

**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 27 February 2014 is set aside.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable at 29 May 2014.**
- c. **The payments are to be back-dated to 29 May 2014.**
- 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 27 February 2014. That decision followed a recommendation by this office which is reported on the web-site as recommendation # 2714.
2. The facts and circumstances leading up to the work capacity decision-making process need not be repeated.
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 assessment 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 which came into effect on 11 October 2013. The *Guidelines* provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessments and decisions.

5. Where the work capacity 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. The applicant raised various issues in the Application for Procedural Review. 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’s submissions went to the merits of the case, that is, the very object of judgement or discretion of the Insurer excluded by section 44(1)(c) and therefore could not be relevant to this review.

### **Submissions by the insurer**

7. The Insurer made no submissions.

### **The Decision**

8. The Insurer has remedied the original errors identified in the course of the first procedural review, with two exceptions, each of which are fatal to the validity of the later decision:

**First, in a decision notice dated 27 February 2014, the Insurer gave the applicant notice that payments would cease from 29 May 2014. This does not allow time for postal service of the notice in addition to the statutorily required three months. The notice period is mandatory.**

**Secondly, the transitional rate was not explained properly (or at all) and an incorrect method was given for the determination of the applicant’s pre-injury average weekly earnings.**

The following words appear in the decision notice:

“4. (a) Pre-injury earnings are calculated to be: \$745.18 based on comparable earnings of a current [worker employed by the same employer] working a 38 hour week. (Which is an average

you received per week as derived from your wages across a 12 Month period).”

Since the applicant was in fact an existing recipient of weekly payments immediately prior to 1 October 2012, the transitional rate automatically applies. It follows that what appears above is completely misconceived.

Both errors thus identified have the effect of rendering the decision invalid by virtue of breach of the legislation in the first instance and demonstrable error in the second.

## RECOMMENDATION

9. I recommend that the Insurer conduct a new work capacity assessment in accordance with the WorkCover *Guidelines* and make a new work capacity decision.
10. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 29 May 2014 until such time as he is properly transitioned. Those payments should continue from 29 May 2014 being the date on which they ceased.
11. 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 29 May 2014 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  
27 August 2014