

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 17 September 2013 is set aside.
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 25 December 2013.
- c. The payments are to be back-dated to 25 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 17 September 2013. The decision advised the applicant that his weekly payments of compensation would cease. The applicant sought internal review and the Internal Review Decision (IRD) was dated 9 January 2014. He then sought Merit Review on or about 30 January 2013 and the Authority issued the Merit Review recommendation on 8 August 2014, some 189 days later¹. The applicant made application to this office on 28 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 eye in the course of his employment as a freight driver. The accepted date of injury was 24 July 2003. Subsequent to the injury the applicant was unable to return to his

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 12 August 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."

pre-injury employment. The applicant has been able to obtain alternate employment both with Mitre 10 Australia Ltd and Woolworths Ltd.

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 made various submissions however none of those submissions are relevant to this procedural review.

Submissions by the Insurer

9. The Insurer has provided submissions in response to the application and those submissions have been duly considered.

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 'reference the relevant legislation' and '*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. The decision informs that applicant that his entitlement to weekly payments of compensation ceases on 25 December 2013.
13. The decision also advises the applicant '*your entitlement to reasonable and necessary medical and related treatment will also continue.*'
14. This decision fails to reference Section 59A of the 1987 Act.
15. *Section 59A(2)* states that treatment expenses and related expenses are no longer payable 12 months after weekly payments cease.
16. The decision fails to advise the applicant that his entitlements to medical expenses will actually cease 12 months after the cessation of his weekly payments and also fails to advise as to *Section 59A (3)* of the 1987 Act.
17. *Section 59A(3)* of the 1987 Act states that the applicant may, after the entitlement to compensation for medical expenses ends, become eligible for further payments for medical expenses if the applicant becomes entitled to compensation for weekly benefits at some stage in the future.
18. The decision fails to comply with the Guideline.
19. The IRD compounds the error by also failing to reference *Section 59A* of the 1987 Act and advising the applicant of the impact the decision will have on his entitlement to medical expenses.
20. *Guideline 5.3.2* notes that the insurer should advise the applicant that any documents or information that have not already been provided to the worker can be provided to the worker on request to the insurer. The decision advises the applicant that he can request copies of the documents listed within the decision.

21. The decision fails to comply with the Guideline.
22. 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.”
23. 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.
24. 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

25. 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

26. The work capacity decision of the Insurer dated 17 September 2013 is set aside.
27. The applicant is to be reinstated to his weekly payments at the rate applicable at 25 December 2013.
28. The payments are to be back-dated to 25 December 2013 in accordance with Clause 30 of the Workers Compensation Amendment (Existing Claims) Regulation 2014.
29. 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
8 October 2014