

**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 31 January 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable immediately prior to 8 May 2014.**
- c. The payments are to be back-dated to 8 May 2014.**
- d. The payments are to continue until such time as a further work capacity decision is made and comes into effect.**

**Background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 31 January 2014. The decision stated that payments were to cease on 8 May 2014. The applicant sought internal review. The Internal Review Decision (IRD) was issued on 26 March 2014. The applicant sought Merit Review by the Authority. The Merit Review was issued on 3 June 2014.
2. The applicant was injured on 21 July 1999. The injury was to his lower back. He was retired in 2007. He obtained suitable employment which he has maintained. 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 transitioning 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, published on 8 October 2013, and 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. 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 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. 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 the decision, that is, the judgement or discretion of the Insurer. As such, the submissions are not relevant.

### **Submissions by the insurer**

7. The Insurer made no submissions.

### **The Decision**

8. The decision states that a work capacity assessment was completed on 31 January 2014. The decision does not state that the assessment is required pursuant to Clause 8 of Part 19H of Schedule 6 to the 1987 Act. As such the legislation has not been properly referenced as *Guideline 5.3.2* requires.
9. There does not appear to be any legislative requirement to notify the applicant of the outcome of the assessment. However, *Guideline 5.3.2* stated 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.

10. The decision states that notice is given pursuant to section 54 of the 1987 Act. The correct reference is to section 54(2)(a) of the 1987 Act. *Guideline 5.3.2* requires the Insurer to refer to the legislation. An appropriate time for 3 months notice is then given to 8 May 2014. It is explained that an extra week has been allowed to allow for delivery of the notice by post *“in accordance with section 76(1)(b) of the Interpretation Act 1987, and Clause 6 of the WorkCover Work Capacity Guidelines”*. Section 76(1)(b) of the *Interpretation Act 1987* states that service by post is taken to be the 4<sup>th</sup> working day after the day of posting. Allowing a week will usually be sufficient but in cases where there are intervening public holidays enough time may not be allowed. *Guideline 6* states that service of a document takes place at a postal address on a day *“4 days after the document is posted”*. Such a statement is not in accordance with the *Interpretation Act*. The *Guideline* is wrong and should not be referred to. The *Guideline* would allow for service to be assumed to have taken place on a weekend or a public holiday in contravention of the *Interpretation Act*.

11. The decision states that under *“subsection 43 (1) (a), I have determined that you have a current work capacity of 8 hours/day, 5 days/week. There are no restrictions specified on your WorkCover Certificate of Capacity”*. The decision does not state that subsection 43(1)(a) is to be found in the 1987 Act. It is not explained that *“current work capacity”* is defined in section 32A of the 1987 Act. The definition *“means a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment”*. This would be of concern to the applicant as he has been told that he has no restriction in relation to work. That means that the definition of current work capacity cannot apply to him.

12. The next sentence is that under *“subsection 43 (1) (b), I have determined the following role(s) constitute suitable employment for you”*. It is not explained where the section may be found. It is not explained that *“suitable employment”* is also defined in section 32A of the 1987 Act. This definition is central to the 2012 amendments to the 1987 Act. The definition includes having regard to the applicant’s *“age, education, skills and work experience”* but having no regard to his *“pre-injury employment.”* Such a definition would not be expected by a normal reading of those words.
13. The applicant is then told that his claim is *“transitioning to the new weekly payment arrangements in accordance with Schedule 6, Part 19H Clause 2 of the Workers Compensation Act 1987 the deemed amount of your pre-injury earnings is \$948.50”*. It is not explained that this rate is used as he was in receipt of weekly payments immediately before 1 October 2012. The Insurer should have referred to clause 1 (the definition of “existing recipient of weekly payments”), clause 2 (the transitional amount as indexed which is why the figure used is \$948.50), and clause 9(3) (the deeming provision) of Part 19H of Schedule 6 of the 1987 Act.
14. The applicant is advised that his claim is subject to section 38 of the 1987 Act, and that for weekly payments to continue he must work more than 15 hours per week and earn more than \$168 per week. The correct reference is to section 38(3)(b) and (c) of the 1987 Act. It also needs to be made clear that the figure of \$168 is indexed.
15. The decision states that the applicant has received 205 weeks of weekly payments. Section 38 is again referred to, but so are sections 36, 37, and 39 of the 1987 Act. The Insurer has not explained that its reference to *“first entitlement period”* and *“second entitlement period”* are terms defined in section 32A of the 1987 Act. It is also not explained that cessation of weekly payments after 5 years that pursuant to clause 4 of Schedule 8 of the Regulation *“no regard is to be had to any weekly payment of compensation paid or payable to the worker before 1 January 2013”*. Without that explanation the applicant would be rightly concerned that he only has a right to a further 55 weeks of weekly compensation.

16. *Guideline 5.3.2* requires the Insurer to “*detail any support, such as job seeking support, which will continue to be provided during the notice period*”. The decision simply states that the decision-maker will during the notice period “*continue to manage your claim and process your weekly payments as they are currently paid*”. No suggestion is made that any other support may be available.
17. *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.*” The decision does not state that Section 59A(2) of the 1987 Act provides that treatment expenses and related expenses are no longer payable 12 months after weekly payments cease.
18. The Insurer also failed to point out that 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. *Guideline 5.3.2* requires the Insurer to “*advise that any documents or information that have not already been provided to the worker can be provided to the worker on request to the insurer*”. The decision states that the applicant has been sent copies of the 3 documents listed in the decision. He is not told that he may request copies of other documents.

## FINDING

20. 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

21. I recommend that the Insurer conduct a new work capacity assessment in accordance with the WorkCover *Guidelines* and make a new work capacity decision.
22. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 8 May 2014 until such time as he is properly transitioned. Those payments should continue from 8 May 2014 being the date on which they ceased.
23. 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 8 May 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  
4 August 2014