

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 31 May 2013 is set aside.**
- b. **The applicant is to be reinstated to her weekly payments at the rate applicable at 31 May 2013.**
- c. **The payments are to be back-dated to 7 September 2013.**
- 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 31 May 2013. The applicant sought internal review and the Internal Review Decision (IRD) was issued on 9 October 2013. She then sought Merit Review on or about 13 November 2013 and the Authority issued the Merit Review recommendation on 25 June 2014, some 224 days later¹. Following receipt of the Merit Review Service (MRS) recommendation, the applicant made application to this office on 16 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 was diagnosed with bilateral carpal tunnel syndrome. The accepted dated of injury was 1 September 2003. The applicant was employed as a full time canteen assistant at that time. The applicant was unable to return to her pre-injury employment. She found

¹ *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 27 September 2012 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."*

alternative employment with Classic Blinds and Shutters in 2008 working an average of 13.5 hours per week.

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 27 September 2012. 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 submissions are not relevant to a procedural review.

Submissions by the Insurer

9. The Insurer has not made submissions in response to the application.

The Decision

10. *Guideline 5.4.2* requires the Insurer to advise the worker of the date that the 'decision will take effect'. That *Guideline* also 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 'wages will cease on 7 September 2013'. Given that the applicant is actually employed and in receipt of wages as well as weekly payments of compensation this statement from the Insurer is incorrect and somewhat confusing.
12. *Guideline 5.4.1* states that the Insurer must provide the worker and the relevant parties with plain language communication regarding the work capacity decision. Plain language communication requires communicating a clear message.
13. It would be more appropriate and correct in the circumstances to have advised the applicant that her payments of weekly compensation will cease on 7 September 2013.
14. The Insurer has failed to comply with both *Guidelines*.
15. The Insurer has failed to advise the applicant of the impact the work capacity decision will have on her entitlement to ongoing medical treatment. The decision states 'we will continue to pay for the reasonably and necessary treatment for 12 months from the date wages cease on 7 September 2013'.
16. *Section 59A(2)* of the 1987 Act states that treatment expenses and related expenses are no longer payable 12 months after weekly payments cease.
17. The present decision fails to advise the applicant that her entitlements to medical expenses will cease twelve months after the cessation of her weekly payments. The decision also **fails** to advise the applicant of *Section 59A (3)* of the 1987 Act.
18. *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.

19. The Insurer has failed to comply with the relevant *Guideline*.
20. *Guideline 5.4.2* 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

21. 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

22. I recommend that the Insurer conduct a new work capacity assessment and make a new work capacity decision in accordance with the WorkCover *Guidelines*.
23. I recommend that the Insurer pay the applicant the weekly benefit to which she was entitled prior to 31 May 2013 until such time as she is properly transitioned. Those payments should continue from 7 September 2013 being the date on which they ceased.
24. 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 31 May 2013 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.



WorkCover **independent** review office

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

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

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