

**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 4 August 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 12 November 2014.**
- c. The payments are to be back-dated to 12 November 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 4 August 2014. The decision advised the applicant that his weekly payments of compensation would cease from 12 November 2014. The applicant sought internal review and the Internal Review Decision was dated 23 September 2014. He then sought Merit Review on or about 30 October 2014. The Authority rejected the application for merit review as it was made out of time. The Authority's letter to the applicant was dated 25 November 2014. The applicant made application to this office on 9 December 2014.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. On 29 November 2000 the applicant sustained injury to his lower back when he was hit by a falling object in the course of his employment as an automotive engineer. The applicant was subsequently certified unfit for duties for a period of time however he was able to return to his pre-injury duties. In March 2002 that applicant ceased employment with the employer as he was no longer able to fulfil the employment contract. At the time the work capacity decision was made the applicant was not working.

4. The applicant was in receipt of weekly payments immediately before 1 October 2012 and according to *Clause 8 of Part 19H of Schedule 6 of the Workers Compensation Act 1987* (the 1987 Act) the Insurer is required 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)*. The relevant version of the *Guidelines* came into effect on 11 October 2013.

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 that he was denied procedural fairness in respect of his application for merit review as a result of delayed mail. This submission is not relevant to procedural review.

Submissions by the Insurer

7. The Insurer has provided submissions in response to the application dated 16 December 2014. These submissions included a useful chronology.

The Decision

8. The Insurer has informed the applicant that “*I am writing to you to confirm the details of the work capacity decision that has been made following the work capacity assessment that completed on your claim*” (sic).
9. The applicant was advised that the work capacity decision was made. He was not informed of the date that the decision was made.
10. The applicant is also unaware of when the work capacity assessment/s occurred. The applicant needs to know this date in order to be able to make coherent submissions about compliance with both the legislation and *Guidelines*.

11. Guideline 5.3.2 requires the Insurer to advise of the date of the work capacity assessment. The Insurer has failed to comply with the Guideline.
12. The Insurer has also not complied with *Schedule 6 Part 19H Division 2 Clause 9* of the 1987 Act or *Schedule 8 Clause 22(1)* of the Regulation in the absence of this information being provided to the applicant.
13. Guideline 2.3 states that *“All decisions made in relation to the worker’s recovery and work capacity should be timely, informed and evidence based.”*
14. In making the work capacity decision the Insurer advised the applicant that it considered all available and relevant documents. Those documents were:
 - Certificate of Capacity completed by Dr DC (NTD)
 - Reports of Dr TH, Orthopaedic Surgeon (Independent Medical Examiner) dated 30 January 2004, 30 December 2004, 1 March 2005, 9 March 2005, 28 April 2005 and 17 October 2005
 - Report of Dr DC (NTD) dated 26 August 2008 and 2 November 2013
 - Reports from WFA (Rehabilitation Provider) dated 9 June 2009, 16 July 2009, 13 August 2009, 30 August 2009, 6 September 2009, 28 October 2009, 13 October 2010, 2 December 2010 and 25 November 2013
 - Report from Dr L L (IME) dated 8 September 2010
 - Reports of Dr R C, Orthopaedic Surgeon (IME) dated 25 October 2013 and 28 November 2013
15. When relying upon evidence to determine the applicant’s current work capacity the emphasis is on the word **current**.
16. The report which forms the basis of the assessment being the Earning Capacity Assessment dated 25 November 2013 is over 9 months old. The majority of the medical evidence is in excess of 4 years old and no evidence referred to specifically in the decision or listed above was obtained in 2014 which was the year the decision was made.
17. The Insurer has not complied with the Guideline. The Insurer’s reliance upon a report obtained in the year prior to the work capacity decision being made cannot be considered timely.

FINDING



18. 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

19. The work capacity decision of the Insurer dated 4 August 2014 is set aside.
20. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 12 November 2014.
21. The payments are to be back-dated to 12 November 2014.
22. 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
14 January 2015.