

**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*.**

1. The injured worker has applied for a procedural review of a work capacity decision made by the Insurer on 27 May 2013.
2. There is no dispute that the applicant was injured in the course of his employment on 12 March 2004. The applicant underwent surgery. After recuperating following the surgical procedure the applicant returned to suitable employment with a different employer. The Insurer made weekly payments for the earnings differential as then required under the provisions of the *Workers Compensation Act 1987* (1987 Act).
3. The NSW Government introduced significant reforms to the Workers Compensation Scheme in June 2012 including the calculation of weekly payments.
4. The applicant was in receipt of compensation by way of weekly payments immediately prior to 1 October 2012. Clause 8 of Part 19H of Schedule 6 to the 1987 Act requires the Insurer to conduct a work capacity assessment for the purpose of facilitating the application of the amended weekly benefits to the applicant.
5. Section 44A of the 1987 Act provided that a work capacity assessment is an assessment of the injured worker's current work capacity and must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (*Guidelines*).
6. The relevant version of the *Guidelines* is the one published on 27 September 2012 which applied to all claims from 1 January 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 an assessment then the Insurer is required to make a work capacity decision. Where that decision involves a reduction in the weekly payments payable to the injured worker then the Insurer is required to give proper notice to the worker (Section 54 of the 1987 Act).

8. The applicant had been in receipt of weekly payments for more than 130 weeks as at the date of the decision and therefore Section 38 of the 1987 Act applies.
9. The Insurer provided a helpful time-line and numerous documents to assist this review. While the decision is silent as to a fair notice letter, that letter was provided by the Insurer. Other documents went to the merits of the decision, such as medical reports. Those documents are not relevant to a procedural review.
10. The applicant made submissions. His submissions went to the merits of his matter, and accordingly are not relevant to a procedural review.
11. The decision does not state that a work capacity assessment has been made. The fair notice call on 2 May 2013 was followed by a letter the same day. That letter does not refer to a work capacity assessment being undertaken. The insurer is required to make a decision “as soon as practicable” after the assessment is made: see clause 23, schedule 8, *Workers Compensation Regulation 2010*. There does not appear to be any legislative requirement to notify the applicant of the outcome. However, *Guideline 5.4.2* states that the decision must;
 - *State the decision and give brief reasons for making the decision;*
 - *Outline the evidence considered in making the decision, noting the author, the date and any key information. All evidence considered should be referred to, regardless of whether or not it supports the decision;*
 - *Clearly explain the reasoning for the decision.*

My finding is that the *Guidelines* result in the insurer being compelled to reveal the outcome of the assessment.

12. In this case the applicant cannot know whether an assessment has been made or the date of the assessment if it was made. The applicant cannot know whether the decision was made as soon as practicable after the assessment and is therefore in breach of clause 23, schedule 8, *Workers Compensation Regulation 2010*.
13. *Guideline 5.4.2* requires the Insurer to reference the legislation. The heading of the Notice refers to section 43 of the 1987 Act. The correct reference is to section 54 of the 1987 Act. As such the legislation is not properly referenced.

14. The decision states that “*In accordance with section 43(1)(d) we have determined your current weekly earnings to be \$230.85. This has been calculated as follows:*” No calculation is set out. In addition, while the heading to the decision refers to section 43 of the 1987 Act, few people would understand that section 43(1)(d) is the same section of the same Act. As such, the legislation is not properly referenced.
15. Section 59A(2) of the 1987 Act states that payment of treatment expenses cease 12 months after weekly payments cease. The decision states that such expenses will cease after 12 months, but refers to section 59 of the 1987 Act and not section 59A(2) of the 1987 Act. As such the legislation is not properly referenced. Again, few people would be able to research the legislation, including the *Workers Compensation Regulation 2010*, the Schedules to the 1987 Act, and the *Workplace Injury Management and Workers Compensation Act 1998* to find the relevant section.
16. *Guideline 5.4.2* requires the decision to “*detail any support, such as job seeking support, which will continue to be provided during the notice period*”. The decision states “*You will be provided with the following support to assist you in your return to work:*” The decision is then silent as to any support.
17. Further, the above *Guidelines* also state that the work capacity decision notice must advise the applicant that any documents or information that have not already been provided to her can be provided on request to the Insurer. The Insurer has failed to so advise the applicant.

FINDING

18. I find that the Insurer has failed to follow the procedures as set out in the *WorkCover Guidelines* which is required by Section 44A of the 1987 Act. The Insurer has also failed to follow the 1987 Act.

RECOMMENDATION

19. I recommend that the Insurer conduct a new work capacity assessment and make a new work capacity decision in accordance with the *WorkCover Guidelines*.
20. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 27 May 2013 until such time as he is properly transitioned and the relevant time period for notice of cessation



WorkCover independent review office

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

of payments has elapsed. Those payments should continue from 2 September 2013 being the date on which they ceased.¹ I note that there is no requirement for the applicant to produce work capacity certificates for the period 2 September 2013 to date, by virtue of section 44B(2) of the 1987 Act.

21. I further note that since the applicant is not currently in receipt of weekly payments, clause 21 of schedule 8 to the *Regulation* cannot apply and therefore I recommend that payments resume immediately.

WAYNE COOPER
Delegate of the WorkCover Independent Review Officer

21 January 2014

¹ These recommendations are binding on the Insurer: see s 44(h) of the 1987 Act.