

**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 31 December 2013 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable at 31 December 2013.**
- c. The payments are to be back-dated to 1 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 31 December 2013. The applicant sought internal review and the Internal Review Decision (IRD) was issued on 18 February 2014. She then sought Merit Review on or about 26 February 2014 and the Authority issued the Merit Review recommendation on 15 May 2014 at least some 78 days later.<sup>1</sup> 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 6 March 2009. The applicant has been unsuccessful in returning to her pre-injury hours of a pharmacy assistant. The applicant has returned to work 6 hours per week as a pharmacy assistant.

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<sup>1</sup> Guideline 10.14 of the *Guidelines for work capacity decision Internal Reviews by insurers and Merit Review by the WorkCover Authority (Review Guidelines)*, which came into effect on 11 October 2013, states that "The Authority will write to the worker and insurer as soon as practicable and preferably within 30-days of receiving the application advising of the outcome of the merit review"

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 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 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 include a lack of communication with the Insurer as well as the fact that the Insurer has accepted liability for upcoming surgery and are still relying upon the work capacity decision. The latter submission is not for procedural review however the earlier submission is considered later in this decision.

### **Submissions by the Insurer**

9. The Insurer has made submissions in response to the application which were received by this office on 13 June 2014.

### **The Decision**

10. The Work Capacity Decision is dated 31 December 2014. *Section 54(2)(a)* of the 1987 Act requires 3 months' notice be given when weekly payments are to be reduced or ceased. A better way to explain the 3 month period is to explain that the *Interpretation Act 1987* section 76(1)(b) states that service by mail is taken to be on the fourth working day after the letter is posted. A working day is a day other than "a Saturday or Sunday, or a public holiday or a bank holiday in the place to which the letter was addressed": section 76(2)(a) and (b) of the *Interpretation Act 1987*. Therefore, the proper notice period is 3 months and four days.
11. This work capacity decision advises the applicant that the change in her entitlement will take effect 'in three (3) months being thirteen (13) weeks from the date of this letter (this period allows a week to allow for postage of this document to you) meaning your weekly benefits will cease on **1 April 2014.**'
12. *Section 17* of the *Interpretation Act* defines 'month' as 'calendar month' which is then defined as 'a period commencing at the beginning of any day of a named month and ending:
  - (a) at the end of the day before the corresponding day of the next named month; or
  - (b) if there is no such corresponding day – at the end of the next named month.'
13. The Insurer appears to have assumed that a month is four weeks and has counted thirteen weeks from the date of the decision. This is clearly incorrect.
14. Furthermore, *Guideline 5.3.1* states that the Insurer must provide the worker with plain language communication regarding the work capacity decision. It would be reasonable to assume that a worker would understand the word 'month' to mean a 'calendar month' rather than the four week period referred to and used by the Insurer.
15. Pursuant to the 1987 Act the required notice period of three months and four days would have taken the notice period to 4 April 2014. The incorrect notice period being provided to the applicant by the Insurer is a clear breach of the 1987 Act and the *Guidelines*.

16. *Section 59A(2)* of the 1987 Act states that treatment expenses and related expenses are no longer payable 12 months after weekly payments cease.
17. The present decision advises the applicant that her entitlements to 'reasonable and necessary medical treatment will continue for twelve months after the cessation of her weekly payments unless it is determined that this treatment is not reasonable and necessary'. The decision fails to clearly advise the worker that her entitlements will actually cease after the twelve month period. The decision also fails to advise the applicant of *Section 59A (3)* of the 1987 Act.
18. *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.
19. *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 present decision advises that applicant that she may request copies of the documents listed in the decision but fails to advise that she can request copies of **any** documents or information. This is a clear fundamental breach of the *Guidelines*.

## FINDING

20. 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



21. 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.
22. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 31 December 2013 until such time as he is properly transitioned. Those payments should continue from 1 April 2014 being the date on which they ceased.
23. 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 31 December 2013 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.

Tracey Emanuel  
Delegate of the WorkCover Independent Review Officer  
14 July 2014