

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 26 November 2013 is set aside.**
- b. **The applicant is to be reinstated to her weekly payments at the rate applicable as at 4 March 2014.**
- c. **The payments are to be back-dated to 4 March 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 26 November 2013. The decision advised the applicant that her weekly payments of compensation would cease on 4 March 2014. The applicant sought internal review and the Internal Review Decision (IRD) was dated 30 January 2014. She then sought Merit Review on or about 20 February 2014 and the Authority issued the Merit Review recommendation on 28 August 2014 some 158 days later¹. The applicant made application to this office on 24 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 her lower back on 17 January 2005 during the course of her employment as a head of kitchen/cook. The applicant was unable to return to pre-injury duties and her employment was terminated 5 weeks post injury. In or about May 2012 the applicant

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 11 October 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."*

commenced alternate employment as an interpreter. In or about October 2013 she also obtained employment as a broadcaster/radio presenter.

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 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 *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’s submissions are not relevant to procedural review.

Submissions by the Insurer

9. The Insurer has provided submissions in response to the application which were received by our office on 26 September 2014 and have been duly considered.

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. *Schedule 8 Clause 23 of the Workers Compensation Regulation 2010* (the Regulation) that an Insurer must make a work capacity decision as soon as practicable after the work capacity assessment.
12. The decision which is the subject of this review informs the applicant that *'CGU Insurance have made a work capacity decision that will result in a discontinuation of your weekly benefit, effective 04/03/2014'*.
13. Later in the decision the applicant is informed *'This work capacity decision has been made by' (name omitted), 'for' (name omitted) 'case manager on 26 November 2013'*.
14. Whilst the applicant has been advised that the work capacity decision was made on 26 November 2013 she was not told when the assessment was conducted.
15. The applicant is unaware of when the work capacity assessment/s occurred.
16. The applicant needs to know the date in order to be able to make coherent submissions about compliance with both the legislation and *Guidelines*.
17. The Insurer has not complied with *Schedule 6 Part 19H Division 2 Clause 9* of the 1987 Act or *Schedule 8 Clause 22(1)* of the Regulation in the absence of this information being provided to the applicant. The IRD attempts to rectify this omission however, it is not sufficient to validate the decision dated 26 November 2013.
18. *Guideline 5.3.2* requires the decision to *'explain the relevant entitlement periods'*. The decision advises the applicant that she has received payments *'for a cumulative period of more than 130 weeks'*. The decision does not advise the worker the exact amount of weekly payments of compensation she has received nor does it explain the relevant entitlement periods.
19. The same *Guideline* notes that the decision must *'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'*. This decision advises *'a copy of all of the above information is enclosed for your reference.'* The insurer has failed to comply with the *Guideline*.
20. 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.”

21. 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.

22. 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

23. 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



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25. The applicant is to be reinstated to her weekly payments at the rate applicable at 4 March 2014.
26. The payments are to be back-dated to 4 March 2014 in accordance with Clause 30 of the Workers Compensation Amendment (Existing Claims) Regulation 2014.
27. 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
28 October 2014