

**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*.**

1. The injured worker is the applicant for a review of a work capacity decision made by a scheme agent of the Workers Compensation Nominal Insurer ("Insurer").
2. The applicant developed post-traumatic stress disorder during the course of his employment. The date of injury was deemed to be 19 March 2001.
3. On 11 July 2013 the Insurer advised the applicant in writing of a work capacity decision which had been made on that date. He was advised that his entitlement to ongoing weekly payments would be terminated on 17 October 2013.
4. The applicant was advised that his ongoing entitlements to medical and other expenses would not be affected until 17 October 2014.
5. The applicant requested an internal review of the work capacity decision which was completed on 27 August 2013.
6. On 20 September 2013 the applicant made an application to the WorkCover Authority of New South Wales for a merit review of the Insurer's work capacity decision. That merit review application was received within the 30 day period. The WorkCover merit review was completed and a Statement of Reasons issued on 17 January 2014.
7. On 7 February 2014 the applicant requested the Independent Review Officer to undertake a review of the decision of the Insurer pursuant to Section 44(1)(c) of the *Workers Compensation Act 1987* ("the 1987 Act"). I am satisfied that the applicant has made the application within the time provided by that section and on the correct form.

**Applicant's Stated Grounds for seeking Procedural Review**

8. The applicant's grounds for seeking procedural review are as follows:

- (i) The applicant was medically retired by his employer;
- (ii) At the time the Work Capacity was made the applicant was on a continuing weekly award from the Workers Compensation Commission;
- (iii) The applicant is bewildered by the process.

## Submissions by the Insurer

9. The Insurer made no submissions in response to the application.

## Legislation

10. Section 44(1)(c) of the 1987 Act limits the scope of procedural review to a review only of:

The insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer in making the decision.

Therefore while it remains the case that no discretion is unreviewable<sup>1</sup>, the Insurer's discretion when making a work capacity decision appears only to be reviewable in the course of merit review or Judicial review.

12. The procedures to be followed by the Insurer are set out in the *WorkCover Work Capacity Guidelines* and *WorkCover Review Guidelines*. Both sets of *Guidelines* should be complied with in order for a work capacity decision to be validly made.
13. The relevant version of the *Guidelines* is the one dated 28 September 2012 and which applied to all claims from 1 January 2013. That publication provides that the *Guidelines* provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessment.

## The Process of the Insurer

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<sup>1</sup> See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997

15. The important consideration on procedural review is not *why* a decision is made, but *how* it is made.

## My Reasons:

16. The grounds upon which the worker seeks review are not specifically procedurally related.
17. The Insurer has made no submissions about compliance with the relevant statutory provisions and guidelines.
18. Since procedural review requires a scrutiny of the decision-making processes of the Insurer, including examination of compliance with legislation and *Guidelines* rather than a consideration of submissions made by either party, the review process may proceed despite the absence of relevant submissions from either party. Any demonstrable error on the part of the Insurer may invalidate the decision.
19. There are in my view breaches of the *Guidelines* which are sufficient to invalidate the work capacity decision made by the Insurer.
20. The work capacity decision advises the applicant that the decision does not affect his entitlement to reasonably necessary medical and other expenses until 17 October 2014. The letter does not explain the 'effect' of the decision on the applicant's entitlements after 17 October 2014. The applicant is not advised of the implications of Section 59A(2) of the 1987 Act and that his entitlement to such treatment expenses will terminate 12 months after the cessation of his weekly payments of compensation. This is in breach of *Guideline 5.4.2*.
21. This *Guideline* also provides that the work capacity decision outline the evidence that was considered in making the decision by noting the author, the date and kind of information. The work capacity decision fails to particularise the medical evidence upon which it relies. Further, a copy of the documents, which the insurer states it has 'reviewed and considered', have not been given to the applicant.
22. Further on this issue *Guideline 5.4.2* states that the work capacity decision notice must advise the applicant that any documents or



information that has not already been provided to him can be provided on request to the Insurer. The Insurer has failed to so advise the applicant.

23. I find that the work capacity decision is accordingly not effective and the weekly payments amendments do not as yet apply to the applicant.

**My Recommendation:**

24. For the reasons set out above I recommend that the Insurer make another work capacity decision, according to the *Guidelines*.
25. Since the applicant was an existing recipient as at 1 October 2012, he remains entitled to receive his pre-transition rate of weekly benefits until such time as he is validly transitioned under the Act. The applicant should have his payments restored from 17 October 2013.
26. Noting the binding nature of these recommendations I recommend that the Insurer takes my views into account, and I recommend that the Insurer immediately gives effect to them.

Tracey Emanuel  
Delegate of WorkCover Independent Review Officer  
11 March 2014