

**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 July 2013 [and re-sent under cover letter dated 11 September 2013] is set aside.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable as at 18 December 2013.**
- c. **The payments are to be back-dated to 18 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 31 July 2013 which was re-sent under cover letter dated 11 September 2013. That cover letter correctly revised the notice period required under *Section 54(2)(a)* of the *Workers Compensation Act 1987* (the 1987 Act).
2. The applicant was advised that his weekly payments of compensation would cease on 18 December 2013. The applicant sought internal review and the Internal Review Decision (IRD) was dated 11 November 2013. He then sought Merit Review on or about 10 December 2013 and the Authority issued the Merit Review recommendation on 7 August 2014, some 239 days later¹. The applicant made application to this office on 4 September 2014.

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 27 September 2012 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."

3. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. The applicant sustained injury to his left shoulder and head when he was struck by a metal support beam in the course of his employment as a truck driver. The date of injury was 6 February 2009. The applicant returned to his pre-injury employer on suitable duties until his employment ceased in December 2009. Since that time the applicant obtained various periods of employment as a truck driver and warranty clerk. As at the time of the work capacity decision in July 2013 the applicant was working 6 hours per week and was in receipt of weekly payments of compensation.
5. 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.
6. *Section 44A of the 1987 Act* provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines (Guidelines)*.
7. 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.
8. 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

9. *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 which have been duly considered.

Submissions by the Insurer

10. The Insurer has provided submissions in response to the application which were received by this office on 8 September 2014. The insurer advised that liability for the applicant's claim had been denied outright as of 11 December 2013 and that any payment of weekly benefits to the applicant is limited by that decision which is yet to be contested in the Workers Compensation Commission.
11. We note the provisions of *Section 44(5)* of the 1987 Act advises that the Commission is *not to make a decision in proceedings concerning a dispute about weekly payments of compensation payable to a worker while a work capacity decision by an insurer about those weekly payments is the subject of a review under this section.*

The Decision

12. The relevant WorkCover Work Capacity Guidelines referable to making this work capacity decision came into effect on 27 September 2012.
13. *Guideline 5.4.2* 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.*'
14. The decision informs that applicant that his entitlement to weekly payments of compensation ceases on 18 December 2013.
15. The decision fails to advise the applicant the impact the work capacity decision has upon his entitlement to medical and related treatment expenses.
16. This decision fails to reference *Section 59A* of the 1987 Act.
17. *Section 59A(2)* states that treatment and related expenses are no longer payable 12 months after the worker ceases to be entitled to weekly payments of compensation.
18. The decision also fails to advise the applicant of *Section 59A (3)* of the 1987 Act.

19. *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.
20. The decision fails to comply with the Guideline.
21. The IRD attempts to rectify the error by advising the applicant of *Section 59A* and the effect that the work capacity decision has on his entitlement to medical expenses. However, this is not sufficient to validate the original decision.
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 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

26. The work capacity decision of the Insurer dated 31 July 2013 and re-sent under cover letter dated 11 September 2013 is set aside.

27. The applicant is to be reinstated to his weekly payments at the rate applicable at 18 December 2013.

28. The payments are to be back-dated to 18 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
10 October 2014