

**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 19 November 2013 is set aside.**
- b. **The applicant is to be reinstated to her weekly payments at the rate applicable as at 27 February 2014.**
- c. **The payments are to be back-dated to 27 February 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 19 November 2013. The decision advised the applicant that her weekly payments of compensation would cease from 27 February 2014. The applicant sought internal review and the Internal Review Decision (IRD) was dated 16 January 2014. She then sought Merit Review on or about 13 February 2014 and the Authority issued the Merit Review recommendation on 11 September 2014 some 209 days later.<sup>1</sup> 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. The applicant alleges that she suffered bilateral epicondylitis as the result of the nature and conditions of her employment as a conveyancing clerk. The deemed date of injury was 20 October 2010. The applicant has been able to resume suitable duties with the same employer working 25 hours per week.

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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."*

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 however they are not relevant to procedural review.

### **Submissions by the Insurer**

7. The Insurer has provided submissions in response to the application which were received by our office on 9 October 2014.

### **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 27/02/2014*’.
10. Later in the decision the applicant is informed ‘*This work capacity decision has been made by*’ (name omitted) ‘*Senior Case Manager, on 19/11/2013*’.
11. Whilst the applicant has been advised that the work capacity decision was made on 19 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 19 November 2013.
14. In the decision the Insurer refers to an email received from the employer dated 28/10/2013 confirming that at the time of the work capacity decision the applicant was working "5 hours per day / 5 days per week". The email also provides the applicant's hourly rate.
15. The Insurer refers to a WorkCover NSW certificate of capacity issued by Dr P dated 28/10/2013 which confirms the applicant has current capacity to work "5.5 hours per day/ 5 days per week."<sup>2</sup>
16. In order to determine the applicant's capacity to earn the Insurer has taken the current hourly rate of \$38.9603 per hour and multiplied it by '*the 27.5 hours you are currently working*' and determined the applicant's current earnings to be \$1,071.41 per week.
17. The Insurer has erred by multiplying the hours that the certificate of capacity assesses the applicant *can* work as against the hours the applicant is *actually working* in order to calculate the applicant's current earnings. This is a demonstrable error.
18. *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 decision the Insurer advises '*a copy of all of the above information is enclosed for your reference*'. This is incorrect and not in accordance with the *Guideline*.

## FINDING

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<sup>2</sup> I take it this was an attempt to say that the applicant could work for 5.5 hours per day, 5 days per week. The utility of adding "/" as opposed to a simple comma is unknown.



19. 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**

20. The work capacity decision of the Insurer dated 19 November 2013 is set aside.
21. The applicant is to be reinstated to her weekly payments at the rate applicable at 27 February 2014.
22. The payments are to be back-dated to 27 February 2014.
23. 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  
12 November 2014