

**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 19 June 2013 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 25 September 2013.**
- c. The payments are to be back-dated to 25 September 2013.**

**Introduction and background**

1. A work capacity decision dated 19 June 2013 was sent to the applicant advising him that his entitlement to weekly payments would cease from 25 September 2013. The applicant requested an internal review on 2 March 2015. The insurer issued an internal review decision dated 16 March 2015. The internal review decision confirmed the original work capacity decision.
2. The applicant applied for merit review by the Authority on 21 April 2015. They delivered a decision dated 27 May 2015 which found that the applicant was not entitled to ongoing weekly payments of compensation as he did not satisfy the special requirements of Section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act).
3. The applicant then made application to this office dated 26 June 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 20 March 2003 the applicant suffered injury to his left shoulder and lower back whilst in the course of his employment as a teacher. The applicant subsequently left that employment and became self-employed as a buyer's agent / building consultant. The applicant was in receipt of weekly payments of compensation from the insurer until 25 September 2013 the date the work capacity decision came into effect.

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).

### **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.*”
7. The applicant has requested a procedural review of the insurer’s work capacity decision. The applicant’s submission is primarily that the insurer did not allow sufficient time between the work capacity assessment and decision and that an earning capacity assessment was not completed prior to that decision being made.

### **Submissions by the Insurer**

8. The Insurer did not provide any submissions in response to the application.

### **The Decision**

9. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
10. Guideline 5.3.2 requires the insurer to state the impact of the decision on the applicant in terms of his entitlement to medical and related treatment expenses.
11. The insurer has informed the applicant at page 1 of the work capacity decision that “*any entitlement you may have to payment of pre-approved reasonable and necessary medical and other expenses, until 25/9/14 will not be affected.*”
12. The insurer has failed to inform the applicant that as a result of the application of Section 59A(2) of the 1987 Act his entitlement to reimbursement of pre-approved medical and related treatment expenses

will cease 12 months after his entitlement to weekly payments cease. Informing the applicant that his entitlement will not be effected until 25 September 2014 without actually explaining the effect is not compliant with the legislation and Guidelines.

13. 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. This was not disclosed by the insurer and is in clear breach of the Guidelines.
14. Guideline 5.3.2 also requires the insurer to advise the applicant of the impact the work capacity decision has on his entitlement to weekly payments of compensation. The insurer has informed the applicant that his entitlement to weekly payments *“must cease within 3 months of this decision – please refer to Section 54(2)(a) of the Workers Compensation Act 1987.”*
15. The above description of the effect of Section 54(2)(a) in the decision misrepresents the notice provision and incorrectly states that payments *“must cease within three months”* of the work capacity decision. The true effect of the section is to say that the payments **may not cease** until three months have elapsed following the provision of notice. That is, the insurer has styled the section as a maximum payment provision rather than a minimum notice provision. The insurer has failed to comply with the Guidelines and misrepresented the legislation.
16. It is noted that the applicant reached 66 years of age on 3 December 2014 and as a result is not entitled to weekly payments of compensation beyond that date as per Section 52 of the 1987 Act. However, we do note that the applicant should be properly transitioned by 1 September 2015 in respect of his entitlement to medical and related treatment expenses.
17. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 19 June 2013.



## **Finding**

18. 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 have been breaches of the legislation and the Guidelines which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

## **RECOMMENDATION**

19. The work capacity decision of the Insurer dated 19 June 2013 is set aside.
20. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 25 September 2013.
21. The payments are to be back-dated to 25 September 2013.

Tracey Emanuel  
Delegate of the WorkCover Independent Review Officer  
28 July 2015