



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 October 2013 is set aside.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable at 31 October 2013.**
- c. **The payments are to be back-dated to 3 December 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 October 2013. The applicant sought internal review of the original work capacity decision dated 3 September 2013 and as a result of the Internal Review Decision (IRD) the Insurer issued a 'fresh decision' on 31 October 2013. He sought Merit Review of the most recent decision on or about 25 November 2013 and the Authority issued the Merit Review recommendation on 4 July 2014, some 214 days later¹. The applicant made application to this office on 20 July 2014.
2. I am satisfied that the applicant has made the application for review of the decision dated 31 October 2013 in the proper form and within time.
3. Section 44(1)(c) of the Workers Compensation Act 1987 (the 1987 Act) only allows WIRO to review decisions reviewed by Merit Review.
4. The applicant suffered injury to his cervical spine on 5 September 2006. He was employed as a truck driver with the employer. Presently the

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 11 October 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."

applicant is employed as a truck driver and factory process worker working 32 to 40 hours per week.

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 was that the Insurer did not provide sufficient notice.

Submissions by the Insurer

10. The Insurer has not provided submissions in response to the application.

The Decision

11. This procedural review is of the decision of the Insurer dated 31 October 2013 (the decision). The original work capacity decision dated 3 September 2013 was the subject of an internal review within the Insurer.
12. The applicant referred the work capacity decision dated 3 September 2013 to the Insurer for internal review on 10 September 2013. The Insurer responded on 31 October 2013 advising a '*fresh decision relating to work capacity*' had been made. Later the decision advises that this work capacity decision will be effective three months from the date of the original notice of work capacity decision dated 3 September 2013.
13. *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. In this case the Insurer took 51 days to respond. The Insurer was in breach of this *Guideline*.
14. In the decisions of 3 September 2013 and 31 October 2013 the applicant was advised that his weekly payments of compensation would cease on 3 December 2013.
15. *Section 54(2)(a)* of the 1987 Act requires 3 months' notice be given when weekly payments are to be reduced or ceased. A better way to explain the 3 month period is to explain that the *Interpretation Act 1987* section 76(1)(b) states that service by mail is taken to be on the fourth working day after the letter is posted. A working day is a day other than "*a Saturday or Sunday, or a public holiday or a bank holiday in the place to which the letter was addressed*": section 76(2)(a) and (b) of the *Interpretation Act 1987*. Therefore, the proper notice period is 3 months and four days.
16. Both the decisions dated 3 September 2013 and 31 October 2013 are in breach of *Section 54(2)(a)* of the 1987 Act.
17. *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.'

18. *Section 59A(2)* of the 1987 Act states that treatment expenses and related expenses are no longer payable 12 months after weekly payments cease.
19. The present decision fails to advise the applicant that his entitlements to medical expenses will cease twelve months after the cessation of his weekly payments. The decision also **fails** to advise the applicant of *Section 59A (3)* of the 1987 Act.
20. *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.
21. The Insurer has failed to comply with the relevant *Guideline*.
22. We note that the original work capacity decision of 3 September 2013 was also in breach of the *Guideline* as it provided incorrect notice period for the cessation of medical expenses and failed to advise of *Section 59A(3)* of the 1987 Act.
23. *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

24. 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

25. I recommend that the Insurer conduct a new work capacity assessment and make a new work capacity decision in accordance with the *WorkCover Guidelines*.
26. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 31 October 2013 until such time as he is properly transitioned. Those payments should continue from the date on which they ceased.
27. 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 October 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.



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