



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 April 2014 is set aside.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable at 3 April 2014.**
- c. **The payments are to be back-dated to the date payments ceased in respect of the decision dated 3 April 2014.**
- d. **Such payments are to continue until such time as a further work capacity decision is made and comes into effect.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 3 April 2014. The applicant sought internal review of the original work capacity decision dated 11 December 2013 and as a result of the Internal Review Decision (IRD) the Insurer issued a new work capacity decision 3 April 2014. She sought Merit Review of the most recent decision on or about 13 May 2014 and the Authority issued the Merit Review recommendation on 11 June 2014. The applicant made application to this office on 10 July 2014.
2. *Section 44(1)(c)* of the *Workers Compensation Act 1987* (the 1987 Act) only allows WIRO to review decisions reviewed by Merit Review.
3. I am satisfied that the applicant has made the application for review of the decision dated 3 April 2014 in the proper form and within time.
4. The applicant suffered injury to her spine on 4 May 2012 in a motor vehicle accident. She was a Pharmacy Services Manager with the employer. She was in receipt of weekly payments of compensation in the sum of \$1625.28 per week at the time the first work capacity decision was issued on 11 December 2013.

5. The applicant was in receipt 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.
6. *Section 44A* of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines (Guidelines)*.
7. The relevant version of the *Guidelines* came into effect on 11 October 2013. That publication stated that the *Guidelines* provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessments and decisions.
8. 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 the weekly benefits payable to the injured worker then the Insurer is required to give proper notice to the worker (*Section 54(2)(a)* of the 1987 Act).

Submissions by the applicant

9. The applicant raised various matters 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 main submission is that her work capacity is not as assessed by the ‘theoretical’ work capacity decision and this is not relevant to a procedural review.

Submissions by the Insurer

10. The Insurer has provided submissions in response to the application which have been considered carefully.

The Decision

11. This procedural review is of the decision of the Insurer dated 3 April 2014 (the decision). The original work capacity decision dated 11 December 2013 was the subject of an internal review.

12. The applicant referred the work capacity decision dated 11 December 2013 to the Insurer for review on 8 January 2014. The Insurer responded on 3 April 2014.
13. *Guideline 7.2.4* states that the Insurer must acknowledge the referral in writing within 7 days of the receiving the application. The Insurer was in breach of this *Guideline*.
14. The Insurer, as a result of internal review, revoked the original decision of 11 December 2013 and replaced it with the decision dated 3 April 2014.
15. *Guideline 7.2.7* states the Insurer must write to the worker within 30 days of receiving the application advising of the outcome of the internal review. The Insurer was in breach of this *Guideline*.
16. The decision at paragraph 33 states '*A further Section 54 note providing an additional 3 months' notice plus allowance for service by post of 7 days (CCI) policy is to be provided to the worker.*'
17. *Section 54(2)(a)* of the 1987 Act requires 3 months' notice be given when weekly payments are to be reduced or ceased.
18. From the documents provided for this procedural review it does not appear that the Section 54 notice was provided to the applicant.
19. The failure to advise is in breach of Section 54(2)(a) of the 1987 Act.
20. The decision states that at that time the applicant's entitlement to workers compensation payments was capped at \$452.60 per week by way of reference to Section 37(1)(a)(i) of the legislation at that time. This is incorrect. At the time of the issuing of the original work capacity decision in December 2013 the applicant was in receipt of \$1625.28 per week. The applicant was being paid under Section 38 of the preceding legislation. This is a demonstrable error.
21. *Guideline 5.3.2* requires the Insurer to 'state the impact of the decision on the worker in terms of entitlement to weekly payments, entitlement to medical and related expenses and return to work obligations.'

22. The decision states *'Payments of medical expenses will continue as approved and reasonably related to the injury but will cease after 12 months from the cessation of weekly payments pursuant to Section 59A(2) of the Act. If the worker becomes entitled to weekly compensation in relation to the injury in future payments of reasonable medical expenses may be approved during the period of incapacity pursuant to Section 59(3) of the Act.'*
23. Given that the Insurer has not advised the applicant of the date upon which the weekly payments will cease the above paragraph does not assist in notifying the applicant when her entitlements to medical expenses will cease. The Insurer has failed to comply with the *Guideline*.
24. *Guideline 5.3.2* states that the Insurer must "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 has failed to so advise the applicant and fails to comply with the *Guideline*.

FINDING

25. 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 has been more than one breach of the *Guidelines* which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

RECOMMENDATION

26. I recommend that the Insurer conduct a new work capacity assessment and make a new work capacity decision in accordance with the *WorkCover Guidelines*.
27. I recommend that the Insurer pay the applicant the weekly benefit to which she was entitled prior to 3 April 2014 until such time as she is properly transitioned. Those payments should continue from the date on which they ceased.



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28. 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 3 April 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.

A handwritten signature in black ink that reads "T. Emanuel".

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
5 September 2014