

**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 29 November 2013 is set aside.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable as at 29 November 2013.**
- c. **The payments are to be back-dated to the date payments ceased 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 29 November 2013. The decision advised the applicant that his weekly payments of compensation "*will be reduced to nil as of 8<sup>th</sup> March 2013.*"<sup>1</sup> The applicant sought internal review and the Internal Review Decision (IRD) was dated 20 January 2014. He then sought Merit Review on or about 3 February 2014 and the Authority issued the Merit Review recommendation on 29 August 2014, some 207 days later,<sup>2</sup> upholding the work capacity decision. The applicant made application to this office on 9 September 2014.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. On 4 February 2010 the applicant sustained injury to both shoulders and his cervical spine during the course of his employment as a truck driver.

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<sup>1</sup> A temporal impossibility.

<sup>2</sup> 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 11 October 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.*"

The applicant was unable to return to his pre-injury duties. He subsequently found suitable employment as an interpreter/translator. At the time of the work capacity decision the applicant was in receipt of weekly payments of compensation.

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 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.
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 not provided submissions in response to the application.

### **The Decision**

10. The relevant *WorkCover Work Capacity Guidelines* with respect to making this work capacity decision came into effect on 11 October 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. *Section 54(2)(a)* of the 1987 Act requires 3 months’ notice be given when weekly payments are to be reduced or ceased. A better way to explain the 3 month period is to explain that the *Interpretation Act 1987* section 76(1)(b) states that service by mail is taken to be on the fourth working day after the letter is posted. A working day is a day other than “a Saturday or Sunday, or a public holiday or a bank holiday in the place to which the letter was addressed”: section 76(2)(a) and (b) of the *Interpretation Act 1987*. Therefore, the proper notice period is 3 months and four working days.
13. The decision which is the subject of this review advises the applicant that his ‘weekly benefits will be reduced to nil as of 8<sup>th</sup> March 2013’ (emphasis added)<sup>3</sup>. The decision does not reference the above legislation.
14. Whilst the date appears to be a typographical error this still represents a demonstrable error. The notice period given to the applicant is not in accordance with *Section 54(2)(a)* of the 1987 Act nor the *Guidelines*.
15. The decision advises the applicant ‘please note this related to *Section 59A of the Workers Compensation Act 1987 as follows:*’. The section is then quoted. No explanation as to the effect legislation has upon the applicant’s entitlement to medical expenses is given.
16. The decision fails to comply with the relevant *Guideline*.
17. The IRD attempts to rectify the issues of the incorrect notice period and the effect of *Section 59A* however this is insufficient to validate the original decision.
18. *Guideline 5.3.2* notes that the insurer should advise the applicant that any documents or information that have not already been provided to

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<sup>3</sup> See note 1, *supra*.

the worker can be provided to the worker on request to the insurer. The decision advises the applicant that he has already been provided with copies of the documents relied upon to make the decision.

19. The decision fails to comply with the Guideline.

20. 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.”

21. 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.

22. 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**



23. 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**

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