

**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 21 November 2013 is set aside.**
- b. **The applicant is to be reinstated to her weekly payments at the rate applicable immediately before 28 February 2014.**
- c. **The payments are to be back-dated to 28 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 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 21 November 2013. The decision advised the applicant that her weekly payments of compensation would cease from 28 February 2014. The applicant sought internal review and Internal Review Decision (IRD) was dated 20 January 2014. She then sought Merit Review and the Authority issued the Merit Review recommendation on 8 August 2014, upholding the work capacity decision. The applicant made application to this office on 25 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 has been paid for over 400 weeks and was an existing recipient as at the relevant time immediately prior to 1 October 2012. She currently works in excess of 15 hours per week and earns in excess of \$173 per week, however the insurer is of the view that she has greater work capacity than she is using. The merit review service is clearly of the same view. This is not a matter which can be examined in the course of procedural review.

A fatal error

4. The Insurer made an extremely lengthy and detailed decision in November 2013, clarified even further by the internal review in January 2014. With the exception of one oversight, the decision(s) could not be faulted. The correct notice period was given, the relevant legislation was both cited and explained, the medical and other evidence relied upon was referred to and quoted where relevant and reasons were given for preferring some evidence to other evidence. In almost all respects the *Work Capacity Guidelines* issued by the Authority were adhered to.
5. Almost – but not quite. *Guideline 5.3.2* has a duodecalogue of directions for insurers, including the requirement to:

“state the impact of the decision on the worker in terms of their entitlement to weekly payments, **entitlement to medical and related and treatment expenses** and return to work obligations.”(emphasis added)

Because this applicant has received more than 130 weeks of weekly payments, her “entitlement” to weekly payments ceases if she does not meet the stringent requirements set out in section 38(3), although the entitlement might spring up once again if those requirements are later met or she becomes a person found to have no work capacity. While all of this was patiently set out and carefully explained, no reference was made to section 59A(2) or (3), nor was there any reference to the impact on medical benefits arising consequentially from the decision to cease weekly payments. This is a clear and important omission, which constitutes demonstrable error and invalidates what is otherwise a well-done decision.

A recent regulation

6. 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.”

7. 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.
8. 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

9. 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 has been 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

10. The work capacity decision of the Insurer dated 21 November 2013 is set aside.



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11. The applicant is to be reinstated to her weekly payments at the rate applicable immediately before 28 February 2014.
12. The payments are to be back-dated to 28 February 2014 in accordance with Clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.
13. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.

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