

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 10 March 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable immediately prior to 18 June 2014.**
- c. The payments are to be back-dated to 18 June 2014.**
- d. The 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 injured worker seeks procedural review of a work capacity decision made by the insurer dated 10 March 2014. This decision determined the worker's Pre-Injury Average Weekly Earnings (PIAWE) to be \$948.50 and reduced the worker's weekly benefit to \$14.55 effective 18 June 2014. An internal review was conducted on 5 May 2014, which partially reversed the original decision. The insurer confirmed the worker's PIAWE but noted the worker's weekly payments would not be decreased to \$14.55 and that they would continue at the usual rate until a new work capacity assessment could be conducted. The applicant sought merit review, and was advised of the outcome of by letter dated 20 June 2014. Following receipt of the Merit Review Service (MRS) recommendation, the applicant made an application to this office dated 24 June 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 5 November 2008. He was lifting a heavy pole in the course of his employment as a self-employed builder when he noticed a strange feeling at the top of his head and face followed by

pain at the back of his head. He was immediately hospitalised and diagnosed with a subarachnoid bleed.

4. The applicant has returned to work although as a result of his injury he has significantly downsized his business.
5. 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 (1987 Act)* required the Insurer to conduct a work capacity assessment.
6. *Section 44A* of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines (Guidelines)*.
7. 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.
8. 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

9. The applicant made extensive submissions which mostly addressed the decision made by the MRS. A procedural review may not consider matters of merit by virtue of the specific wording in section 44(1)(c) which circumscribes procedural review as follows:

a review only of the insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer in making the decision¹

Submissions by the Insurer

¹ See *Workers Compensation Act 1987* section 44(1)(c)..

10. The Insurer made no formal submissions to this office however had set out reasons in the original work capacity decision. .

Relevant legislation

11. Section 38 (3) of the 1987 Act states:

A worker who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if:

(a) the worker has applied to the insurer in writing (in the form approved by the Authority) no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payments after the second entitlement period, and

(b) the worker has returned to work (whether in self-employment or other employment) for a period of not less than 15 hours per week and is in receipt of current weekly earnings (or current weekly earnings together with a deductible amount) of at least \$155 per week, and

(c) the worker is assessed by the insurer as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker's current weekly earnings.

The work capacity decision

12. The insurer's decision was that the worker's assessed capacity to earn in suitable employment was \$744.25 per week and therefore his new weekly benefit was \$14.55 per week.

13. The internal review decision maintained the applicant's PIAWE and assessed capacity to earn remained unchanged. However, the insurer agreed not to decrease the worker's weekly payments to \$14.55 as per the original decision pending a further work capacity assessment.

CONSIDERATION

14. Clause 5.3.2 of the *Guidelines* set out the twelve requirements of a written advice of a work capacity decision and its outcome.
15. *Guideline 5.3.2* requires the insurer to “*advise of the relevant legislative notice requirements applicable to the decision.*” The required period of notice where a work capacity decision discontinues or reduces a worker’s weekly payment is 3 months².
16. It should be explained that the notice period must take into account the time for delivery of the notice by post. This is governed by section 76(1)(a) of the *Interpretation Act 1987* which allows for service by post to be effected on the 4th working day after the day of posting, noting that a decision may only be served in person or by post. Although the insurer has set out to provide three months and one week’s notice, they advised the worker their decision would take effect “*as of insert date.*”³
17. *Guideline 5.3.2* requires the insurer to “*explain the relevant entitlement periods.*” Rather than explain, the insurer attached copies of Sections 36, 37 and 38 of the 1987 Act as “Attachment B” of the work capacity decision. The provision of the extra material does not supply the lack of explanation. This is a breach of the *Guideline*.
18. The Insurer advised that the worker’s entitlement to weekly benefits is assessed under Section 38 of the 1987 Act because as at the time of the decision he had received 232.6 weeks of weekly benefits and was working more than 15 hours per week on average. No reference was made to the requirement that for weekly payments to continue he must earn more than \$168 per week⁴ as per section 38(3)(b) of the 1987 Act. It also needs to be made clear that the figure of \$168 is indexed. Further, no reference was made to the part of Section 38(3)(c) of the 1987 Act, which states that the worker must be “assessed by the insurer as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker’s current weekly earnings.”
19. The decision states that the applicant has received 232.6 weeks of weekly payments. The Insurer has not fully explained the application of

² Section 54(2)(a) of the 1987 Act

³ And thus the Template Gremlin strikes again.

⁴ As indexed.

entitlement periods and how compensation is claimed after the second entitlement period. It did not explain with respect to the cessation of weekly payments after 5 years in Section 39 of the 1987 Act 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 could be left under the impression that he only has a right to a further 27.4 weeks of weekly compensation. This want of explanation is the more confounding to the applicant in light of the provision of copies of sections 36-38, but not section 39.

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 18 June 2014 until such time as he is properly transitioned. Those payments should continue from 18 June 2014 being the date on which they ceased.

23. These recommendations are binding on the insurer: see section 44(3) (h) of the 1987 Act.

24. I note the outcome of both Internal Review and Merit Review, which were to the same or similar effect as appears above.

Wayne Cooper



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

Delegate of the WorkCover Independent Review Officer
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