



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 applicant is to be reinstated to his weekly payments at the rate applicable immediately prior to 12 January 2014.**
- b. The payments are to be back-dated to 12 January 2014 by virtue of clause 30(3) of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.**
- c. 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 injured worker seeks procedural review of a work capacity decision made by the insurer dated 4 October 2013. This decision terminated the worker's weekly benefit effective from 12 January 2014. An internal review, which was conducted on 3 December 2013, confirmed the original decision. The applicant sought merit review. Following receipt of the Merit Review Service (MRS) recommendation dated 9 July 2014, the applicant made an application to this office dated 6 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 spine on 13 December 2006 in the course of his employment as a roller operator when he drove a roller over a large stone. Following an initial return to work performing suitable duties, the applicant's employment was terminated in 2007. He has not worked since.
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* is the one dated 27 September 2012. Those *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 made brief submissions which related to the merits of the insurer's decision as well as his need for future medical treatment. A procedural review may not consider matters of merit by virtue of the specific wording in section 44(1)(c) which 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 decision¹

Submissions by the Insurer

9. The Insurer made no submissions.

CONSIDERATION

10. The only ground on which the applicant requested review from WIRO was related to merit. No procedural issue was raised.
11. The MRS recommendation dated 9 July 2014 determined the applicant had no current work capacity and was likely to continue indefinitely to have no current work capacity. Accordingly, it determined his entitlement to weekly payments to be \$768.40, applying Section 38(2) and Section 38(6) of the 1987 Act.

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

12. 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.”

13. 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.

14. The work capacity decision was made on 4 October 2013. Pursuant to Section 76(1) of the *Interpretation Act 1987*, service of the decision is deemed to have taken effect on the fourth working day after the decision was posted, which in this matter was 11 October 2013. The worker requested internal review on 6 November 2013, some 26 days later.

15. It must follow that the applicant is entitled to the benefit of the Amendment Regulation. Therefore the Insurer should restore the applicant to the payments being received immediately prior to 12 January 2014. The payments should continue until the recommendation of the merit review service comes into effect.²

² If the merit review recommendation has already been effected, the payments would alter on the date when that occurred.



16. In light of the provisions in the Amendment Regulation, I make no further recommendation.

RECOMMENDATION

17. The applicant is to be reinstated to his weekly payments at the rate applicable immediately prior to 12 January 2014.

18. The payments are to be back-dated to 12 January 2014 by virtue of clause 30(3) of the Workers Compensation Amendment (Existing Claims) Regulation 2014.

19. 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.

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