

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 20 January 2014 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable at 20 January 2014.**
- c. The payments are to be back-dated to 27 April 2014.**
- d. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 20 January 2014. The applicant sought internal review and the Internal Review Decision (IRD) was issued on 19 March 2014. He then sought Merit Review on or about 7 April 2014 and the Authority issued the Merit Review recommendation on 9 May 2014. Following receipt of the Merit Review Service (MRS) recommendation, the applicant made application to this office on 3 June 2014.
2. I am satisfied that the applicant has made the application for review in the proper form and within time.
3. The applicant was injured on 19 August 1995. The applicant was successful in returning to work on suitable duties as a Patrolman. The applicant remains in the employ of the original employer and was in receipt of weekly payments of compensation up until the time the work capacity decision purported to come into effect.
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 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 an 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. The applicant raised various matters in the Application for Procedural Review. *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 are not relevant to a procedural review.

Submissions by the Insurer

9. The Insurer has made submissions in response to the application received by this office on 5 June 2014.

The Decision

10. The Work Capacity Decision is dated 20 January 2014. *Section 54(2)(a)* of the 1987 Act requires 3 months’ notice be given when weekly payments are to be reduced or ceased. This decision does not advise the worker clearly that his weekly payments of compensation are going to cease. The notice advises that a work capacity decision was made deducing the applicant’s current weekly earnings were in excess of his deemed pre-injury earnings. This affected the applicant’s entitlements as a result of the *Section 38* calculation which resulted in ‘\$Nil’ according to the Insurer’s calculations.

11. The next heading in the decision is *'What happens during the three month notice period?'* The Insurer states that the decision (referred to above) will result in a discontinuation of the worker's weekly benefits. It does not state when.
12. Finally, in the third paragraph under the aforementioned heading it is stated *'This decision will come into effect as of 27/04/2014.'*
13. *Guideline 5.3.2* requires the Insurer to advise the worker of the date that the *'decision will take effect'*. That *Guideline* also requires the Insurer to *'state the impact of the decision on the worker in terms of entitlement to weekly payments, entitlement to medical and related expenses and return to work obligations.'*
14. The Insurer has not clearly stated that the applicant's weekly payments of compensation will cease on 27 April 2014. *Guideline 5.3.1* states that the Insurer must provide the worker and the relevant parties with plain language communication regarding the work capacity decision. Plain language communication requires communicating a clear message.
15. The Insurer has failed to communicate clearly to the applicant that his entitlement to weekly payments of compensation will cease on 27 April 2014.
16. The Insurer has failed to advise the applicant of the impact the work capacity decision will have on his entitlement to ongoing medical treatment.
17. *Section 59A(2)* of the 1987 Act states that treatment expenses and related expenses are no longer payable 12 months after weekly payments cease.
18. The present decision fails to advise the applicant that his entitlements to medical expenses will cease twelve months after the cessation of his weekly payments. The decision also **fails** to advise the applicant of *Section 59A (3)* of the 1987 Act.
19. *Section 59A(3)* of the 1987 Act states that the applicant may, after the entitlement to compensation for medical expenses ends, become

eligible for further payments for medical expenses if the applicant becomes entitled to compensation for weekly benefits at some stage in the future.

20. *Guideline 5.3.2* states that the Insurer must “advise 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 decision has failed to so advise the applicant.

FINDING

21. 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 there has been more than one breach of the *Guidelines* which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

RECOMMENDATION

22. I recommend that the Insurer conduct a new work capacity assessment and make a new work capacity decision in accordance with the WorkCover *Guidelines*. This should be done with current medical evidence.
23. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 20 January 2014 until such time as he is properly transitioned. Those payments should continue from 27 April 2014 being the date on which they ceased.
24. Since the applicant is not currently in receipt of weekly payments, clause 21 of schedule 8 of the *Regulation* cannot apply and payments may resume immediately. The applicant is not required to produce work capacity certificates for the period from 20 January 2014 to date by virtue of the operation of section 44B(2) of the 1987 Act. These recommendations are binding on the Insurer: see section 44(3)(h) of the 1987 Act.



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