

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 15 July 2013 is set aside.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable at 15 October 2013.**
- c. **The payments are to be back-dated to the date that payments ceased 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 15 July 2013. 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 10 September 2013. He then sought Merit Review on or about 15 January 2014 and the Authority issued the Merit Review recommendation on 29 July 2014, some 195 days later,¹ upholding the work capacity decision. The applicant made application to this office on 18 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 sustained injury to his lower back and legs in the course of his employment as a Vineyard Hand / Bucket Boy. The accepted date of injury was 4 March 1999. Since that time the applicant has not returned

¹ Guideline 10.14 of the *Guidelines for work capacity decision Internal Reviews by insurers and Merit Review by the WorkCover Authority (Review Guidelines)*, which came into effect on 27 September 2012 states that "The Authority will write to the worker and insurer as soon as practicable and preferably within 30-days of receiving the application advising of the outcome of the merit review."

to his pre-injury duties however he has been able to obtain some casual labouring jobs such as cleaning gutters, mowing lawns and fencing.

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* (the 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 27 September 2012. 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 a first 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. *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 relevant submission is that the medical evidence used to make the decision is dated 2002 and is not current. The remaining submissions are not relevant to procedural review.

Submissions by the Insurer

9. The Insurer has provided submissions in response to the application dated 25 August 2014 which have been duly considered.

The Decision

10. The relevant *WorkCover Work Capacity Guidelines* with respect to making this work capacity decision came into effect on 27 September 2012.
11. *Guideline 5.4.2* 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.'
12. *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.
13. The decision dated **15 July 2013** stated '*Employers Mutual will continue to pay your weekly benefits for a period of 3 months from the date of this notice, with the addition of a one week allowance for our postage and your receipt of this notice. This means that you will only continue to be entitled to weekly benefit payments until **15 October 2013** at which time your weekly benefit entitlements will cease*'.
14. Despite advising the applicant that he was entitled to a notice period of 3 months and one week the actual notice period given was 3 months.
15. This notice is in breach of Section 54(2)(a) of the 1987 Act.
16. This decision fails to comply with the *Guideline*.
17. The IRD advises the applicant that his weekly benefits will cease on '*31 December 2013 to allow for additional return to work assistance and to assist you with obtaining the necessary treatment for your co-morbid conditions and workplace injury*'.
18. The IRD extends the notice period albeit for a reason other than the error in the original decision. Despite this extension of time it still does not validate the original decision.

19. *Section 59A(2)* of the 1987 Act states that treatment expenses and related expenses are no longer payable 12 months after weekly payments cease.
20. The present decision advises the applicant *'your entitlement to reasonable and necessary medical and related treatment will also continue, however please contact your Case Manager directly to discuss approval of treatment and/or services prior to commencement'*. The decision does not refer to *Section 59A* of the 1987 Act in any capacity.
21. The decision fails to advise the applicant that his entitlements to medical expenses will actually cease 12 months after the cessation of his weekly payments and also fails to advise as to *Section 59A (3)* of the 1987 Act.
22. *Section 59A(3)* of the 1987 Act states that the applicant may, after the entitlement to compensation for medical expenses ends, become eligible for further payments for medical expenses if the applicant becomes entitled to compensation for weekly benefits at some stage in the future.
23. The IRD compounds the error by omitting to refer to medical expenses in any capacity.
24. The decision fails to comply with the Guideline.
25. In dealing with the applicant's submission that the medical evidence relied upon in the decision is not current and dates back to 2002. However, we note that the decision does refer to current evidence including a fax from the nominated treating doctor Dr Mantilla dated 14 March 2013 and a Functional Assessment report dated 6 May 2013.
26. 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."
27. 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.

28. 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

29. 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 have been breaches of the *Guidelines* which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

RECOMMENDATION

30. The work capacity decision of the Insurer dated 15 July 2013 is set aside.
31. The applicant is to be reinstated to his weekly payments at the rate applicable at 15 October 2013.
32. The payments are to be back-dated to the date that payments ceased in accordance with Clause 30 of the Workers Compensation Amendment (Existing Claims) Regulation 2014.



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33. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.

Tracey Emanuel
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30 September 2014