

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 20 August 2013 is set aside.**
- b. The applicant is to be reinstated to her 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.**

Introduction and Background

1. The applicant seeks procedural review of a work capacity decision made by the insurer dated 20 August 2013. This decision purported to terminate the worker's weekly payments from 20 November 2013. An internal review was conducted on 4 October 2013 and confirmed the original decision. The applicant sought merit review. Following receipt of the Merit Review Service (MRS) recommendation dated 10 June 2014,¹ the applicant made an application to this office on 4 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 or about 8 July 2009. She sustained an over-use injury to the left elbow in the course of her employment as a Medical Laboratory Technician.
4. The applicant was in receipt of weekly payments immediately before 1 October 2012. Accordingly the applicant was an existing recipient of weekly payments at the relevant time and *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.

¹ A mere 231 days following receipt of the application by the Authority. The delay has clearly not been occasioned by the Insurer.

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* is the one dated 27 September 2012, which came into effect on 1 January 2013. Those *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 made unusual submissions which related to the merits of the insurer's decision as well as a request for assistance with retraining. 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 decision²

Submissions by the Insurer

9. The Insurer made no submissions.

CONSIDERATION

10. 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*"³. If the date of the assessment is omitted, it is unclear to the applicant whether or not the decision was made "as soon

² See *Workers Compensation Act 1987* section 44(1)(c)..

³ Schedule 8, Clause 23 of the *Workers Compensation Regulation 2010*

as practicable after the first work capacity assessment.” This represents a practical injustice to the applicant.

11. *Guideline 5.4.2* sets out the requirements of a written Work Capacity Decision Notice. Among the requirements listed, the insurer must “reference the relevant legislation.”
12. 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. This constitutes a breach of the Guidelines.
13. On page two of the decision the Insurer advised the applicant that her benefits would “reduce” to “Nil” on 20 November 2013. Given that the date of the letter giving this advice was 20 August 2013, no allowance had been made for delivery of the decision by post (the only means available under the legislation with the exception of personally handing the letter to the applicant). By virtue of section 76(1)(b) of the *Interpretation Act 1987* a letter is deemed to be received on the fourth working day after posting. Therefore inadequate notice has been given under section 54(2)(a) which requires three months notice be given to the worker prior to the cessation of weekly benefits. This is a demonstrable error.

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* (the Regulation).

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 she was entitled immediately prior to 20 November 2013 until such time as she is properly transitioned. Those payments should continue from 20 November 2013 being the date on which they ceased.
17. These recommendations are binding on the insurer: see section 44(3)(h) of the 1987 Act. Since the applicant was not in receipt of weekly



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payments as at the date of this recommendation, clause 21 of schedule 8 to the *Regulation* cannot apply.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
20 August 2014