

**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 application for procedural review is dismissed.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 14 November 2013.**
- c. The payments are to be back-dated to 22 February 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 the merit review recommendation comes into effect.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 14 November 2013. The decision advised the applicant that his weekly payments of compensation would be reduced from \$537.80 per week to \$94.54 per week from 22 February 2014. The applicant sought internal review and Internal Review Decision (IRD) was dated 7 February 2014. He then sought Merit Review on or about 12 February 2014 and the Authority issued the Merit Review recommendation on 12 August 2014, some 181 days later.¹
2. The Merit Review recommendation increased the applicant's entitlement to weekly payments to a maximum amount of \$206.00 per week pursuant to Section 38(7) of the Workers Compensation Act 1987 (the 1987 Act). The applicant then made an application to this office for procedural review on 22 August 2014.

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 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."

3. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. The applicant sustained injury to his neck and shoulders while performing his pre-injury duties as a Leading Hand. The accepted date of injury was 10 May 1995. The applicant found alternate employment as a sales assistant.
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 *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 are not relevant to procedural review.

Submissions by the Insurer

10. The Insurer has not provided submissions in response to this application.

The Decision

11. The decision of the Insurer displayed a careful consideration of the requirements of the *Guidelines* and the legislation.

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

13. 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.

14. 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



15. I find that no procedural error occurred in this decision.

RECOMMENDATION

16. The application for procedural review dated 22 August 2014 is dismissed.

17. The applicant is to be reinstated to his weekly payments at the rate applicable at 14 November 2013.

18. 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*.

19. Such payments are to continue until such time as the merit review recommendation² comes into effect.

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

² I note that in section 44(3)(g) of the 1987 Act the Authority is said to make recommendations which are binding on the insurer. However, earlier in the same section (at 44(3)(a)) the same Act speaks of "the Authority's **decision** on a review." If it were really a "decision," it could not be a "work capacity decision" since section 43 provides that such decisions are made by *insurers*.