

**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 28 October 2013 is set aside.
- b. The applicant is to be reinstated to his weekly payments at the rate applicable at 5 February 2014.
- c. The payments are to be back-dated to 5 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 28 October 2013. The decision advised the applicant that his weekly payments of compensation would cease on 5 February 2014. The applicant sought internal review and Internal Review Decision (IRD) was dated 17 December 2013. He then sought Merit Review on or about 12 February 2014 and the Authority issued the Merit Review recommendation on 27 August 2014 some 196 days later<sup>1</sup>. The applicant made application to this office on 29 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 14 November 2011 the applicant suffered injury to his back whilst in the course of his employment as a storeman. The applicant returned to suitable duties on 8 March 2012 working 4 hours per day, 5 days per week. The applicant's employment was terminated in February 2013

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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."

and the applicant has not worked since. At the time of the work capacity decision the applicant was in receipt of weekly payments of compensation.

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 1987 Act required the Insurer to conduct a work capacity assessment.
5. *Section 44A of the Workers Compensation Act 1987* (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* 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 provided several submissions which are not relevant to procedural review.

### **Submissions by the Insurer**

9. The Insurer has not provided submissions in response to the application.

### **The Decision**

10. It is noted that at the time of the decision being made the applicant had been in receipt of weekly payments of compensation for 72.8 weeks. The applicant is correctly informed that his entitlements would be assessed pursuant to *Section 37* of the 1987 Act as this section covers the second entitlement period of 14 – 130 weeks.
11. On page 2 of the decision the applicant is informed that for the purposes of *Section 37* he has a *current capacity to work and has returned to work for not less than 15 hours per week* (emphasis added).
12. This is incorrect. The available evidence indicates that the applicant was working suitable duties with the pre-injury employer until February 2013 at which time his employment was terminated. He has not worked since that time. Therefore at the time of the decision the applicant was not working. The insurer has quoted the incorrect scenario upon which to calculate the applicant's entitlement.
13. The Insurer attempted to clarify its position on page 5 where it is stated that '*you have a capacity to perform full time, suitable employment, you are not employed*' (emphasis added).'
14. At page 2 of the decision the applicant is informed that he has been assessed as having a capacity to earn up to \$901.87 gross per week in suitable employment. The particulars of the calculation such as the nature of the suitable employment and hourly rate have not been provided.
15. At page 3 of the decision the applicant is advised that the amount he is able to earn is \$907.87 per week. This is inconsistent with the previous figure mentioned in the decision and in the absence of the particulars used to make the calculation it is impossible for the applicant to know which of the two totals is correct.
16. The particulars of the calculation are provided on page 4 of the decision. However, by this stage the applicant has already been provided with incorrect information as to his employment status, advised that the calculation of his entitlement to weekly payments will be made on the incorrect criteria and has been provided with two differing figures representing his capacity to earn.
17. The Guidelines provide that the Insurer must *state the decision and give brief reasons for making the decision and clearly explain the line of reasoning* for the decision. The Insurer has failed to comply with these Guidelines as noted by the misrepresentations above.

18. At page 2 of the decision the Insurer has advised *'your entitlement to weekly payments at your current rate must cease within 3 months of the decision.'*
19. *Section 54(2)(a)* of the 1987 Act requires 3 months' notice be given when weekly payments are to be reduced or ceased. This notice is to take into consideration the Interpretation Act 1987 *Section 76(1)(b)* which states that service by mail is taken to be on the fourth working day after the letter is posted. Therefore, the notice period is 3 months and four working days.
20. However, the description of *Section 54(2)(a)* of the 1987 Act given at page 2 of the decision is a complete misrepresentation of the notice provision. The true effect of the section is to say that payments *may not cease* until three months have elapsed following the provision of notice. The Insurer has styled the section as a maximum payment provision, rather than a minimum notice provision.
21. The result of this is that the applicant is advised that he will receive payments for three months and one week, on the first page of the decision, and on the second page, he is advised that his payments must cease within 3 months. The statements are clearly inconsistent and this results in a demonstrable error.
22. *Guideline 5.3.2* requires the Insurer to advise 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. In this case the applicant is informed that all documents which were considered in making the decision were previously provided under the fair notice letter. And that should he *'require further copies of documents previously provided to you please contact [the insurer].'* This is incorrect as this paragraph places a condition upon the request for documents that is not in the Guidelines.
23. 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."

24. 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.

25. 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**

26. 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**

27. The work capacity decision of the Insurer dated 28 October 2013 is set aside.



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28. The applicant is to be reinstated to his weekly payments at the rate applicable at 5 February 2014.
29. The payments are to be back-dated to 5 February 2014 in accordance with Clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.
30. 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  
3 November 2014