

**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 30 September 2013 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable at 7 January 2014.**
- c. The payments are to be back-dated to 7 January 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 30 September 2013. The applicant sought internal review and the Internal Review Decision (IRD) was issued on 12 November 2013. He then sought Merit Review on or about 29 November 2013 and the Authority issued the Merit Review recommendation on 4 July 2014, some 217 days later<sup>1</sup>. Following receipt of the Merit Review Service (MRS) recommendation, the applicant made application to this office on 15 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 suffered injury to his right shoulder on 14 January 2004. The applicant was unable to return to his pre-injury duties. The applicant obtained alternative employment initially with G H in 2007 as a forklift driver and with Ca Hs in 2008 as a labourer/forklift. He presently

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<sup>1</sup> *Guideline 10.14 of the Guidelines for work capacity decision Internal Reviews by insurers and Merit Review by the WorkCover Authority (Review Guidelines), which came into effect on 12 August 2013 states that "The Authority will write to the worker and insurer as soon as practicable and preferably within 30-days of receiving the application advising of the outcome of the merit review."*

works approximately 18 hours per week with this employer. The applicant was in receipt of weekly payments of compensation in the sum of \$350 per week up until the time the work capacity decision purported to come into effect.

4. The applicant was in receipt of weekly payments immediately before 1 October 2012. Accordingly *Clause 8 of Part 19H of Schedule 6* to the *Workers Compensation Act 1987* (the 1987 Act) required the Insurer to conduct a work capacity assessment.
5. *Section 44A* of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines (Guidelines)*.
6. The relevant version of the *Guidelines* came into effect on 12 August 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.
7. 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**

8. 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 submission is that he does not believe the assessment was issued in accordance with the law.

### **Submissions by the Insurer**

9. The Insurer has made submissions which have been considered carefully.

## The Decision

10. *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.’
11. The Insurer has advised the applicant that they will continue to approve reasonable and necessary treatment expenses as defined under *Section 60* of the 1987 Act. However under *Section 59A* of the Act the applicant’s entitlement to medical benefits is limited to a period of 12 months after weekly benefits cease. The applicant is advised that his entitlement to medical treatment will therefore expire on 7 January 2015.
12. The present decision correctly advises the applicant that his entitlements to medical expenses will cease twelve months after the cessation of his weekly payments. However, the decision **fails** to advise the applicant of *Section 59A (3)* of the 1987 Act.
13. *Section 59A(3)* of the 1987 Act states that the applicant may, after the entitlement to compensation for medical expenses ends, become eligible for further payments for medical expenses if the applicant becomes entitled to compensation for weekly benefits at some stage in the future.
14. The Insurer has failed to comply with the relevant *Guideline*.
15. *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

16. 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

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



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