

**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 application for procedural review of a work capacity decision is dismissed.**
- b. No recommendation is made.**

1. The applicant injured worker previously applied for procedural review of a work capacity decision made by a licensed specialised insurer (the Insurer) on 30 September 2013. That decision was set aside by a previous decision by this office.¹ A subsequent work capacity decision was made by the Insurer on 10 April 2014, following an assessment process which had concluded on or about 7 March 2014. The applicant sought another internal review and also sought merit review. On 4 June 2014 the merit review service affirmed the Insurer's decision. On 18 June the applicant sought further procedural review.
2. The facts and circumstances surrounding the dispute remain as stated in WIRO decision 4214 and need not be repeated. Relevantly, the applicant has not worked since 2009 and has received weekly payments of compensation for more than 130 weeks. His treating doctor has certified him as capable of working for between 12 hours and 15 hours per week, most recently the latter.

Submissions by the applicant

3. The applicant made the following submissions in his application.
 - The work capacity assessment was not done correctly since it was apparently done on the same day on which the applicant believes the Insurer received a copy of the previous WIRO decision. "Fair notice" of an impending decision, which described the assessment process, was contained in a letter dated 7 March 2014 but received by the

¹ Reported and numbered as 4214.

worker on that very day, with no explanation for the miracle of instantaneous postal delivery.

- The decision having been made on 10 April 2014 was outside the 18 month timeframe in clause 17, Schedule 8 to the *Workers Compensation Regulation 2010* (see also clause 8(2) of Part 19H of Schedule 6 to the 1987 Act).
- The applicant has various complaints about management of his claim and the issuing of section 74 notices in relation to claims for medical and related treatment expenses. As such, these observations are irrelevant.

Submissions by the Insurer

4. The Insurer made submissions to the merit review service. A copy of those submissions was sent to this office. Effectively the submissions emphasize that the applicant has no statutory right to further compensation by way of weekly payments since he has exhausted the 130 week limit in section 38 and does not meet the special requirements in that section to prolong entitlements. By his own admission the applicant does not work 15 hours per week, nor does he earn the indexed minimum of \$168 per week. The submissions are correct, but they do not address matters of procedure and to that extent are of little value for current purposes.

The work capacity decision

5. The Insurer took pains to comply with the legislation and appears to have taken considerable care to overcome the defects in the original decision made on 30 September 2013. Specifically, it is noted that:
 - The correct legislative provisions were included in the heading (which is quite a heading, given how much legislation is involved).
 - Correct postal service notice was given.

- The proper definition of an existing recipient was given and the previous error of saying that transitioning was required of all claims “lodged” before 1 October 2012 was not repeated.
- Both the date of and statutory requirement for the work capacity assessment were specified.
- The decision actually states that the applicant has been paid for more than 130 weeks.
- The “second entitlement period” is explained.
- Section 32A is referred to in relation to “current work capacity.”
- Both section 59A(2) and 59A(3) are referred to and explained.
- All documents considered were referred to and the applicant was advised that copies were available if not already in his possession.
- The Insurer detailed all job-seeking and ancillary support to which the applicant was entitled for the duration of continuing weekly payments.

CONSIDERATION

6. The applicant’s first submission seems to turn on whether or not the Insurer had a false date on its letter dated 7 March 2014. This seems unlikely and there is no evidence to support the suggestion. Since the Insurer received the original WIRO 4214 decision via email on 4 March 2014 the objection that the assessment must have taken place on the same date is both irrelevant and unproven.²
7. The applicant’s second submission concerning the date of the decision might have more substance, but that is not a matter which can be determined within this office, since whether or not it is possible to transition a worker after 31 March 2014 is a question of law. Such questions are to be determined by the Workers Compensation Commission by virtue of sections 105 and 351 of the *Workplace Injury*

² Used here in both the English argot and the Scottish forensic senses.

Management and Workers Compensation Act 1998. The question may be academic in this instance in any event, the assessment having been completed prior to 31 March 2014.

8. The Insurer notes that the applicant's own doctor certifies him fit for work for between 12 and 15 hours per week (depending on which work capacity certificate is consulted). The most recent one said 15 hours. This is really all that is required to prove work capacity, given the narrow range of evidence specified in section 44B under the heading "Evidence of work capacity." That the Insurer then enumerated further documents and other evidence was perhaps of interest to the applicant, but was of no relevance to the assessment of work capacity in light of section 44B.

FINDING

9. I find that the Insurer has followed the procedures as set out in the *WorkCover Guidelines* as required by Section 44A of the 1987 Act. The Insurer has also followed the 1987 Act and the *Workers Compensation Regulation 2010*.

RECOMMENDATION

10. In the circumstances the application is dismissed and I make no recommendation.

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