

## **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 04 October 2013 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at the date when payments ceased.**
- c. The payments are to be back-dated to the date when payments ceased.**
- 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 04 October 2013. The decision advised the applicant that his weekly payments of compensation would cease.<sup>1</sup> The applicant sought internal review and the Internal Review Decision was dated 23 December 2013. He later sought Merit Review on or about 11 March 2014 and the Authority issued the Merit Review recommendation on 15 September 2014.
2. The applicant made application to this office on 13 October 2014. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. On 25 January 2006 the applicant sustained injury to his lumbar spine as a result of lifting a bag weighing in the vicinity of 25 kilograms. The applicant worked on reduced hours in the intervening period, although (perhaps surprisingly) finally gave up tiling as an occupation as recently as September 2013. At the time of the relevant work capacity decision he was engaging in "work experience" with a television network. Since that time he has secured ongoing employment with the network, usually working 24 hours per week.

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<sup>1</sup> No date was specified. See paragraph 11 *infra*.

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 12 August 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 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 listed the following grounds for review:
  - The applicant alleges an agreement with the Insurer whereby he will receive \$198 per week until the age of 65.
  - He has an ongoing need for physiotherapy.
  - He wants the Insurer to be investigated for giving incorrect information and making false statements concerning the provision of assistance with finding work.

None of these grounds are relevant for current purposes, although it is interesting that the applicant cites the need for ongoing physiotherapy. The reason this is interesting is that the work capacity decision notice failed to advise him of the effects of *section 59A(2)* and (3), although the internal review decision belatedly sought to rectify the omission.

## Submissions by the Insurer

9. The Insurer has not provided submissions in response to the application.

## The Decision

10. *Guideline 5.3.2* 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. Unhappily this decision fell at the first two hurdles and never recovered.

- The notice advised the applicant as follows:

*“The decision I have made will result in a discontinuation of your weekly benefits. Because you have been receiving weekly benefits for a continuous period of more than 12 weeks, section 54 of The Act requires I provide you with three months notice before this decision comes into effect. I have extended that period by a further week to allow for the delivery of this notice by post in accordance with section 76(1)(b) of the Interpretation Act 1987 and Clause 6 of the WorkCover Work Capacity Guidelines.”*

*Prima facie*, this is text-book stuff and very properly done. However after checking several times I was unable to locate any reference to an actual date on which payments would cease. This is a breach of the Guidelines and the legislation which might be accurately described as fundamental. It is also a demonstrable error.

- Despite the applicant being advised that he had received 381 weeks of weekly payments and having section 38 very clearly explained, the work capacity decision notice contained no reference to section 59A(2) or (3) and medical expenses were never discussed at any point. This is also in clear breach of Guideline 5.3.2 and represents another instance of demonstrable error. Such errors cannot be “rectified” or “corrected” in the course of internal review – the decision is rendered void *ab initio* and must be reissued.



12. This decision was allegedly made by one named employee of the Insurer and “reviewed and confirmed” by another such employee prior to being issued to the applicant. That such a glaring error as the date of cessation of payments being omitted was allowed to slip through might not be a sign that the Insurer has adequate quality control in place.

### **FINDING**

13. 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**

14. The work capacity decision of the Insurer dated 04 October 2013 is set aside.
15. The applicant is to be reinstated to his weekly payments at the rate applicable as at the date when payments ceased.
16. The payments are to be back-dated to the date when payments ceased.
17. 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  
13 November 2014