

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 June 2014 is set aside.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable at 4 October 2014.**
- c. **The payments are to be back-dated to 4 October 2014 in accordance with Clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 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 30 June 2014. The decision advised the applicant that his weekly payments of compensation would cease on 4 October 2014. The applicant sought internal review and Internal Review Decision (IRD) was dated 13 August 2014. He then sought Merit Review on or about 28 August 2014. The Merit Review Authority issued their findings and recommendations on 25 September 2014.
2. The applicant made application for a procedural review to this office on 15 October 2014. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. On 3 April 2001 the applicant suffered injury to his back in the course of his employment as a communications officer. The applicant underwent surgery and ceased duties with that employer in early 2002. In or about April 2002 the applicant commenced work as a courier however he ended these duties in August 2002. In 2009 the applicant became a '*professional gambler*' and started his own business trading under a business name. The exact nature of this business is not known from the papers provided for this review. As at the time of making the work

capacity decision the applicant was in receipt of weekly payments of compensation.

4. As 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)*.

Submissions by the applicant

6. 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 made submissions which are not relevant to procedural review.

Submissions by the Insurer

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

The Decision

8. The *WorkCover Work Capacity Guidelines* relevant to making this work capacity decision came into effect on 11 October 2013.
9. *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.
10. *Guideline 5.2* requires the Insurer, at least two weeks prior to making a work capacity decision, to communicate its intention to the worker. The worker must be informed that a review of their current work capacity is being undertaken and a work capacity decision is going to be made. The worker is to be given an opportunity to supply further information for consideration.
11. At paragraph 1 of this decision the applicant is advised that a work capacity assessment was carried out on 30 June 2014. At paragraph 2

the applicant is advised that a work capacity decision was also made on 30 June 2014.

12. At 5.1 of the decision the applicant is referred to the *Notice of Intention to make a work capacity decision letter* dated 26 May 2014. The Insurer states *'in that letter, it was explained that [the Insurer] would be conducting a work capacity decision on 16 May 2014.'*
13. The above paragraphs are contradictory and confusing. Any applicant reading this would be unable to fathom when the work capacity assessment was performed and when the decision was made. Of particular concern is paragraph 5.1 where the applicant is advised that the work capacity decision was made ten days prior to the notice of intention letter being drafted and received. This would imply to the applicant that the decision had been made and any documents he wished to submit for consideration would have been pointless. These constitute demonstrable errors.
14. The applicant needs to know the date of the work capacity assessment in order to be able to make coherent submissions about compliance with both the legislation and *Guidelines*.
15. 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 Insurer has also failed to comply with the fair notice provisions in *Guideline 5.2*.

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 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 30 June 2014 is set aside.
18. The applicant is to be reinstated to his weekly payments at the rate applicable at 4 October 2014.



WorkCover **independent** review office

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

19. The payments are to be back-dated to 4 October 2014 in accordance with Clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 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
17 November 2014