

**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 22 November 2013 is set aside.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable as at 2 March 2014.**
- c. **The payments are to be back-dated to 2 March 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 22 November 2013. The applicant was advised that his weekly payments of compensation would cease on 2 March 2014. The applicant sought internal review and the Internal Review Decision (IRD) was dated 24 January 2014. He then sought Merit Review on or about 24 February 2014 and the Authority issued the Merit Review recommendation on 29 August 2014, some 186 days later<sup>1</sup>. The applicant made application to this office on 3 October 2014.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. On 25 September 2007 the applicant sustained injury to his lower back during the course of his employment as an auto-glazier with the employer. The applicant attempted to return to his pre-injury duties however as a result of an aggravation in December 2009 the applicant

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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."

required surgery. His employment was ultimately terminated. The applicant has since found employment as a driving instructor working varying hours each week.

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 *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 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. The Insurer advised the applicant that his weekly payments of compensation would cease 2 March 2014. This is three months and five business days' notice. This notice is given in accordance with the Section 54(2)(a) of the 1987 Act and Section 76(1)(b) of the Interpretation Act (which provides that the notice period should be three months and four business days).
11. On page 2 of the decision the insurer advised the applicant that his entitlement to weekly payments *'must cease within 3 months of this decision'*.
12. This description is a complete misrepresentation of the notice provision in Section 54(2)(a) of the 1987 Act. The true effect of the section is 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.
13. This has been a recurring error in decisions made by this insurer and in keeping with consistent recommendations this misrepresentation is sufficient to be a demonstrable error.
14. *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 a breach as this paragraph places a condition upon the request for documents that is not in the Guidelines.
15. *Guideline 5.3.2* states the decision *'should outline the evidence considered in making the decision, noting the author, the date and key information. All evidence considered should be referred to, regardless of whether or not it supports the decision'*.
16. The decision lists 21 documents which were considered. The internal review decision also lists 21 documents. However, only 7 of the documents referred to in the original decision were reviewed in the internal review decision. Therefore 14 "new" (i.e. different) documents were considered in the internal review process compared to those forming the documentary basis for the original decision.

17. *Guideline 5.1* provides that when making a work capacity decision the Insurer should ‘ensure that all reasonable opportunities to establish capacity for work have been provided to the worker’ and ‘evaluate all available and relevant material and relevant considerations’.

18. Inferentially it might be concluded that the insurer was in possession of material at the time of making the original work capacity decision which was not considered nor was it provided to the worker. This is in breach of the *Guideline*. If it was considered, this was not disclosed to the worker, which is also a breach. Either way, the Insurer has failed to comply with the *Guideline*.

## **A Recent Regulation**

19. 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.”

20. 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.

21. 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**

22. 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**

23. The work capacity decision of the Insurer dated 22 November 2013 is set aside.

24. The applicant is to be reinstated to his weekly payments at the rate applicable at 2 March 2014.

25. The payments are to be back-dated to 2 March 2014 in accordance with Clause 30 of the Workers Compensation Amendment (Existing Claims) Regulation 2014.

26. 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  
6 November 2014