

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 a work capacity decision is dismissed.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 8 November 2014.**
- c. The payments are to be back-dated to 30 December 2014.**
- d. Such payments are to continue until receipt by the applicant of this recommendation.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 31 July 2014. The decision informed the applicant that his weekly payments of compensation were to be terminated on 8 November 2014.
2. The applicant sought internal review on 4 November 2014 and the Internal Review Decision was dated 28 November 2014. That decision confirmed that the applicant's weekly payments of compensation would cease. He then sought Merit Review on or about 30 December 2014 and the Authority issued the Merit Review recommendation on 22 January 2014. The Merit Review recommendation upheld the Insurer's earlier decisions.
3. The applicant made application to this office on 20 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 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.

Submissions by the applicant

5. 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’s submissions (such as they are) appear in the following terms:

- His benefits ceased on 8 November 2014 and he was not paid for the period 8 November 2014 to 29 December 2014.
- The law changed after he received the work capacity decision and at no time was he told that he had only 30 days to lodge a request for internal review in order to have the benefit of the stay conferred by clause 30 of Schedule 8 to the *Workers Compensation Regulation 2010* [the *Regulation*].
- He was only informed by the insurer that he should apply for internal review “as soon as practicable.”
- He thinks it unfair that his benefits stopped and he was not informed of the law changes.

Submissions by the Insurer

6. The Insurer provided submissions in response to the application. Relevantly, they say the following:

- Since the work capacity decision was made on 31 July 2014 and pre-dated the amendments which introduced the stay, the Insurer could not have known about any change to the law at the time the work capacity decision notice went out.
- If the applicant applied for merit review within time he would be entitled to a stay for the duration of the merit review.

- The 30 day period stipulated in clause 30 of Schedule 8 to the *Regulation* had already elapsed by the time the regulation was amended, which was 3 September 2014. This was 64 days after the date of the work capacity decision.

The Decision

7. There can be no dispute that the Insurer is correct. At the time of the work capacity decision there was no “stay” available during the course of section 44 review. By the time the stay was introduced by regulation, the relevant 30 day period had already elapsed in this case, the applicant had not sought internal review at that time and there would have been no utility in the Insurer advising the applicant about a stay which could never have applied in his case.
8. The Insurer concedes that the stay should apply during the course of merit review. *A fortiori* it should apply for the duration of procedural review.
9. The decision was made in accordance with the regulation, the legislation and the Guidelines.

FINDING

10. 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. I find that the current decision was so compliant. Accordingly the work capacity decision must be found to be valid. The applicant should be paid according to the terms of the stay in clause 30 of schedule 8 to the regulation for the duration of Merit Review and Procedural Review only.

RECOMMENDATION

11. The application for procedural review of a work capacity decision is dismissed.
12. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 8 November 2014.



WorkCover **independent** review office

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

13. The payments are to be back-dated to 30 December 2014.
14. Such payments are to continue until receipt by the applicant of this recommendation.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
31 March 2015