

**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 application for procedural review of the work capacity decision of the Insurer dated 3 June 2014 is dismissed.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable at 8 September 2014.**
- c. The payments are to be back-dated to 9 September 2013 in accordance with Clause 30 of the Regulation.**
- d. Such payments are to continue until such time as a copy of this recommendation is received by the parties.**

**Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on "26 September 2014." Since this is the date of the decision by the Authority on merit review, I will regard it as an error in the form filling process with no prejudice to the applicant. It appears that the work capacity decision was in fact dated 3 June 2014. The decision advised the applicant that her weekly payments of compensation would cease on 9 September 2014. The applicant sought internal review and the Internal Review Decision (IRD) was dated 31 July 2014. The IRD confirmed the original decision. She then sought Merit Review on or about 28 August 2014 and the Authority issued the Merit Review recommendation on 26 September 2014. Once again, the original decision was upheld. The applicant made application to this office on 22 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 sustained injury to her right shoulder during the course of her employment on 19 July 2011. As at the time of the work capacity decision the applicant was in receipt of weekly payments of compensation from the Insurer.

4. The applicant was also 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).
6. The relevant version of the *Guidelines* came into effect on 11 October 2013. The *Guidelines* provide instructions and guidance to Insurers regarding the appropriate and consistent conduct 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 *Workers Compensation Act 1987*).

### **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 provided the following submissions:
  - The insurer has failed to handle her case in a ‘fair and reasonable’ manner, to wit:
    - The case worker from the Insurer has failed to keep the applicant ‘and all concerned parties’ updated at all times;
    - The Insurer has failed to provide reports to treating doctors;
    - The Insurer has failed to have the applicant assessed for her injury when they sent her to an IME. The doctor could not assess the applicant as he did not get her file in time;
    - The Insurer has failed to authorise tests which has resulted in the applicant having to pay for them herself;

- The Insurer has failed to take into consideration reports from treating doctors and physiotherapists; and
  - The case-worker from the Insurer ‘used bullying tactics’ when she attended an appointment with the applicant’s treating doctor.
- In addition the applicant notes that the above are “just a few key points to a lot of other issues since I first injured myself and the handling of my case.”

### Submissions by the Insurer

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

### The Decision

10. *Section 54(2)(a)* of the 1987 Act requires 3 months notice be given when weekly payments are to be reduced or ceased. A better way to explain the 3 month period is to explain that the *Interpretation Act 1987* section 76(1)(b) states that service by mail is taken to be on the fourth working day after the letter is posted. A working day is a day other than “a Saturday or Sunday, or a public holiday or a bank holiday in the place to which the letter was addressed”: section 76(2)(a) and (b) of the *Interpretation Act 1987*. Therefore, the proper notice period is 3 months and four working days.
11. The notice which is the subject of this decision is dated 3 June 2014. The applicant is advised that her weekly payments will cease on 9 September 2014. The Insurer has therefore complied with the notice provisions under *Section 54(2)(a)* of the 1987 Act.
12. *Guideline 5.3.2* requires the decision to *explain the relevant entitlement periods*. In this decision the applicant is informed how many weeks of compensation payments she has received (118) and which entitlement period she falls within (the second period, hence section 37 applies). This was all explained very clearly.
13. The *Guideline* also requires the *relevant legislation to be referenced* and for the Insurer to clearly explain the *line of reasoning* for the decision. The applicant is informed that it has been determined that

her weekly payments should cease, under Section 37 and Section 43(1) (a-f) of the *Workers Compensation Act 1987*. The decision does advise the applicant of the nature and content of those sections of the legislation and how they affect her entitlements. The decision has therefore complied with the *Guideline*.

14. The decision made a determination of the applicant's capacity to earn in monetary terms. The insurer calculated, based upon the evidence before it, the applicant's capacity to earn on a weekly basis. The applicant is informed of the transitional rate and the impact that rate has in calculating her ongoing entitlements. The decision has therefore complied with the *Guideline*.
15. The *Guideline* requires the Insurer to state the impact of the decision *on the worker in terms of their entitlement to weekly payments, entitlement to medical and related treatment expenses and return to work obligations*. Section 59A was properly and adequately explained to the applicant, who is thereby aware that her entitlement to medical and related treatment expenses will cease 12 months after the cessation of her entitlement to weekly payments.

## FINDING

16. I find that the Insurer has complied with the Guidelines and relevant legislative requirements. The matters raised by the applicant as grounds of procedural review go in some instances to the merits of the decision, and in other respects they may well form the basis of a complaint. They do not justify any disturbance of the original decision.

## A regulatory stay

17. On 3 September 2014 the *Workers Compensation Amendment (Existing Claims) Regulation 2014* (the Amendment Regulation) was published. Clause 26 of the Amendment Regulation provides that Part 2 "takes effect on and from 1 October 2012." The *Amendment Regulation* now appears in and forms part of Schedule 8 to the *Workers Compensation Regulation 2010* (the Regulation).
18. Clause 30 of the Schedule 8 of the Regulation, which is in Part 2 and therefore is deemed to have been in effect since 1 October 2012, is in the following terms:

## 30 Stay of work capacity decisions

- (1) A review under section 44 (Review of work capacity decisions) of the 1987 Act of a work capacity decision made in respect of an existing claim operates to stay the decision that is the subject of the review and prevents the taking of action by an insurer based on the decision while the decision is stayed.
- (2) This clause applies to an internal review under section 44(1)(a) of the 1987 Act only if the application for internal review is made by the worker within 30 days after the worker receives notice from the insurer of the work capacity decision to be reviewed.
- (3) The stay under this clause operates from the time the application for review is made until the worker is notified of the findings of the review (or the application for review is withdrawn).
- (4) This clause applies despite section 44(4) of the 1987 Act, which is deemed to be amended to the extent necessary to give effect to this clause.

19. It must follow that the applicant is entitled to the full benefit of the Regulation and therefore, application for internal review having been made within 30 days in accordance with clause 30(2), the Insurer should restore the applicant to the payments being received immediately prior to the payments ceasing as a result of the original decision.

## **RECOMMENDATION**

20. The application for procedural review of the work capacity decision of the Insurer dated 3 June 2014 is dismissed.
21. The applicant is to be reinstated to her weekly payments at the rate applicable at 8 September 2014.
22. The payments are to be back-dated to 9 September 2013 in accordance with Clause 30 of Schedule 8 to the Regulation.
23. Such payments are to continue until such time as a copy of this recommendation is received by the parties.

Wayne Cooper  
Delegate of the WorkCover Independent Review Officer  
03 December 2014