

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 8 April 2013 is affirmed.
- b. The applicant is to be reinstated to his weekly payments at the rate applicable immediately prior to 15 July 2013.
- c. The payments are to be back-dated to 13 January 2014 by virtue of clause 30(3) of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.
- d. The payments are to continue at that rate until such time as a further work capacity decision is made giving effect to the merit review recommendation.

Introduction and Background

1. The applicant seeks procedural review of a work capacity decision made by the insurer dated 8 April 2013. This decision terminated the applicant's weekly payments from 15 July 2014. An internal review conducted on 10 January 2014¹ confirmed the original decision. The applicant sought merit review on 13 January 2014 and received a recommendation on dated 23 July 2014. I am satisfied that the applicant has made the application for review in the proper form and within time.
2. The applicant was successful at merit review, in that a finding was made that he has no work capacity and a recommendation was made that, being an existing recipient at the relevant date, he is entitled to 80% of the transitional rate, being \$768.40 per week.

Submissions by the applicant

¹ The applicant did not apply for internal review until 16 December 2013. This has ramifications in light of clause 30(2) of the recently published *Workers Compensation Amendment (Existing Claims) Regulation 2014*. See *infra*.

3. The applicant made the somewhat fanciful submission that the Insurer had failed to observe “time frames.” This was an unexpected submission from an applicant who had waited eight months to apply for internal review.

Submissions by the Insurer

4. The Insurer provided a chronology, some internal file notes and short responses to the applicant’s submissions. I accept their submissions. Relevantly, I accept that the worker was given the correct notice required by section 54(2)(a) of the *Workers Compensation Act 1987* (1987 Act) including time for service.

CONSIDERATION

5. The decision by the Insurer was made after a fair notice call and discussion about the assessment process. The Insurer disclosed when the assessment had taken place. The relevant legislative provisions were explained and quoted where required. All information relied upon was disclosed. There is nothing on the face of the decision which is procedurally objectionable.

A Recent Development

6. 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.”
7. 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.

8. It must follow that the applicant is entitled to the benefit of the Amendment Regulation, albeit this is subject to the very large exception in clause 30(2). In this case there was a delay of approximately eight months between the work capacity decision and the application for internal review. Clearly the applicant fails to satisfy the requirement of seeking internal review within 30 days. I take this to be fatal to his claims for any back-payment prior to his application for merit review. Therefore the Insurer should restore the applicant to the payments being received immediately prior to 15 July 2013, but those payments should only be back-dated until 13 January 2014, which was when the merit review application was received. The payments should continue until the recommendation of the merit review service comes into effect.²

FINDING

9. I find that the Insurer has followed the procedures as set out in the legislation and the WorkCover Guidelines. Therefore the work capacity decision is valid. I note the decision was varied by the merit review service, which has made a binding recommendation.

² Or, if the merit review recommendation has already been effected, the date when that occurred.



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RECOMMENDATION

10. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled immediately prior to 15 July 2013 from 13 January 2014 until the merit review recommendation comes into effect.

11. This recommendation is binding on the insurer: see section 44(3)(h) of the 1987 Act.

Wayne Cooper

Delegate of the WorkCover Independent Review Officer

18 September 2014