

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 seeks procedural review of a work capacity decision made by the Insurer on 12 September 2013.
2. The applicant was employed as a secretary at a hospital. On 6 June 2001 the applicant suffered injury to her lumbar spine. She has returned to work on numerous occasions since her injury and is currently employed as a clinical support officer with a Local Health District on a part time basis. The applicant had been in receipt of weekly payments of compensation from the Insurer.
3. On 12 September 2013 the Insurer advised the applicant in writing of a work capacity decision. She was advised that her entitlement to ongoing weekly payments would be terminated on 20 December 2013.
4. The applicant was not advised that her ongoing entitlements to medical and other expenses would be affected.
5. The applicant requested an internal review of the work capacity decision which was completed 18 October 2013. The original decision was confirmed.
6. On 14 November 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 applicant received the WorkCover merit review decision by email on 26 February 2014.¹ The review confirms the work capacity decision.
7. On 26 March 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.

¹ 104 days after receipt of the application.

Applicant's Stated Grounds for seeking Procedural Review

8. The applicant's grounds for seeking procedural review are as follows:
- (i) All medical reports from Dr L and Dr C were not considered, particularly those pre-dating 2012;
 - (ii) GP Dr H was pressured by the Insurer and Medical Assessors to upgrade work capacity and hours;
 - (iii) The Insurer has not taken into account the injury to the cervical spine in or about 2001, for which liability has been declined. The applicant alleges that this injury impacts upon her capacity to work.

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 judg[e]ment or discretion exercised by the insurer in making the decision.

Therefore while it remains the case that no discretion is unreviewable,² the Insurer's discretion when making a work capacity decision appears only to be reviewable in the course of merit review or Judicial review.

11. 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.
12. The relevant version of the *Guidelines* is the one dated 9 August 2013. That publication provides that the *Guidelines* provide instructions and

² See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997.

guidance to Insurers regarding the appropriate and consistent application of work capacity assessment.

The Process of the Insurer

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

My Reasons:

14. The grounds upon which the worker seeks review are not specifically procedurally related.
15. The Insurer has made no submissions about compliance with the relevant statutory provisions and guidelines.
16. 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.
17. There are in my view breaches of the *Guidelines* which are sufficient to invalidate the work capacity decision made by the Insurer.
18. *Guideline 5.3.2* notes that the work capacity decision must state the *'impact of the decision on the worker in terms of their entitlement to weekly payments, entitlement to medical and related treatment expenses and return to work obligations.'*
19. The work capacity decision does not refer at all to the worker's entitlement to medical or treatment expenses. The applicant is not advised of the implications of Section 59A of the 1987 Act and that her entitlement to such treatment expenses will terminate 12 months after the cessation of weekly payments of compensation. This is a demonstrable error and in clear breach of the *Guideline*.
20. This *Guideline* also requires that the applicant be advised *'that any documents or information that have not already been provided to the*

worker can be provided to the worker on request to the insurer.' The insurer has failed to so advise the applicant accordingly and this is yet another breach of the *Guidelines*.

21. A further requirement of the work capacity notice contained in the *Guidelines* is that the Insurer should outline the evidence considered in making the decision, noting the author, the date and the key information. I note that in the outcome of the Internal Review of the Work Capacity Decision from the Insurer dated 18 October 2013 a 'Vocations Options Approval' document from AW work wise & Dr H dated 13 August 2013 is referred to. This document was *not* referred to in the Work Capacity Decision of 12 September 2013 despite it being available at that time. This document should have been referred to and a copy provided at the time of the original Work Capacity Decision. This is in further breach of the *Guidelines*.
22. 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:

23. For the reasons set out above I recommend that the Insurer make another work capacity decision, in accordance with the legislation and *Guidelines*.
24. Since the applicant was an existing recipient as at 1 October 2012, she remains entitled to receive her pre-transition rate of weekly benefits until such time as she is validly transitioned under the Act. The applicant should have her payments restored from 20 December 2013.
25. 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
30 April 2014