

**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 25 March 2014 was varied by the merit review service of the WorkCover Authority, which ordered that the Insurer should pay the applicant \$274.90 per week.**
- b. **The applicant is to be reinstated to her weekly payments at the rate applicable as at 2 July 2014.**
- c. **The payments are to be back-dated to 2 July 2014 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.**
- d. **Such payments are to continue until such time as a further work capacity decision is made in accordance with the merit review recommendation and comes into effect.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 25 March 2014. The decision purported to reduce the applicant's weekly payments to nil as from 2 July 2014. The applicant sought internal review and the Internal Review Decision (IRD) increased the payments to \$70 per week. She then sought Merit Review and the Authority recommended that weekly payments increase further to \$274.90.
2. I am satisfied that the applicant has made the application for Procedural Review in the proper form and within time.
3. The applicant suffered injury on 28 November 2011 in the course of her employment as a lending manager. She sustained injuries to her left leg, shoulder and lumbar spine. Subsequently she was able to find alternate employment which continues to the present time. 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 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 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. The decision of the Insurer displayed a meticulous regard for the requirements of the *Guidelines* and the legislation. The correct notice period was given, the entitlement periods were not only set out, but were explained with great detail. The legislation was liberally referenced

where required, sparingly where not. The applicant was advised of the date of the work capacity assessment, the totality of the evidence relied upon in reaching the decision and was given extensive commentary on the content of all documents consulted. Section 59A was even correctly explained.

11. There are no procedural errors identifiable in the decision, however I note that the merit review service of the Authority altered the outcome of the process by finding that the applicant is entitled to a weekly payment in the sum of \$274.90. This is a finding which cannot be subject to procedural review by this office.
12. 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.”
13. 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.

14. 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 or being reduced as a result of the original decision and the subsequent internal review decision.

FINDING

15. I find that no procedural error occurred in this matter.

RECOMMENDATION

16. I recommend that the Insurer pay the applicant the weekly benefit to which she was entitled prior to 2 July 2014 in accordance with clause 30 of the Amendment Regulation until such time as a further decision is made in accordance with the recommendation of the merit review service of the Authority.

17. The applicant is not required to produce work capacity certificates for the period from 2 July 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