

**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 2 December 2013 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable immediately before 12 March 2014.**
- c. The payments are to be back-dated to 12 March 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 2 December 2013. The notice of decision advised the applicant that his weekly payments would cease from 12 March 2014. The applicant sought an internal review, which confirmed the original decision. He then sought Merit Review which also confirmed the original decision. Following receipt of the Merit Review Service recommendation, application was made to this office on 8 September 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 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.
4. *Section 44A* of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines (Guidelines)*.

5. 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.
6. Once the Insurer has conducted an 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

7. 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 applicant has made short submissions, primarily based on the irregularity of employment and his physical difficulties. No submissions of a procedural nature were received.

Submissions by the Insurer

8. The Insurer did not make any submissions in respect of this application.

The Decision

9. *Guideline 5.3.2* requires the Insurer ‘*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.*’

The decision states ‘Your entitlement to weekly payments at your current rate **must cease within 3 months of this decision** – please refer to: Section 43(1)(f) and 54(2)(a) of the *Workers Compensation Act 1987*.’(Emphasis added.)

This is clearly untrue in light of section 54(2)(a) which requires payments to continue for at least three months after notice is given.

10. The Insurer has misrepresented the legal position and has thereby failed to comply with the relevant *Guideline*. This of itself is sufficient to render the decision notice invalid.

A recent regulation

11. 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.”
12. 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.
13. 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



14. 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 at least one breach of the *Guidelines* which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

RECOMMENDATION

15. The work capacity decision of the Insurer dated 2 December 2013 is set aside.

16. The applicant is to be reinstated to his weekly payments at the rate applicable immediately before 12 March 2014.

17. The payments are to be back-dated to 12 March 2014.

18. 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

08 October 2014