



**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 17 July 2013 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable at 17 October 2013.**
- c. The payments are to be back-dated to 17 October 2013.**
- d. Such payments are to continue until such time as a work capacity decision was made in accordance with the findings of the merit review recommendation and came into effect, or if no such decision has yet been made, until such time as it 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 17 July 2013. The applicant sought internal review of the original work capacity decision and as a result of the Internal Review Decision (IRD) the Insurer issued a new work capacity decision 12 September 2013. She sought Merit Review of the most recent decision on 5 November 2013 and the Authority issued the Merit Review recommendation on 20 June 2014. The applicant made application to this office on 15 July 2014.
2. I am satisfied that the applicant has made the application for review of the decision dated 17 July 2013 in the proper form and within time.
3. The applicant was successful at the merit review stage and the Authority directed the Insurer to make payments in accordance with the transitional rate appropriate to the applicant.

Submissions by the applicant

4. 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 is that the insurer gave too little or no weight to the opinion of her treating doctor. This is an issue which goes to the merits of the case and cannot be reviewed by this office.

Submissions by the Insurer

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

The Decision

6. The decision of the Insurer dated 17 July 2013 had the following procedural defects which are fatal:

- the decision dated 17 July 2013 purportedly gave three months notice to 17 October 2013, without allowing time for delivery of the decision by post in accordance with the *Guidelines* and the *Interpretation Act 1987*;
- the decision made no reference to the continuation of the applicant’s rights to reasonable medical expenses for a further 12 months under section 59A(2), and made no specific reference to ss 59A(2), (3);
- an attempt was made to remedy the above breach in the internal review decision, but this was a complete failure, the applicant being told nothing more than this:

“Please note that you may still have an entitlement to reasonably necessary medical treatment.”

7. The shortcomings of the decision, which include but are by no means limited to those set out in paragraph 6 *supra*, require me to set aside the original decision.

8. The applicant was successful at merit review¹ and the Insurer is bound by the recommendation of the merit review service. The applicant has not called into question the merit review and I have no power to review that recommendation, which therefore stands.
9. An interesting development is that on 3 September 2014 the *Workers Compensation Amendment (Existing Claims) Regulation 2014* (the Regulation) was published. Clause 26 of the Regulation provides that Part 2 “takes effect on and from 1 October 2012.”
10. Clause 30 of the Regulation, which is in part 2 and therefore is deemed to have been in effect since 1 October 2012, is in the following terms:

30 Stay of work capacity decisions

(1) A review under section 44 (Review of work capacity decisions) of the 1987 Act of a work capacity decision made in respect of an existing claim operates to stay the decision that is the subject of the review and prevents the taking of action by an insurer based on the decision while the decision is stayed.

(2) This clause applies to an internal review under section 44 (1) (a) of the 1987 Act only if the application for internal review is made by the worker within 30 days after the worker receives notice from the insurer of the work capacity decision to be reviewed.

(3) The stay under this clause operates from the time the application for review is made until the worker is notified of the findings of the review (or the application for review is withdrawn).

(4) This clause applies despite section 44 (4) of the 1987 Act, which is deemed to be amended to the extent necessary to give effect to this clause.

11. It must follow that the applicant is entitled to the full benefit of this Regulation and therefore the Insurer should restore the applicant to the payments being received immediately prior to the payments ceasing as a result of the original decision.

¹ See paragraph 3 *supra*.

FINDING

12. In the current instance there has been more than one breach of the legislation and *Guidelines* which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

RECOMMENDATION

13. I recommend that the Insurer pay the applicant the weekly benefit to which she was entitled prior to 17 October 2013 until such time as she is properly transitioned in accordance with the recommendation of the merit review service of the Authority. Those payments should continue from the date on which they ceased until such time as either (i) a work capacity decision was made in accordance with the findings of the merit review recommendation and came into effect, or (ii) if no such decision has yet been made, until such time as it is made and comes into effect.
14. Since the applicant is not currently in receipt of weekly payments, clause 21 of schedule 8 of the *Workers Compensation Regulation 2010* cannot apply and payments may resume immediately. The applicant is not required to produce work capacity certificates for the period from 17 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.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
12 September 2014