

**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 18 September 2013 is set aside.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable 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 18 September 2013. The decision advised the applicant that his weekly payments of compensation would cease on 18 December 2013. The applicant sought internal review and Internal Review Decision (IRD) was dated 7 August 2014. He then sought Merit Review on or about 19 August 2014 and the Authority issued the Merit Review recommendation on 15 September 2014. The applicant made application to this office on 16 September 2014.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. The applicant sustained injury to his right ankle during the course of his employment on 1 April 2008. He did not return to duties with his pre-injury employer. As at the time of the work capacity decision the applicant was in receipt of weekly payments of compensation from the Insurer.
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*).

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 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 is described as ‘*notice under Section 54 under of the Workers Compensation Act 1987*’.
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 notice which is the subject of this decision is dated 18 September 2013. The applicant is advised that his weekly payments will cease on 18 December 2013.
14. The Insurer has not complied with the notice provisions under *Section 54(2)(a)* of the 1987 Act.
15. This single error is sufficient to set aside the work capacity decision. However, the decision contains further errors which render it invalid.
16. *Guideline 5.3.2* requires the decision to *explain the relevant entitlement periods*. In this decision the applicant is not informed as to how many weeks of compensation payments he has received nor which entitlement period he falls within.
17. The *Guideline* also requires the *relevant legislation to be referenced* and for the Insurer to clearly explain the *line of reasoning* for the decision. The applicant is informed that it has been determined that his weekly payments *‘should cease, under Section 38 and Section 43(1) (a, b & e) of the Workers Compensation Act 1987’*. The decision does not advise the applicant of the nature or content of those sections of the legislation nor how they affect his entitlements. The decision has failed to comply with the *Guideline*.
18. The decision does not make a determination of the applicant’s capacity to earn monetary terms. The insurer does not calculate, based upon the evidence before it, the applicant’s capacity to earn on a weekly basis. The applicant is not informed of the transitional rate and the impact that rate has in calculating his ongoing entitlements. The decision has failed to comply with the *Guideline*.
19. The *Guideline* requires the Insurer to state the impact of the decision *on the worker in terms of their entitlement to weekly payments, entitlement to medical and related treatment expenses and return to work obligations*.
20. The applicant is advised that *‘compensation for medical or rehabilitation expenses will cease 12 months after your weekly benefits cease’*. As

the incorrect notice period was given in respect of the cessation of weekly payments, this statement is also incorrect.

21. There is no reference to *Section 59A* of the 1987 Act in advising the applicant of the effects the decision has upon his medical expenses. The decision has failed to comply with the *Guideline*.
22. The *Guideline* also stipulates that the decision is to '*advise 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 Insurer has advised the applicant of the three documents upon which it relied to make its decision. It does not advise as to whether copies of those documents have been provided, are attached, or can be requested. The decision has failed to comply with the *Guideline*.
23. 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."
24. 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.

25. 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

26. 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

27. The work capacity decision of the Insurer dated 18 September 2013 is set aside.
28. The applicant is to be reinstated to his weekly payments at the rate applicable at 18 December 2013.
29. 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*.
30. 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
24 October 2014