

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 31 October 2013 is affirmed.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable immediately prior to 8 February 2014.**
- c. **The payments are to be back-dated to 8 February 2014 by virtue of clause 30(3) of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.**
- d. **The payments are to continue at that rate until such time as a copy of this recommendation is received.**

Introduction and Background

1. The applicant seeks procedural review of a work capacity decision made by the insurer dated 31 October 2013. This decision terminated the applicant's weekly payments from 8 February 2014. An internal review confirmed the original decision. The applicant sought merit review on 23 January 2014 and received a recommendation on dated 22 July 2014. I am satisfied that the applicant has made the application for review in the proper form and within time.
2. The applicant was injured in the course of two different periods of employment, sustaining a shoulder injury in 2000 (the subject of the current review) and a back injury in 2006. Different insurers are involved. It is unclear what claim status the back injury has, or whether any weekly benefits have been paid in relation thereto.

Submissions by the applicant

3. The applicant submitted that those making the work capacity decision on behalf of the insurer were not medically educated and therefore were in no position to make an accurate decision. While it is likely that medical practitioners did not make the actual decision, it is also likely that reports

provided by medically educated folk were relied upon in the course of assessment and decision-making. Either way, this is a matter for the merits of the decision, not for procedural review.

Submissions by the Insurer

4. The Insurer provided a chronology, some internal file notes and short responses to the applicant's submissions. I accept their submissions.

CONSIDERATION

5. The decision by the Insurer was made after a fair notice call and discussion about the assessment process. The Insurer disclosed when the assessment had taken place. The relevant legislative provisions were explained and quoted where required. All information relied upon was disclosed. There is nothing on the face of the decision which is procedurally objectionable. The applicant was told at one part of the decision notice that his payments would cease on 8 February 2014, and at another part that they would cease on 7 February 2014. Since both dates fall outside the required notice period of three months and four working days, nothing turns on the discrepancy.

A Recent Development

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. The payments should continue until this recommendation is received.

FINDING

9. I find that the Insurer has followed the procedures as set out in the legislation and the WorkCover Guidelines. Therefore the work capacity decision is valid.

RECOMMENDATION

10. The work capacity decision of the insurer dated 31 October 2013 is affirmed.

11. The applicant is to be reinstated to his weekly payments at the rate applicable immediately prior to 8 February 2014.

12. The payments are to be back-dated to 8 February 2014 by virtue of clause 30(3) of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.



WorkCover independent review office

Level 4, 1 Oxford St, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

13. The payments are to continue at that rate until such time as a copy of this recommendation is received.
14. This recommendation is binding on the insurer: see section 44(3)(h) of the 1987 Act.

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