

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 25 November 2013 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable as at 2 March 2014.**
- c. The payments are to be back-dated to 2 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 25 November 2013. The decision advised the applicant that her weekly payments of compensation would cease on 2 March 2014. The applicant sought internal review and the Internal Review Decision (IRD) was dated 4 March 2014. She then sought Merit Review on or about 1 April 2014 and the Authority issued the Merit Review recommendation on 19 September 2014 some 172 days later¹. The applicant made application to this office on 7 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 7 October 2002 the applicant suffered injury to her neck and back when she fell from a ladder whilst in the course of her employment as a sales assistant. The applicant unsuccessfully attempted to return to duties with her pre-injury employer and her employment was eventually terminated in 2007. Since 2012 the applicant has been self-employed in

¹ *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."*

her “Events and Party Planning” business working up to 20 hours per week.

4. The applicant was in receipt of weekly payments immediately before 1 October 2012 and according to *Clause 8 of Part 19H of Schedule 6 of the Workers Compensation Act 1987* (the 1987 Act) the Insurer is required 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)*. The relevant version of the *Guidelines* came into effect on 11 October 2013.

Submissions by the applicant

6. 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 made submissions as to the inadequacy of the Insurer’s procedural adherence including failure to explain the transitional rate and failure to follow the *Best Practice Decision Making Guide*.²

Submissions by the Insurer

7. The Insurer has provided submissions in response to the application which were received by our office on 10 October 2014 and included a useful chronology.

The Decision

8. *Schedule 8 Clause 23 of the Workers Compensation Regulation 2010* (the Regulation) states that an Insurer must make a work capacity decision as soon as practicable after the work capacity assessment.
9. The decision which is the subject of this review informs the applicant that ‘*I am writing to you following a review of your ongoing entitlement to weekly payments*’ then ‘*as a result of this decision, your weekly payments will cease from 2/03/2014*’.

² In the version of the *Work Capacity Guidelines* relevant for current purposes, all reference to the *Best Practice Decision Making Guide* had been deleted, rendering the submission on that issue otiose.

10. Later in the decision the applicant is informed *'This work capacity decision has been made by'* (name omitted) *'Senior Case Manager, on 25/11/2013'*.
11. Whilst the applicant has been advised that the work capacity decision was made on 25 November 2013 she was not told when the assessment was conducted.
12. The applicant is unaware of when the work capacity assessment/s occurred. The applicant needs to know the date in order to be able to make coherent submissions about compliance with both the legislation and *Guidelines*.
13. The Insurer has not complied with *Schedule 6 Part 19H Division 2 Clause 9* of the 1987 Act or *Schedule 8 Clause 22(1)* of the Regulation in the absence of this information being provided to the applicant. The IRD attempts to rectify this omission however, it is not sufficient to validate the decision dated 25 November 2013.
14. *Guideline 5.3.2* requires the Insurer to *'explain the relevant entitlement periods'*. The Insurer advises the applicant that she has received payments *'for a cumulative period of more than 130 weeks'*. The Insurer does not advise the worker the exact amount of weekly payments of compensation she has received³ nor does it explain the relevant entitlement periods.
15. The same *Guideline* also 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'*. This decision advises *'a copy of all of the above information is enclosed for your reference.'* In the absence of any advice to the applicant that documents not produced to date may be produced upon request (in addition to those already produced) the insurer has failed to comply with the *Guideline*.

FINDING

16. 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

³ That is to say, the exact number of weeks is not specified.



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

17. The work capacity decision of the Insurer dated 25 November 2013 is set aside.
18. The applicant is to be reinstated to her weekly payments at the rate applicable at 2 March 2014.
19. The payments are to be back-dated to 2 March 2014.
20. 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
10 November 2014