

**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 application for procedural review is dismissed.**

**Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 25 February 2015.
2. The applicant had sustained injury in 2011 with a prior employer and then in June 2012 had suffered further injury while employed by the insured. Payments of weekly compensation were made until December 2012, which means that the applicant was an "existing recipient" of weekly payments immediately prior to 1 October 2012.
3. Payments having ceased in December 2012, the applicant began proceedings in the Workers Compensation Commission of NSW for reinstatement of payments. The proceedings were resolved in mid-2014 with the Insurer re-commencing payments under the former section 40 at the rate applicable for a worker with two dependent children.
4. On 20 October 2014 the applicant resumed employment, earning more than the transitional rate. Five days after that employment commenced the Insurer ceased weekly payments. It appears that neither a section 74 notice nor a section 54 notice issued at the time of cessation.
5. Four months later, on 25 February 2015, the Insurer made a work capacity decision which reflected a reduced assessment of the applicant's weekly entitlement to zero. The decision also had the effect of transitioning the applicant from the former section 40 regime to the current system which has been in place since 1 October 2012.

6. The applicant sought internal review of the work capacity decision and the Internal Review Decision was dated 13 April 2015. That decision confirmed the original work capacity decision.
7. The applicant then sought Merit Review from the Authority on 28 April 2015 and they delivered a decision dated 3 June 2015 finding that the applicant had no entitlement to ongoing payments by virtue of section 37(2) of the *Workers Compensation Act 1987* (the 1987 Act).
8. The applicant applied to this office for procedural review by way of application dated 12 June 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
9. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).
10. The relevant version of the Guidelines came into effect on 11 October 2013.

### **Submissions by the applicant**

11. 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 has requested a procedural review.
12. The applicant’s submissions might be fairly summarised thus:
  - When payments ceased on 25 October 2014 no section 74 notice was issued.
  - A work capacity decision was not done until more than four months after his return to paid employment, and when it was done no notice was given under section 54(2)(a).
  - His payments under section 40 should have continued until a work capacity decision was done and the relevant notice period in section 54(2)(a) had elapsed.

## Submissions by the Insurer

13. The Insurer made submissions dated 19 June 2015 in response to this application.
14. It is noted in the insurer's submissions that since the consent award for weekly payments was entered in the WCC the applicant has returned to paid employment and earns considerably more than the transitional rate. He also earns much more than the maximum under section 40 for a worker with two dependent children. Section 37(2) (in its current form) requires the worker to be paid no more than 95% of Average Weekly Earnings (AWE) minus actual current earnings (E). Since the transitional rate is the relevant earnings rate for "Average Weekly Earnings" for existing recipients, and since that amount is lower than the actual current earning of this applicant, his entitlement must be nil.
15. No good reason appears to have been given for the non-existence of either a section 74 Notice or a Section 54 Notice in October 2014. The argument that section 37(2) automatically operates to justify the cancellation of payments cannot possibly apply to a worker prior to being transitioned onto the 2012 regime.<sup>1</sup>

## The Decision

16. Pursuant to Guideline 5.3.2 the insurer has provided the applicant with all required and relevant information, including an explanation of section 59A. There is nothing about the decision itself which is objected to by the worker, other than the alleged failure to provide notice under section 54(2)(a). However as the Insurer has submitted, there is no requirement to provide further notice of a past event. Since payments had ceased four months prior to the work capacity decision being issued, it is hard to see what utility there would have been in the insurer purporting to give the worker further "notice" in February 2015.
17. It may well be the case that the worker would have a viable argument to run in the WCC concerning reinstatement of weekly payments under section 40 of the 1987 Act from 25 October 2014 until a notional notice period has expired. That, however, is not a matter which can concern

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<sup>1</sup> See para 17 *infra*.



this Office in the course of procedural review of a work capacity decision. Since the decision issued in February 2015 has no more effect than to transition the worker onto the new scheme, any dispute about termination of payments pursuant to an albeit voluntary award prior to the making of the work capacity decision cannot be relevant for present purposes.

18. The decision of the Insurer dated 25 February 2015 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

### **Finding**

19. There are no procedural errors identifiable in the decision. The insurer has complied with the Guidelines and relevant legislation.

### **RECOMMENDATION**

20. The application for procedural review is dismissed.

Wayne Cooper  
Delegate of the WorkCover Independent Review Officer  
27 July 2015