

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 30 July 2013 is set aside.**
- b. The applicant is to be reinstated to weekly payments at the rate applicable immediately prior to 7 November 2013.**
- c. The payments are to be back-dated to 7 November 2013.**
- 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 30 July 2013. The decision advised the applicant that his weekly payments of compensation would cease on 7 November 2013. For unexplained reasons, the applicant delayed until 10 September 2014 to apply for internal review. The Insurer mislaid the application and advised the applicant in late October 2014 that he should apply for merit review, since the 30 day time limit for internal review by the Insurer had expired. The applicant then sought Merit Review on or about 6 November 2014 and the Authority issued the Merit Review recommendation on 2 December 2014. The applicant made application to this office on 1 January 2014.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. Delays on the part of both the applicant and the Insurer have resulted in this matter coming to this Office more than 16 months after the original work capacity decision was made.
4. The applicant was a mortuary worker who suffered a neck injury in about 2003. He suffered pain in the neck, right shoulder and subsequently the back. He underwent cervical spinal fusion in 2005. He is clearly unfit for

his pre-injury duties and now works around 24 hours per week as a security officer with a public hospital, having previously filled the same role with New South Wales Police for about four years.

5. 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.
6. *Section 44A* of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).
7. The relevant version of the *Guidelines* came into effect on 28 September 2012. The *Guidelines* provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessments and decisions.
8. 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

9. *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 which do little more than express umbrage at the recent legislative amendments and question how the Insurer can have the right to terminate payments which he was led to believe would be ongoing on the basis of a previous settlement.

Submissions by the Insurer

10. The Insurer has provided a chronology and some papers from their file.

The Decision

11. *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.’

12. The decision informed the applicant that weekly payments would cease from 7 November 2013. This is adequate notice under the legislation. The entitlement periods were explained and the applicant was advised that he had received well in excess of 130 weeks of payments (as at July 2013 it was 283 weeks).

13. Despite having clearly and very correctly complied with the Guidelines as set out above, the following sentence in the Insurer’s notice was incorrect and breached the Guidelines. Having advised the applicant that his payments would continue during the three months notice period, the insurer said this:

“Your entitlement to reasonable and necessary medical and related treatment will also continue, however please contact your Case Manager directly to discuss approval of treatment and / or services prior to commencement.”

14. This is the only reference in the entire notice to medical expenses and as such it fails to advise the applicant of the impact or even the existence of section 59A(2) and (3). It is therefore clear that the notice was deficient since, contra *Guideline 5.4.2* (as it then was), the Insurer has not properly advised the applicant of the impact of the decision on his entitlement to medical and related expenses.

15. It follows that the decision must be set aside.

RECOMMENDATION

16. The work capacity decision of the Insurer dated 30 July 2013 is set aside.

17. The applicant is to be reinstated to weekly payments at the rate applicable immediately prior to 7 November 2013.

18. The payments are to be back-dated to 7 November 2013.



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19. 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
16 February 2014