

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 27 September 2013 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable at 3 January 2014.**
- c. The payments are to be back-dated to 3 January 2014.**
- 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 27 September 2013. The applicant sought internal review and the Internal Review Decision (IRD) was issued on 21 May 2014. He then sought Merit Review on or about 10 June 2014 and the Authority issued the Merit Review recommendation on 1 July 2014. 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 on 9 August 2001 whilst in the course of her employment as a line controller / process worker. Subsequent to that time the applicant was able to find alternate employment as a receptionist with Velibor Todorovic Pty Ltd. As at the time of the work capacity decision the applicant 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 submissions were not relevant to this procedural review.

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 ‘you are entitled to claim medical and other treatment expenses until 12 months after benefits cease.’

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 her entitlements to medical expenses will cease on 3 January 2014. 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*”.
17. The decision has failed to so advise the applicant and fails to comply with the *Guideline*.
18. 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.”
19. 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.

20. 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

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 pay the applicant the weekly benefit to which she was entitled prior to 27 September 2013 until such time as she is properly transitioned. Those payments should continue from 3 January 2014 being the date on which they ceased.

23. The applicant is not required to produce work capacity certificates for the period from 3 January 2014 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.



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

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