

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 5 July 2013 is set aside.**
- b. The insurer is to calculate the applicant's weekly payments for 13 June 2013 with reference to his pre-injury average weekly earnings as defined by Section 44C of the 1987 Act.**
- c. In calculating the applicant's weekly payments, the insurer is not to apply the transitional amount as set out in Schedule 6, Part 19H, Clause 2 of the 1987 Act.**
- d. The applicant's entitlement to weekly payments are to be assessed as above until such time as a further work capacity decision is made and comes into effect.**

Introduction and Background

1. The applicant injured worker seeks procedural review of a work capacity decision made by the insurer dated 5 July 2013. This decision determined that the worker's deemed pre injury earnings would be \$938.30 in accordance with Schedule 6, Part 19H, Clause 2 of the 1987 Act. An internal review was conducted on 29 August 2013 confirmed the original decision. The applicant sought merit review. Following receipt of the Merit Review Service (MRS) recommendation dated 11 June 2014, the applicant made an application to this office dated 11 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 injured his right knee on 12 July 1995. He made a claim which was accepted and then closed in October 1999. The applicant reopened his claim in April 2010 following an increase in his symptoms. The claim was closed a second time in August 2011. The applicant reopened his claim in June 2013 following review by his nominated

treating doctor. At this point in time, he was now employed by a different employer.

4. The applicant was not in receipt of weekly payments immediately before 1 October 2012.
5. The WorkCover Authority of New South Wales issued the *WorkCover Work Capacity Guidelines* (Guidelines) regarding the appropriate and consistent application of work capacity assessments, decisions and reviews. These *Guidelines* were issued under sections section 376(1) of the Workplace Injury Management and Workers Compensation Act 1998¹.
6. The relevant version of the *Guidelines* is the one dated 27 September 2012, which came into effect on 1 January 2013.

Submissions by the applicant

7. The applicant made a no specific submission about the procedure of the insurer other than generally requesting a review of the insurer'.
8. 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

¹ Section 376(1)(c) of the 1998 Act empowers the Authority to issue Guidelines for "such other matters as a provision of the Workers Compensation Acts provides". Whilst Section 44A of the 1987 Act allows for Guidelines for the purpose of work capacity assessments, there is no equivalent position in Section 43 of the 1987 or elsewhere providing for Guidelines relating to a work capacity decision. This poses the issue of the validity of these Guidelines for work capacity decisions made in the absence of a work capacity assessment.

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

10. *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*”. The insurer advised the applicant that pursuant to Schedule 6, Part 19H, Clause 8(2) of the 1987 Act, the insurer was “*required to make a work capacity assessment and decision for all existing recipients of weekly compensation*”. The insurer then goes on to say the worker was not an existing recipient of weekly compensation.
11. The obvious conclusion is that the insurer referenced the irrelevant legislation. This is not a procedural defect but rather a source of confusion.
12. The relevant item of legislation explaining the application of the weekly payment amendments to the worker’s claim is at Schedule 6, Part 19H, Clause 3(1) of the 1987 Act, which states:

“Except as provided by this Part or the regulations, an amendment made by the 2012 amending Act extends to:

- (a) an injury received before the commencement of the amendment, and*
- (b) a claim for compensation made before the commencement of the amendment, and*
- (c) proceedings pending in the Commission or a court immediately before the commencement of the amendment.”*

13. Clause 8 sets out an exception to the application of Clause 3. It is an exception that – by the insurer’s own admission – does not apply to the applicant. It is not helpful to refer to Clause 8 without explaining Clause 3, the operative Clause in the applicant’s claim that determines how and why the amendments affect him³. On this basis, the work capacity decision is defective.

FINDING

14. I find that the Insurer has failed to follow the procedures as set out in the WorkCover Guidelines. The Insurer has also failed to follow the 1987 Act.

³ Arguably, it’s not helpful to refer to Clause 8 at all in this matter.



RECOMMENDATION

15. I recommend that the Insurer issue a new work capacity decision in accordance with the WorkCover Guidelines.
16. I recommend the insurer is to calculate the applicant's weekly payments for 13 June 2013 with reference to his pre-injury average weekly earnings as defined by Section 44C of the 1987 Act, disregarding the transitional amount as set out in Schedule 6, Part 19H, Clause 2 of the 1987 Act.
17. The worker's entitlement to weekly payments are to be assessed as above until such time as a further work capacity decision is made and comes into effect.
18. These recommendations are binding on the insurer: see section 44(3)(h) of the 1987 Act.
19. I note the outcome the MRS, which was to the same or similar effect as appears above.

Jeffrey Gabriel
Delegate of the WorkCover Independent Review Officer
4 September 2014