

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 3 December 2013 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable at 13 March 2014.**
- c. The payments are to be back-dated to 13 March 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 3 December 2013. The decision advised the applicant that his weekly payments of compensation would cease on 13 March 2014. The applicant sought internal review and the Internal Review Decision (IRD) was dated 14 January 2014. He then sought Merit Review on or about 18 February 2014. The Authority issued their findings and recommendations on 2 September 2014. The Authority found that the applicant is entitled to weekly payments of compensation, albeit the quantum was calculated to be in the amount of nil.¹
2. The applicant made application for a procedural review to this office on 29 September 2014. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. In 2002 the applicant sustained bilateral carpal tunnel injury during the course of his employment. He was unable to return to his pre-injury duties and has subsequently worked in a family business as a

¹ While the Authority was happy to confirm the *quantum*, it was less helpful in suggesting a *modus* by which such "payment" in the amount of "nil" might be effected. Perhaps an *Operational Instruction* might be forthcoming in due course.

truck driver. He currently works in excess of 15 hours per week and earns considerably more than \$173 per 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 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. 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 *Workers Compensation Act 1987* (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 applicant has provided several submissions, mainly concerning the documentation provided to him (perhaps more accurately speaking, *not* provided to him) by the insurer.

Submissions by the Insurer

9. The Insurer made no submissions in response to the application.

The Decision

10. The decision advises the applicant as follows:

This decision was made by the Technical Specialist at [Insurer's name].

This decision was reviewed and confirmed by a Work Capacity Team at [Insurer's name].

11. As a result of the above two sentences it might be thought a fair conclusion to draw that at least two (and probably more) people had read and checked the work capacity decision notice before it was sent out. In the circumstances, it is hard to comprehend how the notice was issued with the following precise wording:

As a result of your work capacity assessment completed on [Click here to insert date], a decision has been made ...

That not one of the readers (leaving aside the original author) picked up and corrected this obvious howler does not engender much in the way of confidence in the quality control element which is the supposed justification for having decisions reviewed prior to issue. It is also clear that the applicant has not been advised of the date on which the assessment was completed. This is a breach of the *Guidelines*.

12. *Guideline 4* comments that a 'work capacity assessment considers all available information'.

13. The decision advises the applicant of no less than 26 documents or categories of documents on which the insurer relied. However in the course of internal review, a further set of documents was referenced, being wage records for the period 2004-2006. There was no reference to these in the original decision, which means that the Insurer breached the requirement of advising the applicant of all documents relied upon. Alternatively the Insurer did not consider documents at first instance which it later came to think relevant in the course of internal review. Both scenarios constitute breaches of the *Guidelines*.

14. The applicant had received in excess of 130 weeks of weekly payments and was accordingly advised that 12 months after receipt of his last payment (as a result of his entitlement ceasing) any

entitlement to medical and related expenses would cease by virtue of the operation of section 59A of the 1987 Act. This was an inadequate explanation, because the applicant was not advised that by virtue of section 59A(3) his rights to medical and related expenses might once again be revived during the course of any period of further entitlement to weekly payments which might arise in the future.²

A Recent Regulation

15. 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.”
16. 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.
17. It must follow that the applicant is entitled to the full benefit of the Amendment Regulation irrespective of the outcome of any review. In

² See the decision of *Vella v Penrith City Council* [2014] NSWCC 363 at 72 *et seq.*



this case the review will result in the original decision being set aside 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

18. 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

19. The work capacity decision of the Insurer dated 3 December 2013 is set aside.
20. The applicant is to be reinstated to his weekly payments at the rate applicable at 13 March 2014.
21. The payments are to be back-dated to 13 March 2014.
22. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
7 November 2014