

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 24 June 2014 is set aside.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable as at 24 June 2014.**
- c. **The payments are to be back-dated to 1 October 2014 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 24 June 2014. The decision advised the applicant that his weekly payments of compensation would cease. The applicant sought internal review and the Internal Review Decision (IRD) was dated 8 August 2014. He then sought Merit Review on or about 14 August 2014 and the Authority issued the Merit Review recommendation on 8 September 2014. The applicant made application to this office on 10 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 1 October 2002 the applicant sustained injury to his back whilst in the course of his employment as a project director. At the time of the work capacity decision being made the applicant was employed by C C F X and 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. The decision which is the subject of this review advises the applicant that he is no longer entitled to weekly payments and that the decision is effective from 1 October 2014. The correct notice period is provided pursuant to *Section 54(2)(a)* of the 1987 Act.
13. The applicant is advised that his entitlement to *'payment of pre-approved reasonable and necessary medical and other expenses will be limited up to 12 months after his entitlement to weekly payments cease'*. The applicant is referred to *Section 59A* of the 1987 Act.
14. The decision then states that *'this means your entitlement to medical and related expenses will cease on 30th September 2014'* (emphasis added).
15. Whilst to an experienced legal practitioner or an insurance claims officer the date may well appear to be a typographical error, to an inexperienced worker unfamiliar with the effect of section 59A(2) this would not be so obvious. Therefore this represents a demonstrable error in a relevant respect. The notice period given to the applicant is not compliant with *Section 59A* of the 1987 Act or the *Guidelines*.
16. *Guideline 5.3.2* notes that the insurer should advise the applicant that any documents or information that have not already been provided to the worker can be provided to the worker on request to the insurer. The decision advises the applicant that he can request further copies of documents already provided to him. This statement places a precondition on the request that is not in the *Guideline* and is therefore non-compliant.
17. 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."
18. 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.

19. 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

20. 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

21. The work capacity decision of the Insurer dated 24 June 2014 is set aside.
22. The applicant is to be reinstated to his weekly payments at the rate applicable at 24 June 2014.
23. The payments are to be back-dated to 1 October 2014 in accordance with Clause 30 of the Workers Compensation Amendment (Existing Claims) Regulation 2014.



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

24. 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