

**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 19 June 2014 is set aside.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable at 25 September 2014.**
- c. **The payments are to be back-dated to 25 September 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 19 June 2014. The decision advised the applicant that his weekly payments of compensation would cease on 25 September 2014. The applicant sought internal review and Internal Review Decision (IRD) was dated 17 July 2014. He then sought Merit Review on or about 1 August 2014.
2. The Merit Review Authority issued their findings and recommendations on 27 August 2014 which included a recommendation that the applicant be paid weekly payments of compensation in the sum of \$34.62 in accordance with *Section 37(3) of the Workers Compensation Act 1987* (the 1987 Act).
3. The applicant made application for a procedural review to this office on 12 September 2014. 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 right shoulder during the course of his employment as a panel beater. The accepted date of injury was 30

April 2012. Liability was accepted by the Insurer and the applicant has been in receipt of weekly payments of compensation since that time.

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 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 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.
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 provided several submissions which have been duly considered.

Submissions by the Insurer

10. The Insurer has not provided submissions in response to the application.

The Decision

11. The relevant WorkCover Work Capacity Guidelines with respect to making this work capacity decision came into effect on 11 October 2013.
12. The requirements of *Guideline 5.3.2* include:

- *Reference the relevant legislation;*
- *Explain the relevant entitlement periods;*
- *State the decision and give brief reasons for making the decision; and*
- *Clearly explain the line of reasoning for the decision.*

13. The decision advises the applicant that as a result of the transitional provisions his pre-injury earnings are indexed at \$960.50. The decision finds that the applicant has the capacity to earn \$772.54 per week.

14. The applicant is advised that at the time of the decision he had received 103 weeks of compensation payments and his ongoing entitlements were calculated pursuant to *Section 37* of the 1987 Act.

15. The decision then provides the following calculation:

$$\begin{aligned} & (\text{AWE} \times 95\%) - E \\ & (\$846.17 \times 0.95) - \$846.17 \\ & \$803.86 - \$846.17 \\ & = -\$42.31 \text{ (hence nil WB entitlements)} \end{aligned}$$

16. If one calculates 95% of the applicant's deemed pre-injury earnings of \$960.50 the result is \$912.48, as opposed to the "answer" in the above calculation. The amount deducted from the average weekly earnings is \$846.17 which is in excess of the applicant's assessed earning capacity of \$772.54. Clearly the above calculation is both procedurally and mathematically incorrect.

17. The above equation is that used for workers who have a current work capacity and have returned to work for not less than 15 hours per week as prescribed by *Section 37(2)*. However, the decision has found that the worker has returned to work for less than 15 hours per week. The relevant section is *Section 37(3)* of the 1987 Act which calculates the payment of compensation for injured workers who have a current capacity and have returned to work for less than 15 hours per week or not at all.

18. The decision has not only incorrectly calculated the applicant's weekly payments it has also based the assessment on the incorrect criteria/section.

19. The decision has failed to comply with the *Guideline*.
20. The bottom of page 2 of the decision under the heading 'Outcome' advises:
- 'You will be entitled to weekly payments of compensation at the rate of \$772.54 during the second entitlement period pursuant to Section 37(3) of the 1987 Act.*
- Your weekly payments of compensation will cease'.*
21. Clearly these statements are inconsistent and result in a demonstrable error.
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 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

26. The work capacity decision of the Insurer dated 19 June 2014 is set aside.
27. The applicant is to be reinstated to his weekly payments at the rate applicable at 25 September 2014.
28. The payments are to be back-dated to 25 September 2014 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
22 October 2014