

**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 28 March 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable at 06 August 2014.**
- c. The payments are to be back-dated to 06 August 2013.**
- d. Such payments are to continue until such time as a work capacity decision is made and the applicant is transitioned to the present legislative scheme.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 28 March 2014. In the course of that decision the Insurer purported to give the applicant written notice that his payments would be terminated on and from 6 August 2014. This notice period would easily satisfy the requirements of section 54(2)(a) of the *Workers Compensation Act 1987* (1987 Act) and the postal delivery time-frame set out in the *Guidelines* and the *Interpretation Act 1987*.
2. In what can at best be described as a self-defeating step, the Insurer failed to post or otherwise transmit the decision notice to the applicant on 28 March 2014 and instead sent the notice under cover of a different letter dated 04 April 2014. For unknown reasons the letter itself referred to the date of "06 August 2014," a date which by 04 April 2014 would not allow sufficient notice to satisfy the *Guidelines*. Further the letter of 04 April 2014 purported to advise the applicant that his entitlement to medical or related expenses would "continue for a further 12 months from this date in accordance with the provisions of the Act." The words "this date" were a clear a reference to 06 August 2014.

3. The applicant is entitled to regard this covering letter as a part of the notice he received concerning the work capacity decision.
4. It is clear that section 59A(2) was not referenced, nor was sufficient notice given for the termination of payments. The section 59A(2) error was a breach of *Guideline* 5.3.2 and the failure to give proper notice was a breach of section 54(2)(a) of the 1987 Act and *Guideline* 6. The two breaches suffice to render the work capacity decision invalid and it must therefore be set aside.
5. 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.”
6. 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.

7. 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.

FINDING

8. 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

9. I recommend that the Insurer pay the applicant the weekly benefit to which she was entitled immediately prior to 06 August 2014 until such time as he is properly transitioned.
10. The applicant is not required to produce work capacity certificates for the period from 06 August 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.

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