

## 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 prior to 18 October 2013.
- c. The payments are to be back-dated to 27 January 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 or the date which the merit review authority recommendation comes into effect, whichever is the later.

### Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 18 October 2013. The applicant's weekly payments of compensation were reduced from \$555.30 to \$358.80 from 27 January 2014. The applicant sought internal review and the Internal Review Decision (IRD) was dated 4 December 2013. That decision reduced his entitlements further to \$265.72. He then sought Merit Review from the Authority on 18 December 2013 and they delivered a decision dated 14 July 2014 some 208 days later.<sup>1</sup> That decision reduced the applicant's entitlements to Nil<sup>2</sup>. He then applied to this office for procedural review on 28 August 2014.

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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."

<sup>2</sup> Or at least purported to. Section 43 seems to suggest that **only an insurer** can make a work capacity decision, but cf the wording in section 44(3)(a) which refers to "the Authority's decision." The latter wording is also seemingly in conflict with section 44(3)(f) and (g), which both speak of a "recommendation" (albeit binding in nature). Surely it is not a distinction without a difference.

2. It would appear that the applicant changed addresses in the interim period and a copy of the merit review recommendations were sent to the applicant by the insurer under cover letter dated 28 July 2014. Therefore, 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 left foot as a result of the nature and conditions of his employment. The deemed date of injury is accepted as 12 July 1995.
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 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 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 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. The applicant’s submissions are directed towards a review of the merit review recommendations. That is not the purpose of this review.<sup>3</sup>

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<sup>3</sup> But see note 2 *supra*.

9. Section 44(1)(c) of the 1987 Act only allows WIRO to review decisions reviewed by Merit Review. Therefore this procedural review can only consider the work capacity decision dated 18 October 2013.

### **Submissions by the Insurer**

10. The Insurer did not make any 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. The correct notice period was given to the applicant of when his payments would be reduced. The entitlement periods were set out and explained. The legislation was referenced where required. The applicant was advised of the date of the work capacity assessment, the totality of the evidence relied upon in reaching the decision.
13. There are no procedural errors identifiable in the decision.
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 no procedural error occurred in this matter.

## **RECOMMENDATION**

18. The application for procedural review is dismissed.
19. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 18 October 2013.
20. The payments are to be back-dated to 27 January 2014 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.
21. Such payments are to continue until the date of receipt of this recommendation or the date which the merit review authority recommendation comes into effect, whichever is the later.

Tracey Emanuel  
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3 October 2014



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