

**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 30 September 2014 is dismissed.**
- b. **By virtue of clause 30 of Schedule 8 to the *Workers Compensation Regulation 2010* weekly payments should be restored to the applicant from 14 January 2015 until the date of receipt by the applicant of this recommendation. They should cease thereafter.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 30 September 2014. The decision informed the applicant his entitlement to weekly compensation payments would cease and that this decision would "become effective" on 13 January 2015. The applicant sought internal review and the Internal Review Decision (IRD) was dated 28 November 2014. The IRD confirmed the earlier work capacity decision.
2. The applicant then sought Merit Review from the Authority on or about 17 December 2014. The Authority issued the Merit Review recommendation on 14 January 2015 confirming the applicant to have no entitlement to weekly payments.
3. The applicant subsequently made application to this office on 12 February 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. The applicant suffered fractures to his lumbar spine on 4 July 2003 when he fell from a 6 metre high platform. He returned to work on restricted duties, but these ceased when the employer ceased to exist in 2009. The insurer accepted liability for weekly payments, which

continued until the work capacity decision came into effect in January 2015. The applicant is currently unemployed.

5. 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.
6. *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

7. 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 the following submissions:

The Insurer breached the relevant Guidelines because:

- The Insurer failed to explain that the review may include further discussions.
- The Insurer failed to tell the applicant when a work capacity decision would be expected to be made. The only date included is a deadline for the worker supply additional information. While the applicant is given 14 days in which to provide further information, no specific date is quoted for the decision to be made.

Submissions by the Insurer

8. The Insurer has provided submissions in response to the application. In answer to the submissions appearing above, the Insurer has provided the following:
 - The fair notice call was made with [the applicant’s English-speaking wife] in the applicant’s presence and at his request. During this fair notice call on 8

September 2014 the Insurer advised that Nominated Treating Doctor (NTD) [Dr R] wanted to discuss vocational options with the applicant and review his capacity for work. Therefore, with reference to WorkCover *Work Capacity Guideline* 5.2 provisions, the Insurer advised that further discussions would take place between the applicant and his NTD.

- The Insurer advised the applicant's wife during the telephone call on 8 September 2014 that a work capacity decision call and letter would be received in three weeks time and that the decision will not come into effect immediately but that 3 months notice would be provided. The fair notice letter provided 14 days (plus four days for postage) to send in further information. It and also said this:

"[A named employee of the Insurer] will contact you following this period to confirm that the work capacity assessment has been completed and to advise of the work capacity decision that has been made."

The Decision

9. I find that the work capacity decision appears to comply with the legislative and other regulatory requirements, including the *Guidelines* issued by WorkCover.
10. The correct notice was provided under section 54(2)(a). The effect of the decision on the applicant's entitlement to ongoing medical and related treatment expenses was explained, with both sections 59A(2) and 59A(3) referenced and explained. The entitlement periods for payment of weekly compensation were set out and explained fully.
11. In relation to those matters forming the basis of the submissions by the parties, it should be noted that the date of both the work capacity assessment and the work capacity decision were set out in the work capacity decision notice dated 30 September 2014. Clearly neither date



could be known in advance and the answer by the Insurer in their submissions meets the objection raised. It is equally spurious of the applicant to say that they were not told of potential further discussions, particularly in light of the response by the Insurer disclosing ongoing discussions with the NTD and requesting further information from the applicant.

FINDING

12. The work capacity decision dated 30 September 2014 was validly made.

RECOMMENDATION

13. The application for procedural review of the work capacity decision of the Insurer dated 30 September 2014 is dismissed.

14. By virtue of clause 30 of Schedule 8 to the *Workers Compensation Regulation 2010* weekly payments should be restored to the applicant from 14 January 2015 until the date of receipt by the applicant of this recommendation. They should cease thereafter.

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