

**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.**

**Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 30 September 2014. The decision informed the applicant that his weekly payments of compensation would cease on 8 January 2015. The applicant sought internal review and the Internal Review Decision was dated 6 January 2015.
2. The Internal Review maintained the original decision. It was received by the applicant on 9 January 2015.
3. The applicant applied for merit review by the Authority, but made that application on 10 February 2015, 32 days after acknowledged receipt of the internal review decision. As a result, the Merit Review Service rejected the application, citing section 44(3)(a) of the *Workers Compensation Act 1987*. The latter section requires an application for merit review to be "made" to the Authority "within 30 days after the worker receives notice in the form approved by the Authority of the insurer's decision on internal review." There can be no dispute that the application was out of time and was rightly rejected.
4. The applicant then made application to this office on 11 March 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
5. The applicant suffered back injury in November 2002. Prior to notification of the injury, he had left the employment responsible and relocated to a different part of the State. Such employment as he subsequently undertook was therefore with other employers. In the course of such subsequent and unrelated employment he suffered injury

to a different body part. While certified as capable of working four hours per day, five days per week as a result of the back injury, the applicant underwent surgery to the other injured body part and has not been able to work since. The second injury is the responsibility of a different insurer, which has accepted liability for that injury and made all relevant payments required.

6. In relation to the back injury, the applicant was an existing recipient of weekly payments immediately before 1 October 2012. It was therefore necessary for the insurer to transition the applicant onto the new system of weekly payments introduced in 2012.
7. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).

### **Submissions by the applicant**

8. 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 has applied for a procedural review.
9. The applicant calls into question a statement by the Insurer that a Certificate of Capacity had not been submitted since January 2014. This was the same month as the recent surgery and the Insurer responsible for the surgery and the subsequent (and probably consequent) lack of work capacity was making relevant payments. Accordingly the Insurer responsible for the back injury advised the applicant that there was no need to provide Certificates of Capacity to it.

### **Submissions by the Insurer**

10. The Insurer has provided submissions in response to the application. They have also provided a chronology of relevant correspondence.

### **The Decision**

11. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
12. The work capacity decision dated 30 September 2014 advised the applicant that a work capacity assessment was completed on 29 September 2014. As a result of the assessment a work capacity decision was made. This is in accordance with Guideline 5.3.2.
13. As the applicant had received 413 weeks of compensation payments his ongoing entitlement is to be determined by reference to Section 38(3) of the 1987 Act. This was correctly and adequately explained by the insurer.
14. The insurer informed the applicant that his payments of weekly compensation would cease on 8 January 2015. This is the correct notice period taking into account the provisions of Section 54(2)(a) of the 1987 Act and Section 76(1)(b) of the *Interpretations Act 1987*.
15. For Schedule 6 Part 19H Division 1 Clause 1 of the 1987 Act to apply the applicant must be an *existing recipient* of compensation as at 1 October 2012. This applicant was certainly an existing recipient.
16. In relation to the submission by the applicant concerning the Certificates of Capacity, the Insurer makes the following response:

*“[The Insurer] contacted [the applicant] on 16 April 2014 and 23 June 2014 via email requesting a copy of a WorkCover certificate of capacity for his compensable back injury. The work capacity decision letter dated 30 September 2014 reiterated that [the applicant] is required to provide WorkCover certificates of capacity in accordance with section 44B of the 1987 Act.*

*“[The Insurer] acknowledged receiving a WorkCover certificate of capacity for the ankle injury which is not a compensable injury with [the Insurer]. No additional evidence was received for the back injury.”*

To the extent relevant, I accept the response by the Insurer. The complaint by the applicant proceeds on the false premise that evidence of one injury can pass for evidence of another as long as capacity for



work is affected by one or other. Contrary to this position, the applicant retains an obligation to show that his compensable injury is the cause of any reduction of work capacity.

## **FINDING**

17. 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 the Insurer has fully complied with the requirements of the legislation and the Guidelines and it follows that the application by the worker must fail.

## **RECOMMENDATION**

18. The application for procedural review of a work capacity decision is dismissed.

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