

**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 July 2014 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable immediately prior to 30 October 2014.**
- c. The payments are to be back-dated to 30 October 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 28 July 2014. The decision advised the applicant that her weekly payments of compensation would cease on 30 October 2014. One page later in the same decision the applicant was advised that payments would in fact cease on 5 November 2014. The latter date was the more correct, since it allowed for the postal service rule. However the incorrect first date of 30 October 2014 was repeated in the internal review decision dated 18 September 2014. That decision also advised that payments would cease. The applicant then sought Merit Review on or about 14 October 2014 and the Authority issued the Merit Review recommendation on 13 November 2014. The applicant made application to this office on 12 December 2014.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. The applicant was an unsworn Communications Officer with New South Wales Police. She suffered post traumatic stress disorder [PTSD] as a result of a telephone call in 2007 which triggered within her a sudden recollection of a deeply distressing event in her own past. This Proustian episode resulted in three months off work and the prescription of anti-depressants. Having returned to work for about five years, in March or

April 2012 the applicant found herself once again exposed to disturbing news which induced further PTSD symptoms and caused her to be off work for about six months. She returned on different duties doing office administration for between 10 and 22.5 hours per week and continued in this role until the suitable duties were withdrawn in April 2013. She has not worked since.

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 11 October 2013. 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 a first 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 *Workers Compensation Act 1987* (the 1987 Act)).

### **Submissions by the applicant**

8. *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 has made submissions through her solicitors which primarily go to the merits of the decision. There are however some submissions concerning the procedures adopted by the Insurer. These include an allegation that a report from a medical provider was not referenced in the decision, a concomitant allegation that the same report was therefore “not taken into account” by the Insurer (and should have been), and an observation that the applicant’s PIAWE was wrongly and confusingly explained in a letter

dated 7 April 2014. Oddly, there were no submissions about inadequate or confusing notice.

## Submissions by the Insurer

9. Since the solicitors for the applicant made the same submissions in the course of internal review and merit review the Insurer has responded to them. First the Insurer says that they are not required to list or refer to every report on their file and, secondly, they state that the report in question was considered in the course of making their decision. So much so that they reiterate the opinion in the report which says that the applicant would be capable of working 12-20 hours per week, which completely contradicts what the applicant asserts. Given that the letter dated 7 April 2014 was subsumed by the subsequent work capacity decision dated 28 July 2014, the contents, while certainly confusing, are of historical interest only and otherwise irrelevant. The applicant's entitlements were varied as a result of the letter dated 28 July 2014, not the earlier one dated 7 April 2014.

## The Decision

10. *Guideline 5.4.2* requires the Insurer to 'reference the relevant legislation' and '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 informed the applicant that her entitlement to weekly payments of compensation would cease on 30 October 2014. On the next page a different date is given, being 5 November 2014. At this point the Insurer has allowed for four working days for postal service. The Insurer has referenced section 76(1)(b) of the *Interpretation Act 1987*. They could also have cited clause 6 of the Guidelines on this point (but did not). But what is the applicant to make of being told two different dates? It cannot be thought satisfactory to send out a notice in this form when the applicant cannot know for certain which of two dates will see the end of their payments. The error is compounded later when the internal review letter dated 18 September 2014 repeats the date of 30 October 2014. In the internal review letter the Insurer goes so far as to say that section 59A(2) will come into effect 12 months after "the effective date listed above" when the only "date listed above" is 30

October 2014. Since 30 October 2014 is less than three months and four working days after 28 July 2014, the notice is insufficient.

12. The decision accordingly fails to comply with clause 6 of the *Guideline* and section 54(2)(a) of the 1987 Act, when read in conjunction with section 76(1)(b) of the *Interpretation Act* 1987. The failure to give proper notice is a serious breach of the procedural requirements imposed by the legislation and accordingly the decision must be set aside.
13. In the present case better (or any) proof-reading of both the original work capacity decision and the internal review decision might have avoided this outcome, since the Insurer was clearly aware of the correct procedure in relation to adequate notice.

#### **RECOMMENDATION**

14. The work capacity decision of the Insurer dated 28 July 2014 is set aside.
15. The applicant is to be reinstated to her weekly payments at the rate applicable immediately prior to 30 October 2014.
16. The payments are to be back-dated to 30 October 2014.
17. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.

Wayne Cooper  
Delegate of the WorkCover Independent Review Officer  
3 February 2014