

**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 31 October 2013 is confirmed.
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 8 February 2014.
- c. The payments are to be back-dated to 8 February 2014 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.
- d. Such payments are to continue until the date of receipt of this recommendation.

**Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 31 October 2013. The applicant's weekly payments of compensation ceased on 8 February 2014. The applicant sought internal review and the Internal Review Decision (IRD) was dated 6 January 2014. He then sought Merit Review from the Authority on 22 January 2014 and they delivered a decision dated 22 July 2014 some 181 days later.<sup>1</sup> The applicant then applied to this office for procedural review on 21 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 suffered injury to his back on 13 June 2000 in the course of his employment as a meat processor.

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<sup>1</sup> 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 11 October 2013 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."

4. The applicant was unable to return to his pre-injury duties. The applicant was initially able to return to light duties with the employer until his employment was terminated in December 2006. The applicant has been operating his own lawn mowing and garden maintenance business since 2007. As at the time of the work capacity decision the applicant was in receipt of weekly payments of compensation.
5. 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.
6. *Section 44A* of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines (Guidelines)*.
7. 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.
8. 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**

9. *Section 44(1)(c)* of 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 submissions made by the applicant are not relevant to procedural review.

### **Submissions by the Insurer**

10. The Insurer did not make any submissions in response to this application.

### **The Decision**

11. The decision provided the applicant with the proper notice period as required by *Section 54(2)(a)* of the 1987 Act as well as referencing that section and *Section 76(1)(b)* of the *Interpretation Act*. The notice period required is three months and four working days. The notice given in this case was three months and five working days which is in excess of the notice required.

12. The applicant was advised the effect that the decision had on his entitlements to medical and treatment expenses and *Section 59A* of the 1987 Act was referenced and its effect explained.

13. The decision advises the applicant that he received 412.4 weeks of compensation payments and the relevant entitlement periods were set out and explained. The legislation was referenced where required. The decision advised the applicant he was to be assessed in accordance with *Section 38* of the 1987 Act.

14. The insurer advised the applicant that the provision of assistance to return to work would be provided up until 8 February 2014 and that documents from the Insurer were available upon request.

15. There are no procedural errors identifiable in the decision.

16. 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.”

17. 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.

18. 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 or being reduced as a result of the original decision and the subsequent internal review decision.

### **FINDING**

19. I find that no procedural error occurred in this matter.

### **RECOMMENDATION**

20. The work capacity decision of the Insurer dated 31 October 2013 is confirmed.
21. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 8 February 2014.



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22. The payments are to be back-dated to 8 February 2014 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.
23. Such payments are to continue until the date of receipt of this recommendation.
24. These recommendations are binding on the Insurer: see section 44(3)(h) of the 1987 Act.

Tracey Emanuel  
Delegate of the WorkCover Independent Review Officer  
1 October 2014