

**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 October 2013 is set aside.
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 7 February 2014.
- c. The payments are to be back-dated to 7 February 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 October 2013. The decision advised the applicant that his weekly payments of compensation would cease on 7 February 2014. The applicant sought internal review and the Internal Review Decision (IRD) was dated 14 February 2014. He then sought Merit Review on or about 27 February 2014 and the Authority issued the Merit Review recommendation on 29 August 2014, some 192 days later<sup>1</sup>. 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. On 30 March 2010 the applicant sustained injury to his lower back in the course of his employment as a fitter and turner/machinist. The applicant did not return to his pre-injury duties and his employment was terminated on 13 August 2010. The applicant was then self-employed

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<sup>1</sup> 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."

as a limousine driver. The applicant received an award from the WCC on or about 17 May 2012 and was awarded weekly payments in the sum of \$500 per week on a continuing basis.

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 Workers Compensation Act 1987* (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 1987 Act).

#### **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 made various submissions however none of those submissions are relevant to this procedural review.

#### **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 11 October 2013.
11. *Guideline 5.3.2* requires the Insurer to 'reference the relevant legislation' and '*state the impact of the decision on the worker in terms of entitlement to weekly payments, entitlement to medical and related expenses and return to work obligations.*'
12. The decision informs the applicant that his entitlement to weekly payments of compensation ceases on 7 February 2014.
13. In respect of the applicant's entitlement to continuing medical and treatment expenses the decision advises:

*"I seek to confirm with you that your entitlement to medical treatment is not being disputed at this point in time, especially not through the Work Capacity and Decision process".*
14. The decision fails to reference *Section 59A* of the 1987 Act and advise the impact that the decision has upon the applicant's entitlements to medical and treatment expenses. That impact being that his entitlements to medical and treatment expenses will cease twelve months after the cessation of his weekly payments.
15. The decision also fails to advise as to *Section 59A (3)* of the 1987 Act.
16. *Section 59A(3)* of the 1987 Act states that the applicant may, after the entitlement to compensation for medical expenses ends, become eligible for further payments for medical expenses if the applicant becomes entitled to compensation for weekly benefits at some stage in the future.
17. The error by itself is sufficient to set aside the decision.
18. The IRD attempts to rectify this error by informing the applicant that his entitlement to medical and treatment expenses ceases one year after the cessation of weekly payments. This is not sufficient to validate the work capacity decision.
19. Further, *Guideline 5.3.2* notes that the insurer should advise the applicant 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 decision advises the applicant that the documents listed in the decision have been '*enclosed in accordance with the Guidelines*'. This is an incorrect description of the *Guideline*.

20. The decision fails to comply with the Guideline.

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 October 2013 is set aside.
26. The applicant is to be reinstated to his weekly payments at the rate applicable at 7 February 2014.
27. The payments are to be back-dated to 7 February 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  
29 October 2014