

**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 3 October 2013 is set aside.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable immediately prior to 11 January 2014.**
- c. **The payments are to be back-dated to 11 January 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 3 October 2013. The decision stated that payments were to cease on 11 January 2014. The applicant sought internal review. The Internal Review Decision (IRD) was issued on 26 November 2013. The original decision was confirmed, although on different grounds. Initially it had been asserted by the Insurer that the applicant was not working 15 hours per week and earning in excess of \$168, whereas in the internal review the Insurer changed this to an admission that the applicant certainly does work 15 hours per week, earning around \$300, but they thought he could do better<sup>1</sup> and so they relied on section 38(3)(c) to come to the same conclusion as before. The applicant sought Merit Review by the Authority. That application resulted in a similar outcome, the recommendation being dated 3 July 2014. An application for procedural review was made within time and on the correct form.

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<sup>1</sup> The Insurer thought 30 hours a more suitable number.

2. The applicant suffered injury to his lower back<sup>2</sup> in the course of his employment as a Meat Packer on or about 22 October 1999. After a short break and then returning on lighter duties, the applicant continued in the same employment until he was terminated in late July 2006. He currently works an average of 15 hours per week in different employment. The Insurer made weekly payments as required under the provisions of the *Workers Compensation Act 1987* (1987 Act).
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 transitioning 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 12 August 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 is required to 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 did list the following grounds of review:

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<sup>2</sup> A body part which was still recognised statutorily as at 22 October 1999. After 31 December 2001 he apparently had an injury to his "spine" [as the *WorkCover Guides for the Evaluation of Permanent Impairment* (3<sup>rd</sup> Ed.) would have it].

- i. The second entitlement period starts from 1 October 2012 and has not yet expired.
- ii. Work capacity assessment on 14 August 2013<sup>3</sup> cannot be based on two reports which do not assess current capacity for work.<sup>4</sup>
- iii. There were two reports relied upon by the Insurer which were not provided to the applicant for consideration prior to the decision being made.
- iv. Reports of one particular doctor did not support the decision made.
- v. Work capacity decision is based on a finding that the applicant does not work 15 hours and earn \$168 per week, when in fact he does precisely that.<sup>5</sup>
- vi. His current position is the only work he has been able to obtain and he is not capable of office work or working as a cleaner or general hand.
- vii. There has been no assessment of his Whole Person Impairment [WPI] and it is therefore possible that he is a “seriously injured worker” with WPI of over 30%.

## Submissions by the insurer

7. The Insurer made no submissions.
8. The submissions of the applicant might be dealt with shortly:
  - i. This is wrong in law and fact.
  - ii. See footnote 4.
  - iii. The insurer denies this, saying that both reports were sent to the applicant on 9 September 2013 together with a “Fair Notice” letter.
  - iv. This goes to the merits of the decision.
  - v. This is admitted by the Insurer.
  - vi. This goes to merits.

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<sup>3</sup> The correct date, despite the decision notice being dated 3 October 2013.

<sup>4</sup> It is unclear whether or not the allegation is that the assessment was not current, or there was no assessment at all.

<sup>5</sup> This finding was overturned during internal review.

- vii. In the absence of such an assessment, the applicant has no grounds to rely on the “seriously injured worker” exception. There appears to be no impediment to the applicant seeking such an assessment.

## The Decision

9. 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 5.3.2* requires.
10. *Guideline 5.3.2* requires the decision to “reference the relevant legislation.” This would require any interpretation of the legislation (including delegated legislation) to be accurate. It is clearly inaccurate to say (as this Insurer has said) that:

“your entitlement to weekly payments at your current rate **must cease within 3 months of this decision** – please refer to: Section 43(1)(f) and 54(2)(a) of the *Workers Compensation Act 1987*.”

Section 43(1)(f) is irrelevant to notice and section 54(2)(a) is a minimum notice provision, not a maximum payment provision. Payments may not cease until 3 months have elapsed, which is the exact opposite of what the applicant was told. This is therefore a demonstrable error and would suffice to set aside the original decision even without any other grounds.

11. Apart from one medical report dated 7 August 2013, all medical evidence cited by the Insurer in making this work capacity decision is dated 2012 or (in most cases) considerably earlier. The relevance of these documents is questionable when the task of the insurer is to assess “current” work capacity. In the event of a new assessment being undertaken it would be very desirable for the Insurer to acquire some evidence which may be relied upon with confidence to reflect the current work capacity of the applicant, rather than historical relics which are years out of date.

## FINDING

12. 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*.

## RECOMMENDATION

13. I recommend that the Insurer conduct a new work capacity assessment in accordance with the WorkCover *Guidelines* and make a new work capacity decision.

14. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 11 January 2014 until such time as he is properly transitioned. Those payments should continue from 11 January 2014 being the date on which they ceased.

15. 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 11 January 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  
04 September 2014