

**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 application for procedural review is dismissed.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 3 June 2014.**
- c. The payments are to be back-dated to 3 June 2014 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.**
- d. Such payments are to continue until the date of receipt of this recommendation.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 7 January 2014. The decision advised the applicant that his entitlement to weekly payments would cease from 14 April 2014. The applicant sought internal review of the decision and the Internal Review Decision (IRD) was dated 24 February 2014. That decision advised the applicant that his weekly payments would be discontinued on 3 June 2014. He then sought Merit Review from the Authority on 23 March 2014 and they delivered a decision dated 29 August 2014 some 159 days later.¹ He then applied to this office for procedural review on 26 September 2014.
2. I am satisfied that the applicant has made the application for Procedural Review in the proper form and within time.

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."

3. On 11 September 2010 the applicant suffered a crush injury to his right foot during the course of his employment as a boilermaker/welder. The Insurer accepted liability. The applicant is not fit to return to his pre-injury duties. He remains working for his pre-injury employer performing suitable duties.
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 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 submissions made by the applicant are not relevant to procedural review. The applicant’s submissions are not relevant to procedural review.

Submissions by the Insurer

9. The Insurer did not make any submissions in response to this application.

The Decision

10. The decision of the Insurer dated 7 January 2014 displayed a careful consideration of the requirements of the *Guidelines* and the legislation.
11. The applicant was advised of the date of the work capacity assessments being 10 October 2013 and 6 January 2014 as well as the date of the work capacity decision being 7 January 2014.
12. *Guideline 2.3* requires that the Insurer's decision should be "*timely, informed and evidence based.*"
13. The Insurer has complied with this *Guideline*.
14. The Insurer has listed the numerous documents considered in making the decision. *Sections 44A* and *44B* of the 1987 Act limit the nature of the evidence that can be used in assessing work capacity. That evidence includes a Certificate of Capacity. In this decision the Insurer has relied upon Certificates of Capacity from Dr Malaowalla dated 29 October 2013, 18 November 2013 and 7 December 2013. This complies with the legislation.
15. The applicant was given the correct notice period in accordance with Section 54(2)(a) of the 1987 Act being 3 months and four working days having regard to Section 76(2)(a) and (b) of the Interpretation Act 1987. In this decision the applicant was advised that his payments would cease on 14 April 2014.
16. *Guideline 5.3.2* requires the Insurer to explain the relevant entitlement periods and legislation. The decision informs the applicant that he has received 165 weeks' worth of weekly payments and as such his entitlements are assessed under Section 38 of the 1987 Act. The decision then provides an adequate explanation of how that Section works and the relevant transitional rate.
17. There are no procedural errors identifiable in the decision.

18. The applicant also requested a procedural review of the Internal Review decision dated 24 February 2014. It is not WIRO's function to review the Internal Review decision of the Insurer. However, in this case we have considered that decision.
19. The decision dated 24 February 2014 refers to a more recent Certificate of Capacity from Dr M dated 29 January 2014. The decision assessed the applicant to have the same capacity as the original decision. However, as updated evidence by way of a further Certificate of Capacity was relied upon and the insurer noted that the first decision had the consequence of reducing the applicant's entitlement to nil and the second decision discontinued weekly payments altogether a new notice period of 3 June 2014 was given.
20. This notice period complies with Section 54(2)(a) of the 12987 Act.
21. The decision of 24 February 2014 has been reviewed and there are no identifiable errors in the decision.
22. 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."
23. 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.

24. 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 or being reduced as a result of the original decision and the subsequent internal review decision.

FINDING

25. I find that no procedural errors occurred in this matter.

RECOMMENDATION

26. The application for procedural review is dismissed.

27. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 3 June 2014.

28. The payments are to be back-dated to 3 June 2014 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation* 2014.

29. Such payments are to continue until the date of receipt of this recommendation.

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
31 October 2014