

**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 29 November 2013 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable immediately prior to 7 March 2014.**
- c. The payments are to be back-dated to 7 March 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 29 November 2013. The decision stated that payments were to cease on 7 March 2014. The applicant sought internal review. The Internal Review Decision (IRD) was issued on 24 January 2014. The applicant sought Merit Review by the Authority on 13 February 2014. The Merit Review was issued on 7 July 2014.
2. The applicant was injured on 3 February 2013. The injury was to his left elbow. He returned to suitable duties but in March 2013 he was made redundant. He has not returned to employment. The Insurer made weekly payments as required under the provisions of the *Workers Compensation Act 1987* (1987 Act).
3. Section 44A of the 1987 Act allows the Insurer to undertake a work capacity assessment, but it is not required before making a decision (section 44A(3)).
4. The relevant version of the *WorkCover Work Capacity Guidelines (Guidelines)* is the one dated 4 October 2013, 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. Once the Insurer has conducted an assessment then the Insurer may make a work capacity decision. Where that 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. 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 procedural matters. The first issue is that the decision does not state that the notice period commences from the date of the letter. The decision is clear that the notice period dates from the date of the letter. The second issue is that 3 months from 29 November 2013 is 7 February 2014. That is wrong. The Insurer gave appropriate notice of 3 months. Thirdly, that the applicant was only paid to 6 March 2014. If so, adequate notice was still given. Allowing for the postal rule in section 76(1)(b) of the *Interpretation Act 1987* notice need only have been given to 5 March 2014. Fourthly that the date medical payments are to cease is incorrect. The Insurer is correct to state that medical payments cease 12 months after weekly payments cease. Finally that the decision does not state that documents may be requested. That is correct. Oddly, the applicant knew that such documents could be requested, so can scarcely complain of not being told.

### **Submissions by the insurer**

7. The Insurer made submissions. The submissions included copies of correspondence and telephone records with the applicant which was of assistance. The other submissions were in answer to the matters raised by the applicant in addition to a time-line. Most interestingly the Insurer notes that while the applicant complains of not being told he could request documents from the Insurer (thus displaying the very knowledge of which he complains of being deprived) he at no time requested any documents.<sup>1</sup>

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<sup>1</sup> An intriguing albeit two-edged paradox.

## The Decision

8. There does not appear to be any legislative requirement to notify the applicant of the outcome of the assessment. However, *Guideline 5.3.2* stated that the decision must:
- *state the decision and give brief reasons for making the decision;*
  - *outline the evidence considered in making the decision, noting the author, the date and any key information. All evidence considered should be referred to, regardless of whether or not it supports the decision;*
  - *clearly explain the line of reasoning for the decision.*

My finding is that the *Guidelines* result in the insurer being compelled to reveal the outcome of the assessment.

9. The decision states that the applicant has been receiving a certain rate of weekly payments pursuant to section 37. He is told that rate will continue for 3 months and 1 week to allow for postage of the decision pursuant to section 54. The decision does not state in which Act these sections may be found. Further down the page the applicant is told that his pre-injury average weekly earnings (PIAWE) is a different figure being 73% of the first figure. The applicant would be concerned that the Insurer has not been particularly careful in preparing the decision when it cannot correctly set out the PIAWE.
10. The reference to section 54 should be a reference to section 54(2)(a) of the 1987 Act.
11. The decision states that the applicant has a current work capacity and reference is made to section 43(1)(a). Also that he has suitable employment option and reference is made to section 43(1)(b). Then that he has the ability to earn a certain amount and reference is made to section 43(1)(c). The decision does not refer to the Act in which these sections may be found. If the applicant could find these sections he would not find them of much assistance. The Insurer should refer to section 32A of the 1987 Act and the definitions of “*current work capacity*”

and “*suitable employment*.” An untutored applicant would not expect ‘*current work capacity*’ to mean being unable to return to pre-injury employment, but being able to work in “*suitable employment*.” The latter term is central to the 2012 amendments. The definition holds in part that suitable employment includes work “*whether the work or the employment is of a type or nature that is generally available in the employment market*.” An applicant is unlikely to know from the term “suitable employment” that it may include work which does not exist or is otherwise unavailable “generally.”<sup>2</sup>

12. The applicant is advised that he has been in receipt of weekly payments for more than 14 weeks but less than 130 weeks. The applicant should be referred to the definitions of “*first entitlement period*” and “*second entitlement period*” in section 32A of the 1987 Act. The applicant would then see that the first period means “*an aggregate period not exceeding 13 weeks*”, not more than 14 weeks. In addition, that the second period ends at the end of 130 weeks, not less than 130 weeks.
13. *Guideline 5.3.2* requires the Insurer “*to state the impact of the decision on the worker in terms of their entitlement to weekly payments, entitlement to medical and related treatment expenses and return to work obligations*.” The decision states that treatment expenses and related expenses will continue for 12 months after weekly payments cease pursuant to section 59 of the 1987 Act. The correct reference is to section 59A(2)(a) of the 1987 Act.
14. The Insurer failed to advise that section 59A(3) of the 1987 Act provides that the applicant may, after the entitlement to compensation for medical expenses ends, become eligible for further payments for medical expenses if he becomes entitled to compensation for weekly benefits at some stage in the future and for such time as those weekly payments continue. This was not disclosed by the Insurer as clearly the Insurer was not aware of section 59A.
15. The decision states that the applicant’s entitlement is to be calculated pursuant to section 37. Which Act is being referred to is not stated. It is also not stated that the calculation is being done pursuant to section

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<sup>2</sup> It is possible on one reading that a person who is fit to be (for instance) an elected union official or fit to hold a statutory appointment is fit for work which is not “available generally” since only a small cohort of candidates would be eligible for the role.

37(1) of the 1987 Act. That is curious as that section applies to an applicant who has “*no current work capacity*” whereas the decision states that the applicant has a capacity to work. This is a demonstrable error.

16. Guideline 5.3.2 requires the Insurer to “*advise that any documents or information that have not already been provided to the worker can be provided to the worker on request to the insurer*”. The decision states that the applicant has been sent copies of the 3 documents listed in the decision. He is not told that he may request copies of other documents. The IRD lists 18 documents. The applicant on receipt of the IRD would be properly concerned that the Insurer has ignored documents when making the decision and has only relied upon those documents which support its decision.

## **FINDING**

17. 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.

## **RECOMMENDATION**

18. I recommend that the Insurer conduct a new work capacity assessment in accordance with the WorkCover *Guidelines* and make a new work capacity decision.
19. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 7 March 2014 until such time as he is properly transitioned. Those payments should continue from 7 March 2014 being the date on which they ceased.
20. 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 7 March 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.



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