

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 12 August 2013 is set aside.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable immediately prior to 20 November 2013.**
- c. **The payments are to be back-dated to 20 November 2013.**
- 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 12 August 2013. The decision stated that payments were to cease on 20 November 2013. The applicant sought internal review. The Internal Review Decision (IRD) was issued on 11 October 2013. The original decision was confirmed. The applicant sought Merit Review by the Authority. That application resulted in a similar outcome, the recommendation being dated 6 June 2014. An application for procedural review was made within time and on the correct form.
2. The applicant was injured in the course of his employment as a Forklift Driver and was subsequently made redundant in 2007. He has never worked since. 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 27 September 2012, which came into effect on 1 January 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 did not formally make submissions as such; however he did list one ground of review, thus:

The procedures followed by the Insurer in making the work capacity decision were not in accordance with the WorkCover Guidelines and the decision is void.

Given the broad and ambiguous wording in section 44(2)¹ (which covers both merit review and procedural review), I take it to be sufficient compliance with the section for the applicant to specify no more than that he seeks procedural review rather than merit review.

Submissions by the insurer

7. The Insurer made no submissions.

¹ “An application for review ... must ... specify the grounds on which the review is sought.”

The Decision

8. The decision states that a work capacity assessment was undertaken but not when it took place. The Insurer is required to make a *“work capacity decision in respect of an existing recipient of weekly payments as soon as practicable after the first work capacity assessment of the worker is conducted”*: see clause 23 of Schedule 8 of the Regulation. Without the date of the assessment the applicant cannot know if the decision was made *“as soon as practicable after the first work capacity assessment.”*
9. 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 5.4.2* requires.
10. *Guideline 5.4.2* 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 states that treatment expenses and related expenses are no longer payable 12 months after a worker ceases to be entitled to weekly payments of compensation. The decision states that *“any entitlement you may have to payment of pre-approved reasonable and necessary medical and other expenses, until 20 November 2014, will not be affected.”* This statement gives no information to the applicant about the effect of section 59A(2) on such entitlements beyond 20 November 2014. The effect of section 59A(2) of the 1987 Act has therefore been disguised, if not misrepresented, by virtue of the Insurer using an antenantiosis in place of a less convoluted, simple and direct statement of fact. This is a clear breach of the *Guidelines*.
11. 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 and the omission constitutes a further breach of the *Guidelines*.
12. The applicant was advised on page two of the notice as follows:

- your entitlement to weekly payments at your current rate must cease within 3 months of this decision – please refer to: Section 43(1)(f)² and 54(2)(a) of the [Act].

It need hardly be said that section 54(2)(a) has the opposite effect of what the applicant was told. Payments must **not** cease until the effluxion of three months after the applicant is notified of the decision to cease payments. This is a demonstrable error and is fundamental to the proceedings. On its own this would be sufficient grounds to render the decision invalid.

13. At the end of the decision and purporting to form part of the decision are 6 pages of extracts from the 1987 Act under the heading “*Key Sections of the Workers Compensation Act NSW 1987 referred to within this Notice*”. That is incorrect as some parts of the extract are in the decision, some are not and there is no reference to the *Regulation*. Setting out large swathes of the 1987 Act under a misleading heading is not helpful. By way of example sections 36 and 37 of the 1987 Act are included, and are not relevant to the applicant’s case. Section 32A is set out in full. Many definitions in that section are of no relevance to the applicant.

FINDING

14. 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

15. I recommend that the Insurer conduct a new work capacity assessment in accordance with the *WorkCover Guidelines* and make a new work capacity decision.
16. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 20 November 2013 until such time as he is

² A section which says nothing of the sort.



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properly transitioned. Those payments should continue from 20 November 2013 being the date on which they ceased.

17. 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 20 November 2013 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
7 August 2014