

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 13 September 2013 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable at 21 December 2013.**
- c. The payments are to be back-dated to 21 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 13 September 2013. The applicant sought internal review and the Internal Review Decision (IRD) was issued on 6 November 2013. He then sought Merit Review on or about 5 December 2013 and the Authority issued the Merit Review recommendation on 24 June 2014, some 201 days later¹. Following receipt of the Merit Review Service (MRS) recommendation, the applicant made application to this office on 23 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 suffered injury to his right hand on 20 December 1992 whilst working as a butcher with Joe's Meat. Subsequent to that time the applicant was able to find alternate employment as a farm hand and plastic production machine operator. However as at the time of the work

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 12 August 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."

capacity decision the applicant was not working and was in receipt of weekly payments of compensation.

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* (the 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 12 August 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 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 relevant submissions include incorrect notice period for cessation of weekly payments and medical expenses and failure to advise of documentation being available upon request.

Submissions by the Insurer

9. The Insurer did not make submissions in response to the application.

The Decision

10. *Guideline 5.3.2* requires the Insurer ‘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 decision states ‘any entitlement you may have to payment of pre-approved reasonable and necessary medical and other expenses until 21 December 2013, will not be affected.’
12. *Section 59A(2)* of the 1987 Act states that treatment expenses and related expenses are no longer payable 12 months after weekly payments cease.
13. The decision fails to advise the applicant that his entitlements to medical expenses will cease on 21 December 2013. The decision also **fails** to advise the applicant of *Section 59A (3)* of the 1987 Act.
14. *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.
15. The Insurer has failed to comply with the relevant *Guideline*.
16. *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*.
17. The Insurer refers to the evidence it considered in determining the applicant’s current work capacity. Emphasis here is on the word **current**. A review of the evidence relied upon is as follows:
 - Claim form dated 4 January 1993;
 - Xray of Dr B dated 9 August 1993 and 13 December 1993;
 - Medical report of Dr McK dated 10 October 1994;
 - Statement of J M dated 11 April 1995;
 - Statement of D W dated 26 April 1995;
 - Determination of Workers Compensation Court of NSW dated 25 August 1995;

- Statements of Employment dated 19 August 2006 and 18 June 2013;
- Medical report of Dr B dated 28 May 2009;
- Earning Capacity Assessment dated 8 July 2009;
- Medical report of Dr H dated 1 May 2012;
- PAYG summaries;
- Medical certificates;
- Payslips

18. *Guideline 2.3* requires that the Insurer's decision should be "*timely, informed and evidence based.*" The medical evidence used by the Insurer is between 18 months and 11 years old. This evidence does not comply with the *Guideline* requirement of 'timely.'

19. The Insurer failed to comply with the *Guideline*.

20. An interesting development is that on 3 September 2014 the *Workers Compensation Amendment (Existing Claims) Regulation 2014* (the Amendment Regulation) was published. Clause 26 of the Amendment Regulation provides that Part 2 "takes effect on and from 1 October 2012."

21. 10. Clause 30 of the Amendment 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.

22. It must follow that the applicant is entitled to the full benefit of the Amendment 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.

FINDING

23. 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

24. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 13 September 2013 until such time as he is properly transitioned. Those payments should continue from 21 December 2013 being the date on which they ceased.

25. The applicant is not required to produce work capacity certificates for the period from 13 September 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
16 September 2014