

**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 23 September 2013 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable at 24 December 2013.**
- c. The payments are to be back-dated to 24 December 2013 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 23 September 2013. The decision advised the applicant that his weekly payments of compensation would cease on 24 December 2013. The applicant sought internal review and Internal Review Decision (IRD) was dated 16 December 2013. He then sought Merit Review on or about 24 July 2014 and the Authority issued the Merit Review recommendation on 22 August 2014 upholding the work capacity decision. The applicant made application to this office on 27 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 left shoulder during his employment as a life guard. The accepted date of injury was 26 September 2001. Since that time the applicant returned to employment with the employer performing suitable duties as a life guard and then pool attendant. His employment ceased in 2006. Since that time the applicant obtained alternate employment as expert opinion consultant, property maintenance contractor and minibus driver.

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 has provided several submissions which have been duly considered.

Submissions by the Insurer

9. The Insurer has not provided submissions in response to the application.

The Decision

10. The relevant *WorkCover Work Capacity Guidelines* with respect to making this work capacity decision came into effect on 12 August 2013.
11. *Guideline 5.3.2* 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 states the insurer is 'required to give under Section 54 of the Workers Compensation Act 1987 your weekly benefits will continue at the current rate for further 3 months (12 weeks) and additional seven (7) business days for postage from 23 September 2013 to 24 December 2014. The change in you benefit rate will become effective following this notice period being your last day of payment being 24 December 2013'.*
14. *The insurer has taken 3 months to be the equivalent of 12 weeks.*
15. *We refer to the Glossary contained within the Guidelines which advises the word month 'means a period commencing at the beginning of a day of one of the 12 named months and ending:*
 - (a) Immediately before the beginning of the corresponding day of the next named month, or*
 - (b) If there is no such corresponding day, at the end of the next named month.'*
16. *This notice provided by the insurer in the decision is in breach of Section 54(2)(a) of the 1987 Act. This breach is sufficient for the work capacity decision to be set aside.*
17. *This decision fails to comply with the Guideline.*
18. *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."*

19. 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.

20. 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

21. 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 is a breach of the *Guidelines* which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

RECOMMENDATION



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22. The work capacity decision of the Insurer dated 23 September 2013 is set aside.
23. The applicant is to be reinstated to his weekly payments at the rate applicable at 24 December 2013.
24. The payments are to be back-dated to 24 December 2013 in accordance with Clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.
25. 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
2 October 2014