

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 9 October 2013 is set aside.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable as at 17 January 2014.**
- c. **The payments are to be back-dated to 17 January 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 9 October 2013. The decision advised the applicant that his weekly payments of compensation would cease on 17 January 2014. The applicant sought internal review and the Internal Review Decision (IRD) was dated 21 February 2014. He then sought Merit Review on or about 24 March 2014 and the Authority issued the Merit Review recommendation on 1 September 2014, some 191 days later¹. The applicant made application to this office on 25 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 suffered injury to his thoracic spine on 1 February 2007. He returned to his pre-injury employer performing suitable duties until he ceased work in late 2007.

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 12 August 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."

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 12 August 2013. 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 which have been considered.

Submissions by the Insurer

9. The Insurer has provided submissions in response to the application which were received by this office on 1 October 2014. These submissions have been reviewed.

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. *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 ceased on 17 January 2014.
13. In respect of the applicant’s entitlement to continuing medical and treatment expenses the decision advises:

“Your entitlement to reasonable and necessary medical treatment will also continue”.
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 entitlement to claim medical and treatment expenses will cease twelve months after the cessation of his entitlement to weekly payments of compensation.
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.²
17. This error by itself is sufficient to set aside the decision.
18. 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 of the documents relied upon to make the decision and that if he ‘*would like copies of any or all of these documents please contact your Case Manager*’.

² For a recent discussion of the operation of section 59A, see *Vella v Penrith City Council* [2014] NSWCC 363, at paragraphs 48-94.

19. This places a condition upon the provision of documents which is not in the *Guideline*.
20. *Guideline 2.3* requires that the Insurer's decision should be "*timely, informed and evidence based.*"
21. *Sections 44A and 44B* of the 1987 Act limit the nature of the evidence that can be used in assessing work capacity.
22. The Insurer advises that in making this work capacity decision it has considered all available and relevant evidence 'including the evidence listed below'. The decision then lists 25 bullet points of documents. The most recent evidence referred to is a report of Melissa Dunn, rehabilitation consultant, dated 9 January 2013. This report is 8 months old and would be considered ultra vires sections 44A and 44B.
23. A certificate of capacity is evidence which can be used to assess capacity. According to *Section 44B* of the 1987 Act a certificate of capacity may not cover a period exceeding 28 days unless the person issuing the certificate provides special reasons and further, the certificate is of no effect to the extent that it relates to a period more than 90 days before the certificate has expired.
24. The only certificates relied upon in this decision were Workcover NSW Medical Certificates issued by Dr Ismay from 7 February 2007 and 31 October 2009. The most recent of these certificates is 5 years old.
25. Clearly the certificate does not comply with the requirements of Section 44B of the 1987 Act.
26. The decision does not comply with the *Guidelines* as it has not been made in a *timely* manner nor is it *informed* and *evidence based*.
27. 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."
28. 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.

29. 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

30. 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

31. The work capacity decision of the Insurer dated 9 October 2013 is set aside.

32. The applicant is to be reinstated to his weekly payments at the rate applicable at 17 January 2014.



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33. The payments are to be back-dated to 17 January 2014 in accordance with Clause 30 of the Workers Compensation Amendment (Existing Claims) Regulation 2014.
34. 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
30 October 2014