

**RECOMMENDATION FOLLOWING AN APPLICATION FOR REVIEW OF THE INSURER'S WORK CAPACITY DECISION PURSUANT TO SECTION 44(C) OF THE *WORKERS COMPENSATION ACT 1987*.**

1. The applicant seeks a review of the work capacity decision of the Insurer.
2. There is no dispute that the applicant was injured in the course of his employment on 5 May 2008 and payments of weekly compensation and medical expenses have been accepted by the insurer and paid to date and continuing.
3. The Insurer completed what they described as an assessment of the work capacity of the applicant and purported to issue a work capacity decision pursuant to Section 43 of the *Workers Compensation Act 1987* ("1987Act") dated 22 November 2012. The Insurer gave the applicant notice pursuant to Section 54 of the *1987 Act* of the reduction of his weekly benefit to nil.
4. There is no evidence at all as to when that decision was sent to the applicant or of its receipt by him. However by letter dated 13 December 2012 the Insurer acknowledges receipt of the Application for an Internal Review by The applicant. It is clear that the applicant received notice of the decision prior to that date.
5. The Insurer completed its internal review and the applicant was notified by letter dated Friday 28 December 2012 of the result of that review. The Internal Review upheld the determination of the Insurer. There is no information as to when the applicant received the notice of the outcome of the review however it appears that the application by him for a merit review was made on 21 January 2013. It is clear that the applicant received notice of the decision prior to that date.
6. The Merit Review was completed and a Statement of Reasons issued on 22 February 2013. The Reviewer upheld the determination of the Insurer but varied the date for commencement of the three month notice to the applicant. That decision was provided to the applicant by email on the same day.
7. On 1 March 2013, the applicant requested the Independent Review Officer to undertake a review of the decision of the Insurer pursuant to Section 44(c) of the *1987 Act*. I am satisfied that the applicant has made that application within the time provided by that section.

8. A series of medical reports and other documents were provided to me by the applicant:
9. The following documents were considered by the insurer in making a Work Capacity Decision on 22 November 2012:
  - 9.1 Medical Certificate.
  - 9.2 Letter of appointment.
  - 9.3 Printout of earnings dated 5 November 2012.

In conducting this review I am only to consider the material that was available to the Insurer in reaching its original first instance decision. I can only have regard to those documents in Paragraph 9 hereof in deciding what recommendation to make.

## **The Background to the Claim by the applicant**

- 10.1 The background to the claim does not appear to be in dispute. The applicant suffered an injury to his left elbow and right knee on 5 May 2008 when he was involved in an assault in the course of his duties. He was treated for those injuries which treatment included surgery. His level of impairment as a result of the injury is less than 20% and he is not a "seriously injured worker".
- 10.2 He recovered from that injury and has been employed since 13 August 2012. His rate of pay is \$60,235 pa which is \$1,158 per week. His actual weekly earnings are higher than that.

## The Legislative Framework

The legislative framework which governs the entitlement to weekly benefits under the 2012 changes and the transition from the previous benefits is complex and it must be difficult for an injured worker alone to navigate and understand its impact.

11. Part 19H of Schedule 6 of the *1987 Act* contains provisions consequent on the enactment of the *Workers Compensation Legislation Amendment Act 2012*.

Clause 1 of that Part contains definitions that are relevant to that Part, including:

**2012 amending Act** means the *Workers Compensation Legislation Amendment Act 2012*.

**Weekly payments amendments** means the amendments made by the 2012 amending Act to division 2 (Weekly compensation by way of income support) of part 3 of the *1987 Act*...

12. The amendments made by the 2012 amending Act to Division 2 include Sections 43 (Work Capacity Decisions) and 44 (Review of Work Capacity Decisions).

Clause 6 provides:

### **Application of weekly payments amendments to existing claimants**

*An existing recipient of weekly payments remains entitled to compensation under Division 2 of Part 3 of the 1987 Act as if the weekly payments amendments had not been made, but only until the weekly payments amendments apply to the compensation payable to the person as provided by this Division.*

Clause 3 of Part 1 of Schedule 8 of the Workers Compensation Regulation 2010 (which came into operation on 1 October 2012) provides:

## **Weekly payments amendments—other than seriously injured workers**

*(1) If a claim for compensation in respect of a worker's injury was made before 1 October 2012, the weekly payments amendments and the relevant transitional arrangements do not apply to the compensation payable in respect of the injury until 1 January 2013.*

*Note. In the case of a claim made on or after 1 October 2012, the weekly payments amendments apply to the claim from when the claim is made.*

*(2) This clause does not apply to a seriously injured worker.*

*(3) In this clause:*

*relevant transitional arrangements means the provisions of Division 2 (Weekly payments) of Part 19H of Schedule 6 to the 1987 Act.*

13. The effect of the legislation is that the provisions of Section 44 do not apply to an injured worker (who made a claim for compensation prior to 1 October 2012) to allow the Insurer to make a work capacity decision prior to 1 January 2013.

### **Process of the Insurer**

14. The reasons for the decision (in brief) which were set out at paragraph 3 of the decision of the Insurer appear to have been:

14.1 Although your doctor certified that the applicant was unfit for his pre injury duties, he was fit for permanently modified duties. The applicant had in fact obtained suitable alternate employment which continues.

14.2 The applicant's basic salary is currently \$60,235 per annum (\$1,158.37 pw) although his actual earnings are \$1,420.82 pw.

14.3 As at the date of the work capacity decision the applicant had received 231.4 weeks of weekly payments and as that is more than 130 weeks of weekly payments but less than 260 weeks his future entitlement is determined by Section 38 of the 1987 Act.

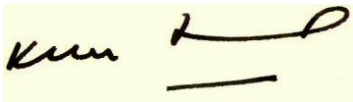
14.4 Given his earnings he would not be entitled to receive any compensation and therefore the current weekly benefits cease upon the expiry of the three month notice period.

15. That reasoning in my view is correct albeit premature.

## My Reasons:

16. My review is only of the procedures of the Insurer and the evidence considered by either the Internal Review by the Insurer and the reasons for its decision, the evidence before the Merit Reviewer and the reasons for the decision are not relevant and I am not required to have regard to them.
16. It is common ground that the applicant is not a seriously injured worker. Therefore the "weekly payments amendments" do not apply to the compensation payable to him until 1 January 2013.
17. Sections 43 & 44 of the *1987 Act* were not in force in relation to the compensation payable by the Insurer to the applicant until 1 January 2013 and accordingly the Insurer was precluded from making a decision before that date.
18. The applicant is therefore entitled to continue to receive the weekly benefits he was entitled to before 1 October 2012 until a work capacity assessment is conducted and a decision is made by the Insurer.

I therefore recommend that the applicant remains entitled to weekly compensation as the Insurer failed to correctly follow the procedure for the issue of the work capacity decision and accordingly the Section 54 notice does not affect his entitlement.



KA Garling  
WorkCover Independent Review Officer

8 March 2013