

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 is dismissed.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 7 January 2015.**
- c. The payments are to be back-dated to 7 January 2015 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.**
- d. Such payments are to continue until the receipt of this recommendation.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 25 September 2014. The decision advised the applicant that his weekly payments of compensation would cease from 7 January 2015, with the last payment to be received on 6 January 2015. The applicant sought internal review of the decision and the Insurer maintained the original decision. The applicant then sought Merit Review from the Authority on 8 November 2014 and they delivered a recommendation dated 8 December 2014, once again affirming the original decision. The applicant then applied to this office for procedural review on 10 December 2014.
2. I am satisfied that the applicant has made the application for Procedural Review in the proper form and within time.
3. The applicant suffered injury to his lower back on 4 November 2005 during the course of his employment while carrying a refrigerated box of wine bottles. He was unable to return to work immediately, having been incapacitated for about six weeks. Thereafter he returned to work for between one and two hours per day until 2008, when the employment was terminated.

4. Having received in excess of 460 weeks of weekly payments, the applicant was an “existing recipient” as at 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.
5. *Section 44A* of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines (Guidelines)*.
6. The relevant version of the *Guidelines* came into effect on 11 October 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.
7. Once the Insurer has conducted a first assessment then the Insurer is required to make a work capacity decision. Where that decision involves a reduction in the 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).

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 requested a procedural review. He has identified no grounds beyond the assertion that he is “in bad shape” and would like the work capacity decision “reversed.” This office has no power to “reverse” a work capacity decision of an insurer and may only identify procedural errors and omissions which go to the validity of the original decision. Accordingly the entreaties of the applicant in relation to issues such as causation and severity of injury are irrelevant. The applicant did not identify (or even purport to identify) any procedural errors.

Submissions by the Insurer

9. The Insurer has not made submissions in response to this application.

The Decision

10. *Guideline 5.3.2* requires the insurer to state the impact the decision has on the applicant's entitlement to weekly payments. In this decision the applicant has been advised that his weekly entitlements have been terminated from 7 January 2015.
11. *Section 54(2)(a)* of the 1987 Act requires at least three months and four working days' notice be given if payments are being reduced or ceased having regard to *Section 76(2)(a)* and *(b)* of the *Interpretation Act 1987*. In this decision the insurer has referenced and explained both sections of each piece of legislation. As a result the applicant was given the correct notice period. The Insurer has complied with the Guidelines and legislation.
12. The same *Guideline* also requires the insurer to advise the applicant of the impact the decision has on his entitlement to medical and related treatment expenses. In this decision the insurer has referenced and explained *Section 59A(1), (2) and (3)*. The applicant was advised that payment of his pre-approved medical and related treatment expenses would cease 12 months after the cessation of his entitlement to weekly payments. It was also explained that the applicant may again become entitled to payment of medical expenses by virtue of *Section 59A(3)* of the 1987 Act. The insurer has complied with the Guideline.
13. *Guideline 2.3* requires that the Insurer's decision should be "*timely, informed and evidence based.*"
14. The insurer advised the applicant that his work capacity assessment was completed on 22 September 2014 and he was advised of the work capacity decision by letter dated 25 September 2014. The Insurer has complied with the Guideline.
15. *Guideline 5.3.2* requires the Insurer to explain the relevant entitlement periods and legislation. The insurer informed the applicant that his entitlements would be assessed pursuant to *Section 38* of the 1987 Act. The insurer explained *Section 38(3)* in detail and even notes that the amount referenced in *Section 38(3)(b)* of \$155 per week has since been indexed to \$173 per week. The insurer has complied with the Guideline.

16. *Section 44B* of the 1987 Act identifies the nature of the evidence upon which work capacity can be assessed. This includes up to date certificates of capacity from the applicant's treating medical practitioner. The Insurer took the perhaps unusual step of qualifying the applicant's own surgeon as an IME, but even that doctor made findings in accordance with the work capacity decision of the insurer. As a result the applicant must be well aware that even his own doctors certify him as fit for work for 20 hours per week with certain restrictions. The relevant findings are set out in the notice.
17. The applicant asserts that his sleep apnoea is work related, whereas his treating doctor clearly states that this condition is unrelated to the back pathology. A separate dispute with the Insurer concerning the aetiology and severity of this and other conditions is apparently the subject of a section 74 notice. This has no relevance for present purposes.
18. The decision of the Insurer dated 25 September 2014 was unusually thorough and displayed a proper consideration of the requirements of the Guidelines and the legislation.

Finding

19. There are no procedural errors identifiable in the decision. The insurer has complied with the Guidelines and relevant legislation. The application for procedural review is dismissed.

Regulatory Stay

20. On 3 September 2014 the *Workers Compensation Amendment (Existing Claims) Regulation 2014* (the Amendment Regulation) was published. Clause 26 of the Amendment Regulation provides that Part 2 "takes effect on and from 1 October 2012."
21. *Clause 30* of the *Amendment Regulation*, which is in part 2 and therefore is deemed to have been in effect since 1 October 2012, is in the following terms:

30 Stay of work capacity decisions

- (1) A review under *section 44* (Review of work capacity decisions) of the 1987 Act of a work capacity decision made in respect of an existing claim operates to stay the decision that is the subject of the review and prevents the taking of action by an insurer based on the decision while the decision is stayed.
- (2) This clause applies to an internal review under *section 44* (1) (a) of the 1987 Act only if the application for internal review is made by the worker within 30 days after the worker receives notice from the insurer of the work capacity decision to be reviewed.
- (3) The stay under this clause operates from the time the application for review is made until the worker is notified of the findings of the review (or the application for review is withdrawn).
- (4) This clause applies despite *section 44* (4) of the 1987 Act, which is deemed to be amended to the extent necessary to give effect to this clause.

22. It must follow that the applicant is entitled to the full benefit of the Amendment Regulation and therefore the Insurer should restore the applicant to the payments being received immediately prior to the payments ceasing or being reduced as a result of the original decision and the subsequent internal review decision.

RECOMMENDATION

23. The application for procedural review is dismissed.
24. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 7 January 2015.
25. The payments are to be back-dated to 7 January 2015 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.
26. Such payments are to continue until the receipt of this recommendation.



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

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
15 January 2015