

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 May 2014 is set aside.
- b. The applicant is to be reinstated to her weekly payments at the rate applicable at 6 September 2014.
- c. The payments are to be back-dated to 6 September 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 30 May 2014. The decision advised the applicant that her weekly payments of compensation would cease. The applicant sought internal review and Internal Review Decision (IRD) was dated 26 June 2014. She then sought Merit Review on or about 23 July 2014 and the Authority issued the Merit Review recommendation on 14 August 2014 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 her lower back in the course of her employment as a legal secretary. The accepted date of injury was 29 November 2000. The applicant was unable to return to her pre-injury duties and her employment was subsequently terminated.
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 submissions include failure to reference the proper legislation being *Section 54(2)(a)* of the 1987 Act and failure to advise with respect to entitlement to medical expenses.

Submissions by the Insurer

9. The Insurer concedes, by way of email received by this office on 25 August 2014, that the decision was issued without referencing relevant sections of the Act.

The Decision

10. The relevant *WorkCover Work Capacity Guidelines* with respect to making this work capacity decision came into effect on 11 October 2013.

11. *Guideline 5.3.2* requires the decision to reference relevant legislation. The insurer, on its own admission, has failed to comply with this Guideline.
12. Therefore, the decision must be set aside.
13. The insurer has failed to reference and explain most relevantly Sections 54(2)(a), 38 and 59A of the 1987 Act.
14. Of further concern is the insurer's comment on the last page of the decision *'this notice affects your entitlements to weekly payments of compensation only. All other entitlements including medical, hospital, rehabilitation, travel expenses and any entitlement you may have to lump sum compensation are not the subject of this decision'*.
15. Excluding the reference to lump sum compensation the aforementioned paragraph is simply incorrect and is a demonstrable error.
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 as a result of the original decision.

FINDING

19. 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

20. The work capacity decision of the Insurer dated 30 May 2014 is set aside.

21. The applicant is to be reinstated to his weekly payments at the rate applicable at 6 September 2014.

22. The payments are to be back-dated to 6 September 2014 in accordance with Clause 30 of the Workers Compensation Amendment (Existing Claims) Regulation 2014.

23. 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
1 October 2014