

**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 applicant has applied for procedural review of a work capacity decision by the Insurer dated 6 August 2013.
2. The applicant suffered injury to her back on or about 23 October 2010 in the course of her employment as a Sales Assistant. Subsequently symptoms developed in the left hip resulting in a diagnosis of a 'left labral hip tear.' She has returned to suitable employment with the same employer. While she returned to suitable duties, the hours were reduced. Prior to the injury she worked up to 9.5 hours in a shift, whereas post-injury she could only tolerate work for 7.5 hours at a time. The Insurer made weekly payments of compensation as required under the provisions of the *Workers Compensation Act 1987* (1987 Act).
3. The applicant was in receipt of weekly payments immediately before 1 October 2012. Clause 8 of Part 19H of Schedule 6 to the 1987 Act required the Insurer to conduct a work capacity assessment (assessment) for the purpose of facilitating the application of the amended weekly benefits provisions to the applicant, who qualifies for the statutory definition of an 'existing recipient of weekly payments.'
4. Section 44A of the 1987 Act provides that a work capacity assessment is an assessment of the injured worker's current work capacity and must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (*Guidelines*).
5. The relevant version of the *Guidelines* came into effect on 1 January 2013. That publication stated that the *Guidelines* provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessments and decisions.
6. Once the Insurer has conducted an assessment then the Insurer is required to make a work capacity decision. Where that decision involves a reduction or cessation of weekly benefits payable to the injured worker then the Insurer is required to give proper notice to the worker (Section 54(2)(a) of the 1987 Act).

7. In this case the applicant had her weekly compensation payments 'reduced to zero' as a result of a work capacity decision made on 6 August 2013. Payments accordingly ceased from 14 November 2013, following the expiration of notice given pursuant to section 54 of the 1987 Act.
8. Internal review by the Insurer upheld the original decision and on 15 October 2013 the Merit Review Service (MRS) received an application for merit review of the decision(s) of the insurer. On 13 February 2014<sup>1</sup> MRS upheld the applicant's objection to the work capacity decision and found that the Insurer should re-determine the applicant's entitlements on a week-to-week basis under section 37(2) of the 1987 Act.
9. On 13 March 2014 the applicant sought procedural review of the Insurer's work capacity decision, specifying that no objection was taken to the decision by MRS.

## **Submissions by the parties**

### **Applicant**

10. The applicant (somewhat unusually) relies on procedural grounds. First, exception is taken to the absence in the notice of decision dated 6 August 2013 of any reference to section 59A(3). Secondly, the applicant suggests that the Insurer should have advised her of possible weekly benefits under section 41 of the 1987 Act, which might in turn re-activate an entitlement under section 59A(3). Interestingly, the final submission only to say "I do not seek review of the [MRS] decision."<sup>2</sup>

### **The Insurer**

11. The Insurer made the following submissions:

We note [the applicant] has requested a review of our original Work Capacity Decision, dated 6th August 2013, on procedural grounds. Please be advised that a review of the original Work Capacity Decision was conducted by the Merit Review Office on 13th February 2014, resulting in the original decision being overturned. As such, [the applicant] is currently in receipt of

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<sup>1</sup> Some 120 days following receipt of the application: cf *Review Guideline* 10.14.

<sup>2</sup> This is just as well, since I have no jurisdiction to review the MRS recommendation.

weekly payments of compensation and reasonably necessary medical expenses.

We are, therefore, of the opinion there is nothing to be reviewed at this time.

12. This raises the question of what utility there might be in WIRO conducting a procedural review of a decision which MRS has already overturned. The answer is that MRS has made a binding recommendation which will take effect once implemented by the Insurer from that prospective future date, or at the earliest, from the date of the MRS recommendation. In contradistinction to this, if procedural review shows that no valid decision was ever made by the Insurer, I may recommend that payments be reinstated from the *date of cessation* up to the date on which payments resumed as a result of the MRS recommendation. Accordingly it remains appropriate for a procedural review to proceed.

### **The Decision**

13. The applicant is correct to submit that the shortcomings enumerated in paragraph 10 (*supra*) are sufficient to constitute demonstrable error. It follows that the work capacity decision purportedly made by the Insurer on 6 August 2013 should be set aside.

### **FINDING**

14. I find that the Insurer has failed to follow the procedures as set out in the *WorkCover Guidelines* which is required by Section 44A of the 1987 Act. The Insurer has also failed to follow and apply the 1987 Act and the *Workers Compensation Regulation 2010*.

### **RECOMMENDATION**

15. I recommend that the Insurer recalculate the applicant's entitlements for all weekly periods between 14 November 2013 and the date on which the new decision based on the recommendation of MRS is to take effect.



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16. I recommend that the Insurer pay the applicant the weekly benefit to which she is entitled until such time as the MRS recommendation takes effect. Those payments should continue from 14 November 2014, being the date on which they ceased.
  
17. The applicant is not required to produce work capacity certificates for the period from 16 October 2013 to date by virtue of the operation of section 44B(2) of the 1987 Act. These recommendations are binding on the insurer: see section 44(3)(h) of the 1987 Act.

Wayne Cooper  
Delegate of the WorkCover Independent Review Officer  
15 April 2014