

**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 2 October 2013 is set aside.**
- b. **The applicant is to be reinstated to her weekly payments at the rate applicable at 10 January 2014.**
- c. **The payments are to be back-dated to 10 January 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 2 October 2013. The applicant sought internal review from the Insurer which made a decision dated 28 November 2013. She sought Merit Review on or about 24 December 2013 and the Authority issued the Merit Review recommendation on 4 July 2014, some 192 days later¹. The applicant made application to this office on 1 August 2014.
2. I am satisfied that the applicant has made the application for review of the decision dated 2 October 2013 in the proper form and within time.
3. The applicant suffered injury to her back on 2 November 2007. She remains employed with the employer performing suitable duties for 12 hours per week.

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."*

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 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 are not relevant to procedural review.

Submissions by the Insurer

9. The Insurer has not provided submissions in response to the application.

The Decision

10. *Guideline 5.3.1* requires the Insurer to ‘provide the worker and other relevant parties with plain language communication regarding the work capacity decision’. This includes communicating a clear message.
11. *Guideline 5.3.2* requires the Insurer to ‘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’.
12. The decision states ‘...a decision has been made that you are no longer entitled to weekly payments under the new Section 38 of the Workers Compensation Act 1987. This decision is effective from the 10th January 2014’.
13. The above statement does not actually advise the applicant that her entitlements will cease. This statement advises her that she is no longer entitled to weekly payments of compensation under the ‘new Section 38’.
14. Later the decision states ‘your weekly payments at your current rate will continue until the 10th of January 2014 provided certificates of capacity cover you until that date. Please refer to Section 54(2)(a) of the Workers Compensation Act 1987 and Section 76 (1)(b) of the Interpretation Act 1987’.
15. The decision does not state the effect the legislation and decision has on the entitlements to the weekly payments of the applicant. Importantly the decision does not advise the applicant that she will not be receiving any payments of weekly compensation after 10 January 2014. The decision encloses a copy of Section 54 of the 1987 Act however it does not provide a copy of the section referred to in the Interpretation Act 1987.
16. The decision does not advise the applicant that Section 54(2)(a) of the 1987 Act requires 3 months’ notice be given when weekly payments are to be reduced or ceased. A better way to explain the 3 month period is to explain that the Interpretation Act 1987 section 76(1)(b) states that service by mail is taken to be on the fourth working day after the letter is posted. A working day is a day other than “a Saturday or Sunday, or a public holiday or a bank holiday in the place to which the letter was addressed”: section 76(2)(a) and (b) of the Interpretation Act 1987. Therefore, the proper notice period is 3 months and four days.

17. The internal review attempts to rectify this issue but it is not sufficient as that explanation should have been included in the work capacity decision.
18. The decision advises '*your entitlement to medical and related expenses will cease on 10th of January 2015. Please refer to Section 54 of the Workers Compensation Act 1987*'.
19. The decision fails to explain the effects of the legislation to the applicant.
20. It is correct in advising that *Section 59A(2)* of the 1987 Act states that treatment expenses and related expenses are no longer payable 12 months after weekly payments cease.
21. However, the decision also fails to advise the applicant of *Section 59A(3)* of the 1987 Act.
22. *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.
23. The Insurer has failed to comply with the relevant *Guideline*.
24. *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*". The decision has failed to so advise the applicant and fails to comply with the *Guideline*.
25. On 3 September 2014 the *Workers Compensation Amendment (Existing Claims) Regulation 2014* (the Amendment Regulation) was published. 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.

26. 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

27. 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

28. I recommend that the Insurer pay the applicant the weekly benefit to which she was entitled prior to 2 October 2013 until such time as she is properly transitioned. Those payments should continue from the date on which they ceased.

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



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