

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 21 October 2014 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable immediately prior to 20 January 2015.**
- c. The payments are to be back-dated to 20 January 2015.**
- d. The payments are to continue until such time as a further work capacity decision is made and comes into effect.**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 21 October 2014. The decision stated that payments were to cease on 28 January 2015. The applicant sought internal review. The Internal Review Decision (IRD) was issued on 12 December 2014. The earlier decision was confirmed, with a bizarre alteration.¹ The applicant sought Merit Review by the Authority which issued a concurring recommendation on 4 February 2015.
2. The applicant sought procedural review by application dated 3 March 2015. I am satisfied that the application was made within time and on the correct form.
3. The applicant was injured in 1995 in the course of an assault while at work. The injuries sustained were both physical and psychological. The Insurer made weekly payments as required under the provisions of the *Workers Compensation Act 1987* (1987 Act).
4. The applicant was in receipt of compensation by way of weekly payments immediately before 1 October 2012. Accordingly Clause 8 of Part 19H of Schedule 6 to the 1987 Act required the Insurer to conduct a

¹ See *infra*.

work capacity assessment for the purpose of facilitating the application of the amended weekly benefits provisions to the applicant's claim.

5. The relevant version of the WorkCover Work Capacity Guidelines (*Guidelines*) is the one dated 4 October 2013, published on 8 October 2013, and which came into effect on 11 October 2013. 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 in or cessation of the weekly benefits payable to the injured worker then the Insurer is required to give proper notice to the worker (see section 54(2)(a) of the 1987 Act).

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’s submissions might fairly be summarised as follows:
 - The Insurer has an incorrect history of post-injury employment which states that she worked at a job for 6 years whereas the actual period worked was no more than approximately 63 hours over a period of less than 3 months.²
 - She denies providing full-time care to her husband, who drives to work and goes shopping on his way home.
 - One doctor has attributed her incapacity to “poorly controlled” diabetes, which she denies.
 - She claims that her pre-injury employment (which spanned 28 years) was “like a marriage” and after the injurious events she was “discarded like the daily garbage.”

² How an Insurer making weekly payments does not know the correct post-injury work history is baffling, since the payments would be calculated on the basis of the injured worker's earnings.

- In the course of Internal Review she was given incorrect information about the notice period for the termination of her payments. She was told that her payments would continue “for a period of 3 months from *the date of this notice*, with the addition of four working days to allow for our postage and *your receipt of this notice*.” Given that “this notice” was dated 12 December 2014, the applicant was perhaps doubly surprised to find that the insurer had (a) not extended time to 16 March 2015 (which would have been the date 3 months and 4 days after the date of “this notice”), and (b) actually purported to reduce the time given in the original work capacity decision from 28 January 2015 to 20 January 2015, the latter being a reduction which (if it were acted upon) would constitute a clear breach of section 54(2)(a).

Submissions by the insurer

8. The Insurer made submissions in reply, which included a helpful timeline/chronology.

The Decision

9. The decision made by the Insurer on 21 October 2014 is unobjectionable on its face. The correct notice period in section 54(2)(a) is specified; the applicant (who has received well in excess of 500 weeks of payments) is told the correct way to determine the various payment periods and is also advised about the transitional rate applicable to existing recipients. The insurer even made a decent fist of explaining section 59A(2) and (3). If the insurer had not engaged in the Internal Review process, there would be nothing on the face of the decision to call it into question on procedural grounds.
10. The applicant was advised that she may request an Internal Review, and she exercised that right. In the course of the Internal Review decision notice dated 12 December 2014 the following two sentences appear:

[The Insurer] will continue to pay your weekly payments for a period of 3 months from the date of this notice, with the addition of four working days to allow for our postage and your receipt of

this notice. This means that you will only continue to be entitled to weekly compensation payments until 20 January 2015 after which time your entitlements to weekly compensation will terminate..”

11. There are two glaring errors in those sentences: first, the date specified is not an extension of time to 16 March 2015, and is therefore clearly not 3 months and four working days after the date of “this notice,” and secondly, the new date of 20 January 2015 reduces the original notice period given on 21 October 2014, the original notice period having ended on 28 January 2015.
12. In the course of their submissions the insurer made the following statement:

[The Insurer] completed a Work capacity decision and issued a notice dated 21 October 2014... The effective date of that decision was 28 January 2015, which is greater than 3 months and four days, the required period for a decision to become effective taking into account the postage allowance.... [The Insurer] issued an Internal review Decision dated 12 December 2014 ... maintaining the original decision.

Had the Insurer in fact maintained the original decision, there might have been no problem, however they varied the original decision by purporting to change the last date on which payments would be received. The variation was two-fold and internally inconsistent (being both an extra 3 months and four working days, and – in the very next sentence - eight days fewer than the original notice period). The applicant, who relies on these weekly payments, is entitled to be told the correct information in a non-misleading way.

13. It follows that section 54(2)(a) was breached in the course of the Internal Review decision, which materially varied the work capacity decision. The breach must render the decision invalid.
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14. Given what appears in paragraph 13, it is unnecessary to examine the remainder of the allegations arising out of the applicant’s submissions, however it might be prudent for this Insurer to get updated reports with a correct post-injury work history before proceeding further.



FINDING

15. The Insurer has failed to correctly apply the 1987 Act and it follows that *Guideline 5.3.2* which requires the legislation and its effect on the worker's claim to be explained to her was breached.

RECOMMENDATION

16. The work capacity decision of the Insurer dated 21 October 2014 is set aside.
17. The applicant is to be reinstated to her weekly payments at the rate applicable immediately prior to 20 January 2015.
18. The payments are to be back-dated to 20 January 2015.
19. The payments are to continue until such time as a further work capacity decision is made and comes into effect.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
8 April 2015