



**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 April 2014.**
- c. The payments are to be back-dated to 3 April 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 and cease immediately thereafter.**

**Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 27 December 2013. The decision advised the applicant that his entitlement to weekly payments<sup>1</sup> would "be reduced to nil" from 3 April 2014. The applicant sought internal review of the decision and ultimately Merit Review. He then applied to this office for procedural review on 22 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 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.

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<sup>1</sup> Note that the Insurer actually misused the word "wages" as a synonym for "weekly payments," which was unfortunate in circumstances where the applicant was back at work earning his own wages.

4. *Section 44A* of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines (Guidelines)*.
5. The relevant version of the *Guidelines* came into effect on 11 October 2013. 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 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**

7. *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. Largely he was concerned with the seeming injustice of the legislative amendments, commenting in passing that he would be out of pocket to the tune of nearly \$5,000 per annum for medical and related expenses unless the insurer accepted responsibility for continuing payments.

### **Submissions by the Insurer**

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

### **The Decision**

9. The decision of the Insurer dated 27 December 2013 showed an unusually close adherence to the requirements found within the *Guidelines* and the legislation. Put in summary form, the Insurer correctly:
  - Referenced the relevant legislation where required;
  - Set out and explained the entitlement periods;

- Gave adequate notice under section 54(2)(a) including an allowance for postal service;
- Fully explained the reasoning process of the insurer in arriving at the decision;
- Gave a passable explanation of the transitional rate;
- Disclosed the date(s) on which the work capacity assessment was conducted;
- Referred to the medical and other evidence relied upon in reaching the decision; and
- Explained the impact the decision would have on the applicant's benefits

10. *Guideline 5.3.2* requires the Insurer to explain the relevant entitlement periods and legislation. The decision informs the applicant that he has received more than 142 weeks 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.

11. There are no procedural errors identifiable in the decision.

### **A Recent Regulatory Development**

12. 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."

13. 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.

14. 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**

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

## **RECOMMENDATION**

16. The application for procedural review is dismissed.

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

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

19. Such payments are to continue until the date of receipt of this recommendation and cease immediately thereafter.



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