

**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 31 May 2013 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable immediately prior to 10 August 2013.**
- c. The payments are to be back-dated to 10 August 2013.**
- 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 31 May 2013. The decision informed the applicant that her weekly payments of compensation would be reduced to \$105.40 per week from 10 August 2013. The applicant sought internal review and the Internal Review Decision was dated 17 July 2013. This review reduced the applicant's entitlements to nil. The applicant was advised that her weekly payments would cease on 23 October 2013.
2. The applicant then sought Merit Review from the Authority on or about 12 November 2014. There was an issue as to whether the Insurer had sent the Internal Review Decision to the applicant within the required timeframe. The Authority ultimately accepted that the applicant did not receive the Internal Review Decision until 20 November 2014. As a result the Authority accepted that the applicant's application for Merit Review in accordance with Section 44(3)(b) of the *Workers Compensation Act 1987* (the 1987 Act) which allows an application for review by the Authority to be made without an internal review if the Insurer failed to conduct an internal review and notify the worker of the decision of the review within 30 days.

3. The Authority issued the Merit Review recommendation on 12 January 2015 confirming the applicant's weekly entitlement to be nil. The applicant then made application to this office on 27 January 2015.
4. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
5. The applicant suffered injury to her back with referred pain to her right hip, groin and leg whilst in the course of her employment as a nursing assistant. The agreed date of injury is 7 March 2012. The applicant resigned from that employment effective from 16 January 2013. She then obtained alternate suitable employment as a receptionist working on average 27 hours per week.
6. 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.
7. *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

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 made submissions which were not relevant to procedural review.

Submissions by the Insurer

9. The Insurer has provided submissions in response to the application annexing relevant correspondence together with an explanation of the outcome of the merit review.

The Decision

10. The work capacity decision which is the subject of this review is dated 31 May 2013. The relevant WorkCover Capacity Guidelines were gazetted on 27 September 2012.
11. *Guideline 5.4.2* required the insurer to state the impact of the decision on the applicant in terms of her entitlement to weekly payments and to reference the relevant legislation. Section 54(2)(a) of the 1987 Act also requires the Insurer to provide the applicant with not less 3 months' notice if payments of compensation are going to be reduced or discontinued.
12. The insurer advised the applicant in the work capacity decision that her weekly payments of compensation would be reduced on 10 August 2013. This is not the required three month notice period.
13. The Insurer has failed to refer to Section 54(2)(a) of the 1987 Act. The insurer has also failed to take into account and explain the notice period is three months and four working days (taking into account Section 76(1)(b) of the Interpretation Act). The insurer has failed to comply with the legislation and the Guideline.
14. The Insurer informed the applicant that she had received 57 weeks of weekly payments. The Insurer failed to inform the applicant that her ongoing entitlements would be assessed pursuant to Section 37(2) of the 1987 Act. Although the section is referenced in brackets in the work capacity decision there was no explanation accompanying the reference as to its application in this particular case. The Insurer has failed to comply with Guideline 5.4.2 in that it did not explain the relevant entitlement period.
15. The non-compliance with the Guidelines and the legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 31 May 2013.

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 31 May 2013 is set aside.

18. The applicant is to be reinstated to her weekly payments at the rate applicable immediately prior to 10 August 2013.

19. The payments are to be back-dated to 10 August 2013.

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
26 February 2015.