

**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 26 June 2013.
2. There is no dispute that the applicant was injured in the course of her employment on 1 July 2004. The applicant returned to suitable employment with the Employer in February 2006 but that employment was terminated in August 2007. After that time the applicant found alternative suitable employment. 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 360.19 weeks as at the date of the decision and therefore Section 38 of the 1987 Act applies.
9. The decision does not state that a work capacity assessment has been made. 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 actual date of the assessment. A fair notice call was made and a fair notice letter was sent on 3 June 2013. This call and letter are required by the *Guidelines*. The insurer in the Internal Review of the decision of 19 August 2013 states that the assessment was referred to in the call. It is certainly mentioned in the letter of the same date. I find that the applicant was aware that an assessment was taking place and that 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”. The decision states that “Your entitlement to reasonable and necessary medical and related treatment will also continue...” Section 59A of the 1987 Act states that such medical treatment ceases 12 months after weekly payments cease. The decision fails to set out the effect of the section 59A. The *Guidelines* require at Part 5.4.2 that the legislation be referenced. Section 59A is not referred to in the decision.
12. The decision sets out the transitional amount and refers to Schedule 6 Part 19H(2) of the 1987 Act. The proper reference is to Schedule 6, Part

19H, Division 1, Clause 2 of the 1987 Act. An applicant is unlikely to be able to be able to work out the legislation with the reference provided. In addition the decision states that entitlements are assessed under section 37 of the 1987 Act. The actual section is section 38. Both of these are failures to reference the legislation as required under the *Guidelines*.

13. Further, the above *Guidelines* also state that the work capacity decision notice must advise the applicant that any documents or information that have not already been provided to her can be provided on request to the Insurer. The Insurer has failed to so advise the applicant.
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 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

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*.



WorkCover independent review office

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

17.I recommend that the Insurer pay the applicant the weekly benefit to which she was entitled prior to 4 April 2013 until such time as she is properly transitioned. Those payments should continue from 4 July 2013 being the date on which they ceased.

BRIAN HATCH
Delegate of the WorkCover Independent Review Officer

10 January 2014