

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 16 October 2013 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable immediately prior to 24 January 2014.**
- c. The payments are to be back-dated to 24 January 2014.**
- d. The 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 injured worker seeks procedural review of a work capacity decision made by the insurer dated 16 October 2013. This decision terminated the worker's weekly benefit effective from 24 January 2014. An internal review conducted on 25 November 2013 confirmed the original decision. The applicant sought merit review. Following receipt of the Merit Review Service (MRS) recommendation dated 4 July 2014, the applicant made an application to this office dated 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 injured his back on 1 October 2008. He made a claim for workers compensation which was accepted by the insurer. The applicant was performing suitable duties until his employment was terminated in August 2009. He is not currently working.
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* (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 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.
7. Once the Insurer has conducted an assessment then the Insurer is required to make a work capacity decision¹. Where that decision involves a reduction or cessation 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 made two submissions as to the insurer's procedure. Namely, that the insurer applied the "wrong Act" and that they did not "consider all the documents". The applicant also made a submission in relation to the merits of the decision.
9. 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 decision

Submissions by the Insurer

10. The Insurer made no submissions.

CONSIDERATION

11. *Guideline 5.3.2* sets out the requirements of a written Work Capacity Decision Notice. Among the requirements listed, the insurer must "*reference the relevant legislation*". I do not accept the applicant's submission that the insurer applied the "wrong Act". The insurer is correct to refer to the 1987 Act in its decision.

¹ Schedule 8, Clause 22 of the *Workers Compensation Regulation 2010*

12. *Guideline 5.3.2* requires the insurer to “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.” This requirement is different to the applicant’s submission that the insurer did not “consider all the documents” which would be much more onerous.
13. The applicant’s specific submission is that the insurer did not consider WorkCover medical certificates from 2009. I note the insurer refers to a WorkCover Certificate of Capacity from the nominated treating doctor dated 4 September 2013, a mere six weeks prior to the work capacity decision. The insurer’s decision also acknowledged WorkCover Certificates of capacity and other documents from 2009 as documents provided to the insurer for review by the worker in support of his claim. Having regard to those aspects of the decision as well as the definition of current work capacity to mean in Section 32A of the 1987 Act² I do not consider the insurer to have breached this aspect of the *Guideline*.
14. *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 insurer did not advise the worker that the work capacity decision would materially affect his entitlement to claim for medical expenses. The insurer did not explain Section 59A(2) of the 1987 Act, which states that treatment expenses and related expenses are no longer payable 12 months after a worker ceases to be entitled to weekly payments of compensation.
15. Further, 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 and for such time as those weekly payments continue. This was not disclosed by the Insurer, which constitutes a breach of the Guidelines.

FINDING

² “[c]urrent work capacity, in relation to a worker, means a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment”.



16. I find that the Insurer has failed to follow the procedures as set out in the WorkCover Guidelines.

RECOMMENDATION

17. I recommend that the Insurer issue 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 immediately prior to 24 January 2014 until such time as he is properly transitioned.

19. These recommendations are binding on the insurer: see section 44(3)(h) of the 1987 Act.

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