides that treatment expenses and related expenses are no

longer payable 12 months after weekly payments cease. The legislation has not been properly referenced as required by *Guideline 5.3.2*.

18. In addition, section 59A(3) of the 1987 Act states that the applicant may, after the entitlement to compensation for medical expenses ends, become eligible for further payments for medical expenses if the applicant becomes entitled to compensation for weekly benefits at some stage in the future and for such time as those weekly payments continue. This was not disclosed by the Insurer.
19. The applicant is advised that he may apply for a review of the decision. The relevant form is attached to the decision. It is not stated that the application must be lodged “as soon as practicable after receiving the work capacity decision” as required by *Guideline 7.1.2*. The applicant may have been led to believe that he could lodge the application at any time in the future.
20. *Guideline 7.1.6* states that the Internal Review is to be undertaken by a “party” who is independent to the original decision. The decision is signed by the “Workers Compensation Manager”. The same person signed the IRD. Beneath that name is the words “Internal Reviewer” and a name is given. The approved form attached to the IRD gives the name of the decision maker as the Internal Reviewer. Having the Workers Compensation manager signing both the decision and the IRD means that the IRD has not been made by someone independent to the original decision.

FINDING

21. 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 and the *Workers Compensation Regulation 2010*.



RECOMMENDATION

22. I recommend that the Insurer conduct a new work capacity assessment in accordance with the WorkCover *Guidelines* and make a new work capacity decision.
23. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 6 February 2014 until such time as he is properly transitioned. Those payments should continue from 10 May 2014 being the date on which they ceased.
24. Since the applicant is not currently in receipt of weekly payments, clause 21 of schedule 8 of the *Regulation* cannot apply and payments may resume immediately. The applicant is not required to produce work capacity certificates for the period from 18 June 2014 to date by virtue of the operation of section 44B(2) of the 1987 Act. These recommendations are binding on the insurer: see section 44(3)(h) of the 1987 Act.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
23 July 2014