

**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 31 July 2013 is set aside.**
- b. **The applicant is to be reinstated to her weekly payments at the rate applicable as at 8 November 2013.**
- c. **The payments are to be back-dated to 2 September 2014 in accordance with Clause 30(3) 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 31 July 2013. The decision advised the applicant that her weekly payments of compensation would cease on 8 November 2013. The applicant sought internal review and the Internal Review Decision (IRD) was dated 26 August 2014. She then sought Merit Review on or about 2 September 2014 and the Authority issued the Merit Review recommendation on 1 October 2014. 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. As a result of the nature and conditions of the applicant's employment she suffered injury to her right shoulder. The deemed date of injury was 13 December 1999. The applicant was unable to return to her pre-injury duties. The applicant is presently performing alternate duties for up to 33 hours per fortnight with a different employer.
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 27 September 2012. 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 submissions as to the shortcomings of the Insurer’s procedural adherence including failure to provide the correct notice period and referencing *Section 76(1)(a)* of the *Interpretation Act 1987* and failure to reference medical expenses.

### **Submissions by the Insurer**

9. The Insurer has provided submissions in response to the application dated 10 October 2014 and those submissions have been duly considered.

### **The Decision**

10. *Guideline 5.4.2* 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.’
11. The decision informed the applicant that her entitlement to weekly payments of compensation ceased on 8 November 2013. The decision referenced *Section 54* of the 1987 Act. The applicant is correct in her submission that the decision did not reference *Section 76(1)(a)* of the *Interpretation Act 1987*. However, the Insurer did provide the correct notice period of at least three months and four business days. Therefore, despite its failure to reference both pieces of legislation the correct notice period has been provided.
12. The decision advised the applicant ‘your entitlement to reasonable and necessary medical and related treatment will also continue.’
13. This decision fails to reference *Section 59A* of the 1987 Act.
14. The decision fails to advise the applicant that her entitlements to medical expenses will cease 12 months after the cessation of her entitlement to weekly payments and also fails to advise as to *Section 59A (3)* of the 1987 Act.
15. *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.
16. The decision fails to comply with the *Guideline*.
17. *Guideline 5.4.2* 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 that she can request copies of the documents listed within the decision.
18. The decision fails to comply with the *Guideline* as it places a condition upon the request for documents that is not present in the *Guidelines*.

19. *Guideline 5.4.2 states the decision must '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'.*
20. The work capacity decision notes the Insurer has '*considered all available and relevant evidence, including the evidence listed below.*' The following documents are listed:
- i. Certificate of Capacity completed by Dr N dated 15 November 2012;
  - ii. Vocational Assessment prepared by ITS dated 20 September 2011;
  - iii. Vocational Assessment prepared by RFS dated 14 April 2011.
21. The Insurer has failed to comply with the guideline by not listing **all** the evidence upon which it made its assessment and decision.
22. On page 3 of the decision the insurer states it 'has determined that you currently have capacity for work'. The emphasis here is on the word **currently**.
23. The most recent evidence considered in the decision is a Certificate of Capacity from Dr N dated 15 November 2012. The decision is dated 31 July 2013. This makes the certificate some eight and one half months old.
24. *Section 44B of the 1987 Act states that a certificate of capacity must 'certify as to the worker's incapacity for work and whether the worker has a current work capacity or has no work capacity during the period, not exceeding 28 days, stated in the certificate'.*
25. The Certificate of Capacity relied upon has significantly exceeded the 28 days referred to in the legislation.
26. *Guideline 2.3 requires the Insurer's decision should be 'timely, informed and evidence based'.*

27. By relying upon evidence in excess of 8 to 20 months old the Insurer has failed to comply with the *Guideline*.

## **A Recent Regulation**

28. 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.”

29. 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.

30. It must follow that the applicant is entitled to the benefit of the Amendment Regulation from the time she applied for Merit Review. Clause 30(2) of the Amendment Regulation provides that a stay does not operate during the course of internal review if a worker delays longer than 30 days in seeking such review. In the current instance the applicant did not seek internal review for a period considerably in excess of 30 days and therefore, while the Insurer should restore the applicant to the level of payments being received immediately prior to the payments ceasing as a result of the original decision, such

restoration need only operate from the date when the applicant sought Merit Review, which was 2 September 2014.

## FINDING

31. 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

32. The work capacity decision of the Insurer dated 31 July 2013 is set aside.
33. The applicant is to be reinstated to her weekly payments at the rate applicable at 8 November 2013.
34. The payments are to be back-dated to 2 September 2014 in accordance with Clause 30(3) of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.
35. 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