

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 4 June 2014 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable at 4 June 2014.**
- c. The payments are to be back-dated to the date payments ceased.¹**
- d. 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 4 June 2014. The decision advised the applicant that her weekly payments would cease on either of two dates, both positively asserted to be correct.² Perhaps understandably the applicant sought internal review of this decision. The internal review upheld the original decision.
2. The applicant then sought merit review. The Merit Review Service of the WorkCover Authority issued their findings and recommendations on 8 September 2014, also upholding the original decision.
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 on the proper form and within time.
4. The applicant sustained injury in the course of her employment on 12 July 2007.

¹ Either of 23 July 2014, or 12 September 2014 – whichever is correct.

² See paragraph 13 *infra*.

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. 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 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 made short submissions in her application which are reproduced in part below.

Submissions by the Insurer

9. The Insurer prepared and filed a document described as a “Reply.” It completely ignored the issues raised by the applicant. To give some idea of the texture of the “Reply,” it was noted that the applicant is “*not exempt from legislative changes as she is not a sworn police officer.*” I should say that no assertion to the contrary had been made by the applicant, who worked in a hospital at all relevant times. Oddly, the Insurer chose not to point out that she was neither a fire-fighter nor a para-medical officer.

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. 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.*

12. The decision advises the applicant that she has received “588 weeks” of weekly payments as at 4 June 2014. Since weeks tend to have seven days apiece and there are usually 52 of them per year, it is hard to see how a person injured on 12 July 2007 could have accrued 588 weeks of payments in the absence of a functioning time machine. By my own rough calculations some eleven years and sixteen weeks would need to pass between 12 July 2007 and the relevant date for 588 weeks to have elapsed. That would make it around 5 November 2018. This statement is therefore obviously untrue. In the “Reply” document sent to my office it is asserted that the worker has received 370 weeks of payments, a more credible guesstimate appearing in a document dated 18 September 2014. It also contradicts the number of weeks nominated in the work capacity decision notice, thereby confirming the original error.

13. In her application to this office the applicant herself identified a problem with the date on which payments were supposed to cease. At one point it was said that the decision would “become effective on 12/09/2014.”³ At a later point in the same letter this appears:

“This means that you will continue to be entitled to weekly compensation payments until 23/07/2014 at which time your entitlement to weekly compensation payments will terminate (pursuant to Sections 38(3), 38(8) 44 and 54 of the *Workers Compensation Act 1987*.”

The applicant herself was able to describe this situation as “confusing,” a description with which it is hard to disagree.

14. The situation is not assisted by the Insurer having asserted in the “Reply” document that “*the effective date of that decision was 23/7/2014.*” This assertion is actually an admission that the Insurer does not understand the significance of section 54(2)(a) which requires a worker in the position of this applicant to receive three months notice.

³ A date which would have comfortably satisfied the notice requirements in section 54(2)(a) and *Guideline 6*.

15. The decision has failed to comply with the legislation and the *Guidelines*. The provision of inadequate notice is a demonstrable error and it follows that the decision must be set aside.

FINDING

16. 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

17. The work capacity decision of the Insurer dated 4 June 2014 is set aside.
18. The applicant is to be reinstated to her weekly payments at the rate applicable at 4 June 2014.
19. The payments are to be back-dated to the date payments actually ceased (either 23 July 2014, or 12 September 2014 – whichever is correct).
20. Payments are to continue until such time as a further work capacity decision is made and comes into effect.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
24 October 2014