

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 30 July 2013 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable immediately prior to 7 November 2013.**
- c. The payments are to be back-dated to 7 November 2013.**
- d. The 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 dated 30 July 2013. This decision reduced the worker's weekly benefits to "Nil" from 7 November 2013. An internal review was conducted, which confirmed the original decision. The applicant sought merit review. The Merit Review Service (MRS) recommendation dated 24 July 2014 confirmed the original decision. The applicant made an application for procedural review to this office dated 20 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 sustained injury in February 2000. He has received weekly payments for over 400 weeks from this insurer.
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* 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.
7. Once the Insurer has conducted an assessment then the Insurer is required to make a work capacity decision¹. Where that decision involves a reduction or cessation in the weekly benefits payable to the injured worker then the Insurer is required to give proper notice to the worker pursuant to Section 54(2)(a) of the 1987 Act.

Submissions by the applicant

8. The applicant submitted that he had been unfairly treated. He also submitted the insurer's decision could not be legal because he had received "damages" from the Compensation Court of NSW in 2003 "and again in 2014."²
9. A procedural review may not consider matters of merit. Section 44(1)(c) 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 decision*³

Submissions by the Insurer

10. The Insurer submitted some internal documents and also came upon some new information, which was illuminating for another scheme agent. The new information concerns a subsequent injury suffered by the applicant for which he is currently in receipt of compensation by way

¹ Schedule 8, Clause 22 of the *Workers Compensation Regulation* 2010

² This news would be very welcome to an insurer aware of sections 149 and 151A of the 1987 Act.

³ See *Workers Compensation Act* 1987 section 44(1)(c)..

of medical expenses [and most probably weekly payments as well] from a second scheme agent Insurer.

CONSIDERATION

11. The applicant's submissions are ill-conceived. An Insurer can make a work capacity decision independently of any decision current or pending in the Workers Compensation Commission. The commission itself cannot make a decision which is inconsistent with the decision of an insurer.
12. Where the applicant might have been on stronger ground is in relation to the currency (and therefore the relevance) of the medical evidence considered by the Insurer. The medical reports referred to within the decision notice range in date from 2000 to 2009. In relation to a worker being assessed in 2013, a report dated 2009 can have only limited relevance as a background document and cannot be instructive of the applicant's "current" work capacity.
13. That there was no recent medical evidence may well explain why it was news to this insurer that the applicant has a concurrent claim being managed by a different scheme agent, for which he is certified as having "no current work capacity." The failure to obtain current medical reports is no more than an indication of this claim being the subject of obvious neglect. The decision reached was based on misleading and out of date information and cannot be considered a valid decision.

A Recent Regulation

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

FINDING

17. I find that the Insurer has failed to follow the procedures as set out in the WorkCover Guidelines and has denied the applicant procedural fairness.

RECOMMENDATION



18. The work capacity decision of the insurer dated 30 July 2013 is set aside.
19. The applicant is to be reinstated to his weekly payments at the rate applicable immediately prior to 7 November 2013.
20. The payments are to be back-dated to 7 November 2013.
21. The payments are to continue until such time as a further work capacity decision is made and comes into effect.
22. The applicant is not required to produce work capacity certificates for the period from 7 November 2013 to date by virtue of the operation of section 44B(2) of the 1987 Act.
23. These recommendations are binding on the Insurer: see section 44(3)(h) of the 1987 Act.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
1 October 2014