

**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*.**

1. The injured worker is an applicant for a review of the decision made by the Insurer.
2. There is no dispute that the applicant was injured in the course of her employment on 19 October 2007. Although the applicant has returned to suitable employment the Insurer has made weekly payments for the earnings differential as required under the provisions of the *Workers Compensation Act 1987* (1987 Act).
3. As the applicant was in receipt of compensation by way of weekly payments as at 1 October 2012, Clause 8 of Part 19H of Schedule 6 to the 1987 Act required the Insurer to conduct a work capacity assessment for the purpose of facilitating the application of the amended weekly benefits to the applicant.
4. Section 44A of the 1987 Act provides that a work capacity assessment is an assessment of the injured worker's current work capacity and must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (the Guidelines).
5. The relevant version of the Guidelines is the one published on 27 September 2012.
6. 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 payments payable to the injured worker then the Insurer is required to give proper notice (Section 54 of the 1987 Act).
7. The applicant has been in receipt of weekly payments for over 130 weeks and therefore the amended Section 38 of the 1987 Act applies. In order to receive a weekly payment the applicant who has current work capacity must be working 15 hours per week and earning more than \$168 per week. That is not in dispute.
8. It is not in dispute that the present average weekly earnings of the applicant are in \$857.68. The deemed pre-injury average weekly earnings for the applicant is \$938.30 pursuant to Schedule 6 Part 19H clause 2(1).
9. The applicant is not entitled to any further payments of weekly benefits as soon as she is properly transitioned to the new benefits scheme.

10. The Insurer is required to give notice in accordance with Section 54 of the 1987 Act following its work capacity assessment and decision before the new weekly payment has effect. That is written notice of three months clear notice which takes into account the time for delivery of that notice to the applicant.
11. In this case the Insurer gave notice by letter dated 31 May 2013 that the weekly benefit would cease on 10 September 2013 which is sufficient notice. However, the decision does not state that an assessment has been made. The insurer is required to make an assessment pursuant to the 1987 Act Schedule 6 Part 19H clause 8(2).
12. The insurer is required to then make a decision “as soon as practicable” after the assessment is made.
13. In this case the applicant cannot know if an assessment has been made, or if one has been made the date of the assessment and therefore whether the decision was made as soon as practicable after the assessment was made.
14. Guideline 5.4.2 requires the Insurer “*to state the impact of the decision on the worker in terms of their entitlement to weekly payments, entitlement to medical and related treatment expenses and return to work obligations*”. Section 59A of the 1987 Act states that payment of treatment expenses ceases 12 months after weekly payments cease. The decision says “*Your entitlement to reasonable and necessary medical and related treatment will also continue...*” Such a statement is clearly misleading and wrong. The insurer submitted that “*Section 59A limitations do not apply to this decision as the worker continues to be entitled to reasonably necessary medical and related treatment as an algorithm payable at \$0.00 is applied.*” It is difficult to know what to think of a submission that zero dollars amounts to a payment. Perhaps a pure mathematician could explain this submission.<sup>1</sup>
15. The Guidelines also state that the work capacity decision notice must advise the applicant that any documents or information that have not already been provided to her can be provided on request to the Insurer. The Insurer has failed to so advise the applicant. The insurer lists some documents and refers to others but states in the decision that “*we have considered all available and relevant evidence*”. Such a statement leaves

---

<sup>1</sup> Although like the square root of minus one, this “entitlement” is more likely to be imaginary than real. This argument shows the dangers inherent in the use of autochthonous argot by non-specialists.

the reader in a quandary as to what documents the insurer actually has and which were taken into account.

16. There is one major difficulty which faced the Insurer in making its work capacity decision and that is the requirement contained in Guidelines 5 and 5.1 in the following terms:

**“5**

***Work capacity decisions should be made in line with the Best Practice Decision-Making Guide.”***

and then:

**“5.1**

***When making a work capacity decision the insurer should follow the Best Practice Decision-Making Guide.”***

That Guide did not exist and has never existed or been published by WorkCover. The Guidelines of 8 October 2014 have removed the requirement to comply with the non-existent Best Practice Decision-Making Guide.

## **FINDING**

17. I find that the Insurer has failed to follow the procedures as set out in the WorkCover Guidelines which is required by Section 44A of the 1987 Act. The Insurer has also failed to follow the 1987 Act and the *Workers Compensation Regulation 2010*.

## **RECOMMENDATION**

18. I recommend that the Insurer conduct a new work capacity assessment and make a new work capacity decision in accordance with the WorkCover Guidelines.
19. I recommend that the Insurer pay the applicant the weekly benefit to which she was entitled prior to 31 May 2013 until such time as she is properly transitioned. Those payments should continue from 10 September 2013 being the date on which they ceased.



WorkCover **independent** review office

Level 4, 1 Oxford Street, Darlinghurst NSW 2010  
T: 13 9476  
contact@wiro.nsw.gov.au  
www.wiro.nsw.gov.au

Wayne Cooper  
Delegate of the WorkCover Independent Review Officer

17 January 2014

My recommendation is binding upon the Insurer (Section 44(h) of the 1987 Act)