

**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 02 September 2013 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable at 02 December 2013.**
- c. The payments are to be back-dated to 02 December 2013.**
- d. Such payments are to continue until a work capacity decision is made and the applicant is transitioned to the present legislative scheme.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 02 September 2013. In the course of that decision the Insurer purported to give the applicant written notice that his payments would be terminated on and from 02 December 2013. This was emphasised by the Insurer in the course of Internal Review which further purported to be a "fresh decision" but gave the same date for cessation of payments as the original decision. This notice period does not satisfy the requirements of section 54(2)(a) of the *Workers Compensation Act 1987* (1987 Act) and the postal delivery time-frame set out in the *Guidelines*¹ and the *Interpretation Act 1987*. This constitutes two statutory breaches and one breach of the *Guidelines*, compounded by being repeated in the course of internal review.
2. The applicant sought merit review, as a result of which the original decision was affirmed. He subsequently sought procedural review by this office. I am satisfied that he has made the application within time and on the correct form.

¹ See *Guideline 6*.

3. The applicant was advised that the insurer had “recently” conducted a work capacity assessment, without being told the date. This is a breach of the *Guidelines*.
4. Having been (correctly) advised that the transitional rate applied to his case, the applicant was then given the following peculiar misinformation:

We note that if you were employed in your pre-injury role you would earn \$983.30 based on your pre-injury earnings.

While I have very little doubt that the Insurer means well, this is so far off the mark as to raise issues about quality control. This is beyond a demonstrable error and might lead an impressionable applicant who knows no better to believe that if they fully recovered and found work in their pre-injury duties the most they could earn would be the transitional rate.

5. On 3 September 2014 the *Workers Compensation Amendment (Existing Claims) Regulation 2014* (the Regulation) was published. Clause 26 of the Regulation provides that Part 2 “takes effect on and from 1 October 2012.”
6. Clause 30 of the 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 1987Act 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 1987Act 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.

7. It must follow that the applicant is entitled to the full benefit of this 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

8. In the current instance there has been more than one breach of the legislation and *Guidelines* which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

RECOMMENDATION

9. The work capacity decision of the Insurer dated 02 September 2013 is set aside.
10. The applicant is to be reinstated to his weekly payments at the rate applicable at 02 December 2013.
11. The payments are to be back-dated to 02 December 2013.
12. Such payments are to continue until a work capacity decision is made and the applicant is transitioned to the present legislative scheme.
13. The applicant is not required to produce work capacity certificates for the period from 02 December 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.



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