

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 August 2013 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable at 21 November 2013.**
- c. The payments are to be back-dated to 21 November 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 August 2013. The applicant sought internal review and the Internal Review Decision (IRD) was issued on 11 October 2013. He then sought Merit Review on or about 8 November 2013 and the Authority issued the Merit Review recommendation on 25 June 2014, some 229 days later¹. Following receipt of the Merit Review Service (MRS) recommendation, the applicant made application to this office on 14 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 lower back and right leg on 28 July 1998 whilst in the course of his employment crane driver / dogman with Brambles Industrial Services. The applicant was unable to return to his

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."

pre-injury duties however he was able to obtain alternate employment and was in receipt of payments of weekly 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 include insufficient consideration of all relevant medical evidence and failure to provide support throughout notice period.

Submissions by the Insurer

9. The Insurer made submissions in response to the application which were received by this office on 8 August 2014 and have been given due consideration.

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 November 2014, 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 November 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* provides the Insurer '*outline the evidence considered in making the decision, noting the author, the date and key information. All evidence considered should be referred to, regardless of whether or not it supports the decision.*'
17. The decision indicates that it has considered the following documents:
 - Your Claim form dated 29 July 1998
 - Revised Plan progress report from IOH dated 12 April 2000
 - Vocational Counselling report from IOH dated 21 June 2000
 - Pre-placement Workability Functional Assessment from IOH dated 18 December 2000
 - Section 53 re-training documents from IOH dated 4 April 2001
 - Progress report from IOH dated 14 June 2001
 - Progress report from IOH dated 10 July 2001

- Section 53 re-training documents from IOH dated 11 July 2001
- Closure report from IOH dated 18 October 2001
- Workcover Medical certificate from Dr R dated 6 March 2002
- Court Order from Compensation Court of NSW dated 2 April 2003
- Statutory Declaration of employment from [the applicant] dated 14 June 2005
- Letter from B P/L dated 20 March 2006
- Certificate of Capacity from Dr Ch dated 14 May 2013
- Letter from Allianz to [the applicant's solicitors] dated 14 June 2013
- Payslips from WEAI Various dates
- Payslips from KC Various dates
- Workcover medical certificate from Dr Ch dated 13 November 2012
- Certificate of Capacity issued by Dr Ch dated 6 August 2012

18. The decision then refers to *'evidence which supports our decision'*. The decision fails to refer to all the documents which it has said that it considered and has failed to refer to any evidence which did not support the decision. The Insurer has **failed** to comply with the *Guideline*.

19. *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"*.

20. The decision has failed to so advise the applicant and **fails** to comply with the *Guideline*.

21. 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."

22. 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.

23. 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

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 pay the applicant the weekly benefit to which he was entitled prior to 21 November 2013 until such time as he is properly transitioned. Those payments should continue from 21 November 2013 being the date on which they ceased.

26. The applicant is not required to produce work capacity certificates for the period from 21 November 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.



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

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