

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 14 October 2013 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable immediately prior to 22 January 2014.**
- c. The payments are to be back-dated to 22 January 2014.**
- d. The 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 dated 14 October 2013. This decision reduced the worker's weekly benefits from \$450 per week to \$378.80 effective from 22 January 2014. An internal review was conducted on 21 November 2013, which confirmed the original decision. The applicant sought merit review. The Merit Review Service (MRS) recommendation dated 23 July 2014 confirmed the original decision with respect to the worker's ability to earn in suitable employment and further stated that the worker satisfied the requirements of Section 38(3) of the 1987 Act. The applicant made an application for procedural review to this office dated 12 August 2014.
2. I am satisfied that the applicant has made the application for review in the proper form and within time.
3. The applicant injured his back in the course of his employment as a Gyprocker on 18 January 1997. Whilst installing a ceiling, he felt pain in his back. The applicant was unable to return to his pre-injury employment. He gained alternative employment from 8 March 2010 as a process worker. The applicant is currently working an average of 20 hours per week.
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 (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. 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 decision¹. Where that decision involves a reduction or cessation in the weekly benefits payable to the injured worker then the Insurer is required to give proper notice to the worker pursuant to *Section 54(2)(a)* of the 1987 Act.

Submissions by the applicant

8. The applicant submitted he had been unfairly treated. He also submitted the insurer's decision was ultra vires because he had received a continuing award from the Compensation Court of NSW on 8 March 2000.
9. A procedural review may not consider matters of merit. *Section 44(1)(c)* circumscribes procedural review as follows:

a review only of the insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer in making the decision²

Submissions by the Insurer

10. The Insurer submitted that they were legally able and obliged to make a work capacity decision.

CONSIDERATION

11. The applicant submits that the insurer should not have made a work capacity decision because a continuing award was made by a judge of the Compensation Court of NSW on 8 March 2000. With reference to

¹ Schedule 8, Clause 22 of the *Workers Compensation Regulation 2010*

² See *Workers Compensation Act 1987* section 44(1)(c)..

Section 44(1)(c) of the 1987 Act, WIRO cannot consider this submission as it is directed at the judgement or discretion exercised by the insurer.

12. Clause 5.3.2 of the *Guidelines* set out the twelve requirements of a written advice of a work capacity decision and its outcome.
13. *Guideline* 5.3.2 requires the insurer to “reference the relevant legislation”. The insurer’s decision does not state that the assessment was required pursuant to *Clause 8 of Part 19H of Schedule 6* to the 1987 Act³. This constitutes a breach of the *Guideline*.
14. *Guideline* 5.3.2 requires the insurer to “explain the relevant entitlement periods”. The decision erroneously states that the applicant’s entitlements are assessed under Section 37 of the 1987 Act because he had received 388 weeks of weekly compensation. The insurer should have said the applicant’s entitlements would be assessed under Section 38 of the 1987 Act⁴. This error could have given the applicant the false impression that he only needed to satisfy the requirements of Section 37 of the 1987 Act to receive weekly payments as opposed to the more onerous requirements set out in Section 38⁵. This failure to explain the relevant entitlement period constitutes a breach of the *Guideline*.

FINDING

15. I find that the Insurer has failed to follow the procedures as set out in the WorkCover Guidelines. Therefore the work capacity decision is invalid.

RECOMMENDATION

16. I recommend that the Insurer conduct a new work capacity assessment in accordance with the WorkCover Guidelines and make a new work capacity decision.
17. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 22 January 2014 until such time as he is properly transitioned. Those payments should continue from 22 January 2014 being the date on which they ceased.

³ The insurer belatedly referred to this Clause in its submissions to WIRO.

⁴ This was correctly pointed out in the MRS recommendation.

⁵ For a worker assessed as having current work capacity, the criteria are set out in Section 38(3)(a)-(c) of the 1987 Act.



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18. The applicant is not required to produce work capacity certificates for the period from 22 January 2014 to date by virtue of the operation of section 44B(2) of the 1987 Act.
19. These recommendations are binding on the Insurer: see section 44(3)(h) of the 1987 Act.

Jeffrey Gabriel
Delegate of the WorkCover Independent Review Officer
25 September 2014