

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*.

1. The injured worker has applied for a procedural review of a work capacity decision made by the Insurer on 17 June 2013.
2. There is no dispute that the applicant was injured in the course of his employment on 27 June 2012. The applicant did not return to work on suitable duties at all from the time he lodged a WorkCover claim and has since been terminated from his pre-injury employment. The applicant is not currently working and has been in receipt of weekly payments from the Insurer. The Insurer made weekly payments as required under the provisions of the *Workers Compensation Act 1987* (1987 Act).
3. The applicant was in receipt of compensation by way of weekly payments as at 1 October 2012. Clause 8 of Part 19H of Schedule 6 to the 1987 Act required the Insurer to conduct a work capacity assessment for the purpose of facilitating the application of the amended weekly benefits to the applicant.
4. Section 44A of the 1987 Act provided that a work capacity assessment is an assessment of the injured worker's current work capacity and must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).
5. The relevant version of the *Guidelines* is the one published on 27 September 2012 which applied to all claims from 1 January 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.
6. Once the Insurer has conducted an assessment then the Insurer is required to make a work capacity decision. Where that decision involves a reduction in the weekly payments payable to the injured worker then the Insurer is required to give proper notice to the worker (Section 54 of the 1987 Act).
7. The applicant has been in receipt of weekly payments for 45 weeks as at the date of the decision and therefore Section 37 of the 1987 Act applies.
8. The decision states that a work capacity assessment has been made. No date for the making of the assessment is given. The insurer is required to make a decision "as soon as practicable" after the

assessment is made: clause 23, schedule 8, *Workers Compensation Regulation* 2010. There does not appear to be any legislative requirement to notify the applicant of the outcome. However, the *Guidelines* at Part 5.4.2 state that the decision must;

- *State the decision and give brief reasons for making the decision;*
- *Outline the evidence considered in making the decision, noting the author, the date and any key information. All evidence considered should be referred to, regardless of whether or not it supports the decision;*
- *Clearly explain the reasoning for the decision.*

My finding is that the *Guidelines* result in the insurer being compelled to reveal the outcome of the assessment.

9. In this case the applicant knows an assessment has been made. What the applicant cannot know is whether the decision was made as soon as practicable after the assessment as he cannot know the date of the assessment. Therefore there is a breach of clause 23, schedule 8, *Workers Compensation Regulation* 2010.
10. *Guideline* 5.4.2 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”. Section 59A(2) of the 1987 Act states that compensation in respect of any treatment, service or assistance is not payable more than 12 months after the applicant ceased to be entitled to weekly payments of compensation. The decision says “any entitlement you may have to payment of pre-approved reasonable and necessary medical and other expenses, until the 25th of September 2013, will not be affected”. Such a statement is in breach of the *Guidelines* and misrepresents section 59A(2).
11. *Guideline* 5.4.2 requires the Insurer to reference the legislation. Section 59A(2) of the 1987 Act is not referred to in the decision.
12. The decision states “You [the applicant] have a current capacity to work and have not returned to work: Please refer to Section 43(1)(a) of the *Workers Compensation Act* 1987”. The legislation that should have been referred to is section 32A of the 1987 Act and the definitions of “current work capacity” and “suitable employment”, and section 37(3) of the 1987

Act in relation to the calculation to be made to determine the amount payable. Thus, the legislation has not been properly referenced.¹

13. The decision states: *You have been assessed as having capacity to earn \$1066.33 gross per week in suitable employment: Please refer to: Section 43(1)(c) & (d) of the Workers Compensation Act 1987.* The areas of suitable employment are set out but the legislation is not properly referenced. Later in the decision suitable employment is properly described and the correct reference is made to Section 32A of the 1987 Act. Having two legislative references to the issue of suitable employment is confusing to an applicant, and as such the legislation has not been properly referenced.
14. The decision refers to the transitional amount. The transitional amount is the AWE for existing recipients of compensation prior to 1 October 2012. The AWE is defined in section 35 of the 1987 Act, but for existing recipients of compensation prior to 1 October 2012 the AWE is altered by Clause 9(3), Part 19H, Schedule 6 of the 1987 Act (the transitional amount). The actual transitional amount is set out in Clause 2, Part 19H, Schedule 6 of the 1987 Act. None of these provisions are referenced in the decision. The decision refers instead to Section 43(1)(d) of the 1987 Act. *Guideline 5.4.2* requires that the legislation be referenced. This reference would be of no assistance to the applicant.
15. Further, the above *Guidelines* also state that the work capacity decision notice must advise the applicant that any documents or information that have not already been provided to him can be provided on request to the Insurer. The Insurer failed to so advise the applicant. The Insurer only advised that: *“Should you require further copies of documents previously provided to you please do not hesitate to contact [the Insurer]...”* Emphasis added.
16. The final paragraphs of the decision purport to tell the applicant where he may turn for advice in relation to the decision. The last paragraph states *“a lawyer is **not** entitled to be paid for assistance provided in connection with a review of a work capacity decision of an insurer: Please refer to Section 44(6) of the Workers Compensation Act 1987.”* It should be more clearly stated that a lawyer may assist the applicant, but may not be **paid** for that work. The wording of decision may give an impression to an applicant that a lawyer cannot assist. Accordingly, the legislation has not been properly referenced.

FINDING

¹ A verb form appearing perhaps too often in the next two paragraphs.



17. I find that the Insurer has failed to follow the procedures as set out in the *WorkCover Guidelines*, as required by Section 44A of the 1987 Act. The Insurer has also failed to follow the 1987 Act otherwise and the *Workers Compensation Regulation 2010*.

RECOMMENDATION

18. I recommend that the Insurer conduct a new work capacity assessment and, if appropriate, make a new work capacity decision in accordance with the *WorkCover Guidelines*.

19. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 17 June 2013 until such time as he is properly transitioned and the correct notice period in section 54 has elapsed. Those payments should continue from 25 September 2013 being the date on which they ceased.

20. Since the payments had ceased, clause 21 of schedule 8 to the *Regulation* is inapplicable and payments may therefore resume immediately. There is no requirement for the applicant to provide work capacity certificates for the period 25 September 2013 to date since section 44B(2) applies. These recommendations are binding on the Insurer: see s 44(h) of the 1987 Act.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer

23 January 2014