

**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 11 April 2014 is set aside.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable at 15 July 2014.**
- c. **The payments are to be back-dated to 15 July 2014 in accordance with Clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 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 11 April 2014. The decision advised the applicant that his weekly payments of compensation would cease. The applicant sought internal review and Internal Review Decision (IRD) was dated 30 May 2014. He then sought Merit Review on or about 17 June 2014 and the Authority issued the Merit Review recommendation on 31 July 2014 upholding the work capacity decision. The applicant made application to this office on 13 August 2014.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. The applicant had previously sought procedural review of a work capacity decision dated 11 June 2013. The applicant was successful and the work capacity decision was set aside by an earlier decision of this office<sup>1</sup>.

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<sup>1</sup> Reported and numbered as 1514.

4. The facts and circumstances concerning the background of the claim are set out in the aforementioned recommendation and need not be repeated.

### **Submissions by the applicant**

5. Section 44(1)(c) of the *Workers Compensation Act 1987* (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 submission is that he has not been accepted as a seriously injured worker. This submission is not relevant to procedural review.

### **Submissions by the Insurer**

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

### **The Decision**

7. The relevant *WorkCover Work Capacity Guidelines* with respect to making this work capacity decision came into effect on 11 October 2013.
8. *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.’
9. *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 working days.
10. The decision dated 11 April 2014 advises the applicant that his weekly payments of compensation will cease on 15 July 2014. This is 3 months and 1 clear working day.
11. This notice is in breach of Section 54(2)(a) of the 1987 Act.

12. This decision fails to comply with the *Guideline*.
13. The IRD attempts to rectify the error in the work capacity decision by amending the notice period from 15 July 2014 to 18 July 2014 however, this amendment is not sufficient to overcome the non-compliance of the decision.
14. 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.”
15. 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.
16. 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

17. 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 a breach of the *Guidelines* which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

## RECOMMENDATION

18. The work capacity decision of the Insurer dated 11 April 2014 is set aside.
19. The applicant is to be reinstated to his weekly payments at the rate applicable at 15 July 2014.
20. The payments are to be back-dated to 15 July 2014 in accordance with Clause 30 of the Workers Compensation Amendment (Existing Claims) Regulation 2014.
21. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.

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