



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 is dismissed.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 26 September 2014.**
- c. The payments are to be back-dated to 26 September 2014 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.**
- d. Such payments are to continue until the date of receipt of this recommendation.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 19 June 2014. The decision advised the applicant that his entitlement to weekly payments would cease from 25 September 2014. The applicant sought internal review of the decision and the Internal Review Decision (IRD) was dated 15 August 2014. He then sought Merit Review from the Authority on 15 September 2014 and they delivered a decision dated 7 October 2014. He then applied to this office for procedural review on 31 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 suffered injury to his neck and left shoulder on 22 June 2001 during the course of his employment. Liability for the injury was accepted and the applicant was in receipt of varying payments of weekly compensation. The applicant remains in the employment of the pre-injury employer performing suitable duties.

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 11 October 2013. That publication stated that 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 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 more relevant to merit review and not relevant to procedural review. Those submissions being that his whole person impairment should be assessed prior to a work capacity decision being made and that if he lost his present employment he would have difficulty finding further employment.

Submissions by the Insurer

9. The Insurer has made submissions in response to this application which were received by this office on 5 November 2014.

The Decision

10. The decision of the Insurer dated 19 June 2014 displayed a careful consideration of the requirements of the Guidelines and the legislation.
11. *Guideline 2.3* requires that the Insurer's decision should be "timely, informed and evidence based."
12. The insurer advised the applicant that his work capacity assessment commenced on 10 March 2014 and was completed on 17 June 2014 and that the work capacity decision was made on that day. The applicant was notified of the work capacity decision by letter dated 19 June 2014. The Insurer has complied with the Guideline.
13. The insurer has relied upon certificates of capacity of Dr Lip, the most recent of which was dated 12 May 2014. This complies with *Section 44B* of the 1987 Act.
14. *Guideline 5.3.2* requires the Insurer to explain the relevant entitlement periods and legislation. The decision informs the applicant that he has received 324 weeks' worth of weekly payments and as such his entitlements are to be assessed under *Section 38* of the 1987 Act. The decision then provides an adequate explanation of how that Section works. The insurer has complied with the Guideline.
15. The applicant was given the correct notice period in accordance with *Section 54(2)(a)* of the 1987 Act being at least three months and four working days having regard to *Section 76(2)(a)* and *(b)* of the *Interpretation Act 1987*. In this decision the applicant was advised that his payments would cease from 26 September 2014 which is precisely the notice period required. The insurer has complied with the legislative requirements in respect of the notice period.
16. *Guideline 5.3.2* also 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.
17. The Insurer has advised the applicant of the date of cessation of his weekly payments. The Insurer has also advised the applicant of the impact that the decision has on his entitlement to medical and related treatment expenses with reference to *Sections 59A(2)* and *59A(3)* of the 1987 Act. The insurer has complied with the Guideline.

Finding

18. There are no procedural errors identifiable in the decision. The insurer has complied with the Guidelines and relevant legislation. The application for procedural review is dismissed.

Regulatory Stay

19. 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.”

20. *Clause 30 of the Amendment 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.



21. It must follow that the applicant is entitled to the full benefit of the Amendment Regulation and therefore the Insurer should restore the applicant to the payments being received immediately prior to the payments ceasing or being reduced as a result of the original decision and the subsequent internal review decision.

RECOMMENDATION

22. The application for procedural review is dismissed.
23. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 26 September 2014.
24. The payments are to be back-dated to 26 September 2014 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.
25. Such payments are to continue until the date of receipt of this recommendation.

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
11 December 2014