

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 28 May 2014.**
- c. The payments are to be back-dated to 5 September 2014 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.**
- d. Such payments are to continue until the implementation of the recommendation of the Merit Review Authority.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 28 May 2014. The decision advised the applicant that his entitlement to weekly payments would be reduced from \$483.83 to \$279 per week from 5 September 2014. The applicant sought internal review of the decision and the Internal Review Decision (IRD) was dated 22 September 2014. The IRD maintained the original decision.
2. On or about 22 August 2014 the insurer issued the applicant with a Section 74 notice denying liability for the claim and advising his weekly payments of compensation would cease on 3 October 2014.
3. The applicant then sought Merit Review from the Authority on 24 September 2014 and they delivered a recommendation dated 17 October 2014. The Authority found that the applicant had no work capacity and that he was entitled to weekly payments of compensation at the rate of \$768.40. According to the submissions from the Insurer they immediately implemented the recommendations of the Authority. Those payments however ceased on 3 October 2014 in accordance with the Section 74 notice issued.

4. The applicant then applied to this office for procedural review on 31 October 2014. I am satisfied that the applicant has made the application for Procedural Review in the proper form and within time.
5. The only document which is the subject of this review is the work capacity decision dated 28 May 2014.
6. The applicant suffered injury to his lower back during the course of his employment as a butcher. The accepted date of injury is 12 September 2012. The applicant has not worked since his injury.
7. 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.
8. *Section 44A* of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines (Guidelines)*.
9. 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.
10. 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

11. *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 include the insurer not referencing the legislation; the insurer not advising of the relevant notice period under *Section 54(2)(a)* of the 1987 Act ; failure to reference *Section 76(1)(a)* of the *Interpretation Act* and lastly no reference to medical expenses.

Submissions by the Insurer

12. The Insurer has made submissions in response to this application which were received by this office on 5 November 2014. These submissions included a useful chronology.

The Decision

13. The decision of the Insurer dated 28 May 2014 displayed a careful consideration of the requirements of the Guidelines and the legislation.
14. The applicant submits that three months' notice is not given pursuant to *Section 54(2)(a)* of the 1987 Act as required and that *Section 76(1)(a)* of the *Interpretation Act* is not referenced in the decision.
15. The Insurer advised the applicant on page 2 of the decision "*In line with the notice period CGU is required to give under Section 54(2)(a) of the Workers Compensation Act 1987, your weekly payments will continue at the current rate for 3 months and 1 week (to allow for delivery of this notice) to 05/09/2014. The change in benefit rate will become effective following this notice period.*"
16. *Section 54(2)(a)* of the 1987 Act requires at least three months and four working days' notice be given if payments are being reduced or ceased having regard to *Section 76(2)(a)* and *(b)* of the *Interpretation Act*. In this decision the applicant was advised that his payments would be reduced from 5 September 2014 which is precisely the notice period required. The Insurer did fail to reference the *Interpretation Act* however, the Insurer has allowed for the 4 working day period for delivery of the notice. This is in accordance with the requirements of the *Interpretation Act*. The Insurer has complied with the Guidelines and legislation by providing notice of and explaining the correct notice period.
17. The applicant has also submitted, as a ground for review, that the Insurer has failed to reference his entitlement to medical expenses. As the work capacity decision only reduced the applicant's payments of weekly compensation and did not terminate the payments his entitlement to medical and treatment expenses remains unchanged. It is not incumbent upon the insurer to advise that there had been no change to the applicant's entitlements.

18. *Guideline 2.3* requires that the Insurer's decision should be "timely, informed and evidence based."
19. The insurer advised the applicant that his work capacity assessment commenced on 13 May 2014 and was completed on 28 May 2014 and that the work capacity decision was made on that day. The applicant was notified of the work capacity decision by letter dated 28 May 2014. The Insurer has complied with the Guideline.
20. *Guideline 5.3.2* requires the Insurer to explain the relevant entitlement periods and legislation. The decision informs the applicant that his entitlements are assessed under *Section 37* of the 1987 Act. The decision then provides an adequate explanation of how that Section works. The insurer has complied with the Guideline.

Finding

21. 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

22. 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."
23. *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.

24. 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

- 25. The application for procedural review is dismissed.
- 26. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 28 May 2014.
- 27. The payments are to be back-dated to 5 September 2014 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.
- 28. Such payments are to continue until the date of implementation of the recommendations and findings of the Merit Review Authority.

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