

**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 14 April 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable at 14 April 2014.**
- c. The payments are to be back-dated to 18 July 2014 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 14 April 2014. The applicant sought internal review and the Internal Review Decision (IRD) was issued on 9 May 2014. He then sought Merit Review on or about 26 May 2014 and the Authority issued the Merit Review recommendation on 30 June 2014. Following receipt of the Merit Review Service (MRS) recommendation, the applicant made application to this office on 20 July 2014.
2. I am satisfied that the applicant has made the application for review in the proper form and within time.
3. The applicant was injured on 3 May 2010. The applicant has been unsuccessful in returning to his pre-injury duties of a painter. He has been in receipt of weekly payments from the Insurer.
4. The applicant was in receipt of weekly payments immediately before 1 October 2012. Accordingly *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)*.
6. The relevant version of the *Guidelines* came into effect on 11 October 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 benefits payable to the injured worker then the Insurer is required to give proper notice to the worker (Section 54(2)(a) of the 1987 Act).

Submissions by the applicant

8. The applicant raised various matters 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 are not of a nature relevant for procedural review.

Submissions by the Insurer

9. The Insurer has not made submissions in response to the application.

The Decision

10. On the third page of the decision the Insurer refers to the applicant having a current capacity for suitable employment. The emphasis here is on the word **current**. A review of the medical evidence relied upon to make the decision is a report of Dr B dated 23 October 2013 and Earning Capacity Assessment reports dated 1 August 2013 and 13 August 2013.
11. The only current medical evidence is a Workcover certificate of Capacity from Dr L dated 1 April 2014. However the Insurer states ‘*despite your certificate stating you have no capacity for work we prefer the evidence*

of the ECA IMC Dr K and the Earning Capacity Assessment Report dated 13.08.13, Earning Capacity Assessment Report dated 1.08.12 and IME Dr B dated 23.10.13.'

12. The evidence which the Insurer is relying upon to justify its decision is up to 20 months old. The current Work Capacity Certificate was not accepted by the Insurer.
13. *Guideline 2.3* requires that the Insurer's decision should be "*timely, informed and evidence based.*" The medical evidence used by the Insurer was up to 20 months old and clearly does not comply with the *Guideline*.
14. *Section 59A(2)* of the 1987 Act states that treatment expenses and related expenses are no longer payable 12 months after weekly payments cease. The Insurer has so advised the applicant.
15. However the decision also fails to advise the applicant of *Section 59A(3)* of the 1987 Act. *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.
16. *Guideline 5.3.2* states that the Insurer must "*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 present decision advises that applicant that '*if you feel that you have not been provided with the above documents or information, please request copies from your case officer*'. This is a clear fundamental breach of the *Guidelines*.

FINDING

17. 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 has been more than one breach of the *Guidelines* which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.



RECOMMENDATION

18. I recommend that the Insurer conduct a new work capacity assessment and make a new work capacity decision in accordance with the *WorkCover Guidelines*. This should be done with current medical evidence.
19. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 14 April 2014 until such time as he is properly transitioned. Those payments should continue from 14 July 2014 being the date on which they ceased.
20. 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 14 April 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.

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
5 August 2014