

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 30 September 2013 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable at 8 January 2014.**
- c. The payments are to be back-dated to 8 January 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 30 September 2013. The decision advised the applicant that his weekly payments of compensation would cease on 8 January 2014. The applicant sought internal review and Internal Review Decision (IRD) was dated 1 November 2013. He then sought Merit Review on or about 13 February 2014. The Authority issued their findings and recommendations on 25 August 2014, some 192 days later¹. The Authority found that the applicant is entitled to weekly payments of compensation in the amount of nil.
2. The applicant made application for a procedural review to this office on 10 September 2014. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. On 31 May 2001 the applicant sustained injury to his lower back during the course of his employment as a diesel boilermaker/ fitter. He was unable to return to his pre-injury duties and ceased working with his

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 12 August 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."

employer in or about June 2002. At the time of the work capacity decision being made the applicant was working an average of 24 hours per week in a self-employed capacity.

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 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 12 August 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 *Workers Compensation Act 1987* (the 1987 Act)).

Submissions by the applicant

8. *Section 44(1)(c)* of 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

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 12 August 2013.
11. The decision advises the applicant that *'as a result of your work capacity assessment completed on 10 July 2013, a decision has been made that you are no longer entitled to weekly payments under the new Section 38 of the Workers Compensation Act 1987'*.
12. *Guideline 4* comments that a *'work capacity assessment considers all available information'*.
13. The decision advises the applicant that based on Accuracy's Industry Averages Report dated 7 August 2013 *'you have been assessed as having a capacity to earn \$829.90 per week in suitable employment'*. Later in the decision the applicant is informed that Dr Home, in his supplementary report dated 15 August 2013, is of the opinion that he has demonstrated the capacity to work 24 hours per week as an Instrument Fitter.
14. Both of the above reports relied upon post-date the actual work capacity assessment.
15. The statement that the work capacity assessment was performed on 10 July 2013 is misleading. According to that statement the assessment was performed prior to all of the evidence being available to both the insurer and the applicant. Either the statement made by the Insurer is untrue or erroneous.
16. *Section 54(2)(a)* of the 1987 Act requires 3 months' notice be given when weekly payments are to be reduced or ceased. This notice is to take into consideration the Interpretation Act 1987 *section 76(1)(b)* which states that service by mail is taken to be on the fourth working day after the letter is posted. Therefore, the notice period is 3 months and four working days.
17. The decision which is the subject of this review advises the applicant that his weekly payments will cease on 8 January 2014. This is actually in excess of the required notice period and is valid.
18. However, the description of *Section 54(2)(a)* of the 1987 Act given at page 3 of the decision is a complete misrepresentation of the notice provision and incorrectly states that *'your entitlement to weekly payments at your current rate must cease within 3 months of this*

decision – please refer to: Section 54(2)(a) of the Workers Compensation Act 1987. Whereas the true effect of the section is to say that payments *may not cease* until three months have elapsed following the provision of notice. The Insurer has styled the section as a maximum payment provision, rather than a minimum notice provision.

19. The result of this is that the applicant is advised that he will receive payments for three months and one week, on the first page of the decision, and on the second page, he is advised that his payments must cease within 3 months. The statements are clearly inconsistent and this results in a demonstrable error.
20. *Guideline 5.3.2* requires the decision to advise the applicant that any documents or information that have not already been provided to the worker can be provided upon request to the insurer. The decision advises the applicant that if he requires copies of documents previously provided he may request them from the Insurer. This is incorrect and places a condition upon the request that is not contained in the *Guidelines*.
21. 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.”
22. 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.

23. 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

24. 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

25. The work capacity decision of the Insurer dated 30 September 2013 is set aside.

26. The applicant is to be reinstated to his weekly payments at the rate applicable at 8 January 2014.

27. The payments are to be back-dated to 8 January 2014 in accordance with Clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.

28. 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
23 October 2014