

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 15 September 2014 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable immediately prior to 22 December 2014.**
- c. The payments are to be back-dated to 22 December 2014.**
- 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 15 September 2014. The decision informed the applicant that her weekly payments of compensation would cease. The applicant sought internal review and the Internal Review Decision was dated 28 November 2014. The decision remained unchanged. The applicant then sought Merit Review on or about 15 December 2014 and the Authority issued the Merit Review recommendation on 22 January 2015, varying the Insurer's decision. The Merit Review Service of the Authority made the exceptional recommendation that the Insurer assess the applicant's income on a *weekly* basis, due the variations in hours worked. A maximum weekly entitlement of \$296.50 is to be applied.
2. The applicant made application to this office on 07 February 2015. 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 her right shoulder on or about 10 July 2013 in the course of her employment as a Support Worker in the disability support sector. As a result of ongoing friction with a co-worker, the applicant also suffered psychological injury. The parties seem to

agree on a date for the latter injury as 24 October 2013. Currently she works as a Teacher's Aide.

4. The applicant was injured well after the introduction of the 2012 legislative amendments to the *Workers Compensation Act 1987* (the 1987 Act). Section 43 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).

Submissions by the applicant

6. 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 primarily directed to the merits of the case, her financial situation and dissatisfaction with the outcome of her dispute with the Insurer.

Submissions by the Insurer

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

The Decision

8. The work capacity decision which is the subject of this review attempts to comply with the notice provision in section 54(2)(a) and broadly complies with the Guidelines issued by WorkCover. However, the details are hard to understand and in one glaring instance missing altogether.
9. In relation to the notice provisions in section 54, the worker is told the following:

Entitlements will remain the same for 13 weeks (3 months & 1 week) from the date of the S54 Notice, 15th September 2014.¹

10. Subject to what appears in footnote 1 (*supra*), what the applicant is told is unexceptionable. However, the applicant is never actually told the precise date on which payments will cease. The closest the Insurer comes to this fundamental task is when in the course of discussing the rights of the applicant between the date of the Notice and the date of cessation of benefits the following is said:

- R[] O[] will still be available to assist you with Job seeking up to 22nd December 2014.

This might have been better expressed and could be confusing to a reader still coming to grips with the idea that 3 months plus 1 week equals 13 weeks. The date of 22 December 2014 appears nowhere else in the Notice. It is left to the applicant to *conclude* that payments will cease on 22 December 2014, after joining the dots. It is the obligation of the Insurer to make this clear and the applicant should have been told explicitly, rather than inferentially.

11. The applicant was not told anything about the effect the decision to cease weekly payments would have on her right to pre-approved hospital, medical and related treatment expenses. The topic simply did not come up. This is in clear breach of Guideline 5.3.2 which requires the Insurer to fully explain the effect of a work capacity decision on the worker's entitlements, including hospital, medical and related treatment expenses.

12. The applicant was also told that she "must" apply for Internal Review within 30 days, "or [the Insurer] may decline to review the decision(s) further." This is untrue. It is a misstatement of section 44(1)(a). If it is an attempt to protect the rights of the applicant pursuant to clause 30 of Schedule 8 to the *Workers Compensation Regulation 2010* it is

¹ "3 months & 1 week" would actually be 14 weeks, not 13 weeks as stated. A distressingly high number of scheme agents appear to believe that "3 months" = "12 weeks." This is apparently based on the false notion that a month is comprised of 4 weeks, a fact only true in February. It takes no expertise with numbers to adduce that if there are 12 months in a year and 52 weeks in that same year, then if 25% x 12 months = 3 months, so 25% x 52 weeks = 13 weeks.

misguided since the applicant was not an existing claimant and the “stay” in that clause therefore does not apply.

FINDING

13. 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

14. The work capacity decision of the Insurer dated 15 September 2014 is set aside.
15. The applicant is to be reinstated to her weekly payments at the rate applicable immediately prior to 22 December 2014.
16. The payments are to be back-dated to 22 December 2014.
17. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
11 March 2015.