

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 10 July 2014 is dismissed.**
- b. **The applicant is to be reinstated to her weekly payments at the rate applicable immediately prior to 17 October 2014, in accordance with clause 30 of Schedule 8 to the *Workers Compensation Regulation 2010*.**
- c. **The payments are to continue until such time as the parties receive this recommendation.**

Introduction and background

Prior application.

1. The applicant originally applied for procedural review of a work capacity decision made by the Insurer on 7 November 2013. The decision was made to cease weekly payments with the last date for payment to be 13 February 2014. The applicant sought review by the insurer, the merit review service and this office and the decision was ultimately set aside on the basis of various procedural infractions, including having the same person conduct merit review who had signed the work capacity decision.

Present application

2. As a result of the earlier recommendation by this office¹ the Insurer made a further work capacity decision on 10 July 2014. He was advised that weekly payments would cease as at 17 October 2014. The applicant again sought both internal review and merit review, neither of which disturbed the earlier decision.

¹ Reported as 7314.

3. The facts and circumstances surrounding the application require no repeating, having been set out in full in recommendation 7314.
4. The applicant was an “existing recipient” as that term is defined in the 1987 Act.
5. Section 44A of the 1987 Act provides that a work capacity assessment is an assessment of the injured worker’s current work capacity and must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines). The assessment on this occasion took place on 9 July 2014, the day before the decision was made.
6. The relevant version of the *Guidelines* is the one dated 4 October 2013, published on 8 October 2013, and which came into effect on 11 October 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 an assessment then the Insurer is required to make a work capacity decision. Where that decision involves a reduction in or cessation of the weekly benefits payable to the injured worker then the Insurer is required to give proper notice to the worker (see section 54(2)(a) of the 1987 Act).

Submissions by the applicant

8. The applicant made some startling submissions, not the least of which appears to be an attempt to say that the Insurer cannot “transition” him onto the new benefit regime² due to the expiry of the period specified in clause 17 of Schedule 8 to the *Workers Compensation Regulation 2010* (the Regulation). While this was a legitimate concern as at the date of the work capacity decision, the Regulation was amended in September 2014 to extend the time set out in clause 17 until late in 2015. The amendment appears in clause 31 and is therefore deemed to have been in operation since 1 October 2012.³ This retrospectivity legitimizes what would

² “New” being a meme for “the 2012 amendments.”

³ See clause 26.

otherwise be a work capacity decision made beyond power. The bulk of the applicant's submissions go to the merits of the case, including contesting the finding by the Insurer (accepted by the merit review service) that the applicant can work in suitable employment.

Submissions by the Insurer

9. The Insurer made no submissions.

The Decision

10. The decision by the Insurer was made with the benefit of a prior decision having been scrutinized internally by the Insurer, examined externally by the merit review service and ultimately overturned by this office on procedural grounds. It is clear that the Insurer has benefitted from this prior experience.
11. The insurer has complied with Guideline 5.3.2 in that it has extracted and explained the legislation, where relevant. It has properly explained the full effect of the decision to the applicant. This includes explaining the effect the decision would have had on the applicant caused by the operation of section 59A. I said "would have had" since the same amending instrument which extended the sunset clause in Schedule 8 to the Regulation for the transitioning of claims also provided that workers who were "existing recipients" with greater than 20% whole person impairment (WPI) would be exempt from the operation of section 59A until retirement age. Since the applicant has 22% WPI, he is so exempt.
12. The entitlement periods are correctly set out and explained. The correct notice period is given. The failure by the applicant to satisfy the requirements of section 38(3) is correctly explained.
13. Clause 30 was inserted into Schedule 8 to the regulation on 3 September 2014, with the same retrospective effect as referred to above in relation to Clause 31. Clause 30 provides that a "stay" of the Insurer's decision is to apply during the course of review under section 44 of the 1987 Act. Any such stay ceases upon receipt by the parties of the recommendation or decision of the reviewer. It follows that in this case the decision by the insurer is stayed and cannot be implemented until receipt by the parties of

this recommendation. Therefore the applicant should continue to receive weekly payments at the rate applicable immediately prior to 17 October 2014.

FINDING

14. I find that the Insurer has complied with the procedures as set out in the *WorkCover Guidelines* as required by Section 44A of the 1987 Act. The Insurer has also complied with the 1987 Act and the *Workers Compensation Regulation 2010*.

RECOMMENDATION

15. The application for procedural review of the work capacity decision of the Insurer dated 10 July 2014 is dismissed.

16. The applicant is to be reinstated to his weekly payments at the rate applicable immediately prior to 17 October 2014, in accordance with clause 30 of Schedule 8 to the *Workers Compensation Regulation 2010*.

17. The payments are to continue until such time as the parties receive this recommendation.

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