

**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 a review of the decision made by the Insurer. (Insurer).
2. There is no dispute that the applicant was injured in the course of his employment on 23 March 2009. Although the applicant has returned to work the Insurer has made weekly payments for the earnings differential as required under the provisions of the *Workers Compensation Act 1987* (1987 Act).
3. The NSW Government introduces significant reforms to the Workers Compensation Scheme in June 2012 including to the calculation of weekly payments.
4. As the applicant was in receipt of compensation by way of weekly payments as at 1 October 2012, Clause 8 of Part 19H of Schedule 6 to the 1987 Act required the Insurer to conduct a work capacity assessment for the purpose of facilitating the application of the amended weekly benefits to the applicant.
5. Section 44A of the 1987 Act provided that a work capacity assessment is an assessment of the injured worker's current work capacity and must be conducted in accordance with the WorkCover Guidelines.
6. The relevant version of the Guidelines is the one published in September 2012.
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 payments payable to the injured worker then the Insurer is required to give proper notice (Section 54 of the 1987 Act).
8. The applicant has been in receipt of weekly payments for over 130 weeks and therefore the amended Section 38 of the 1987 Act applies. In order to receive a weekly payment the applicant who has current work capacity must be working 15 hours per week and earning more than \$168 per week. That is not in dispute.
9. It is not in dispute that the present average weekly earnings of the applicant are in excess of \$938.80. That is important because the

applicant is not entitled to receive any weekly payment where he earns more than that amount being the deemed transition rate.

10. The applicant is not entitled to any further payments of weekly benefits as soon as he is properly transitioned to the new benefits scheme.
11. The Insurer is required to give notice in accordance with Section 54 of the 1987 Act following its work capacity assessment and decision before the new weekly payment has effect. That is written notice of three months clear notice which takes into account the time for delivery of that notice to the applicant.
12. In this case the Insurer gave notice by letter dated 4 June 2013 that the weekly benefit would cease on 4 September 2013 which is not sufficient notice. Accordingly the failure to give the proper notice means that the attempt to transition the applicant has not been effective.
13. The importance of giving proper notice has been emphasised by my office in a number of recommendations following procedural reviews which are published on the WIRO website.
14. There are other deficiencies in the document described as a Work Capacity Decision Notice dated 4 June 2013. It may assist the Insurer to consider the matters referred to in my published decisions when proceeding with a fresh transition of this applicant.
15. The applicant should however appreciate that his entitlement to weekly benefits will cease as soon as the Insurer correctly transitions him.

## **FINDING & RECOMMENDATION**

16. I find that the Insurer has failed to follow the procedure as set out in the WorkCover Guidelines which is required by Section 44A of the 1987 Act.
17. I recommend that the Insurer conduct a new work capacity assessment and make a new work capacity decision in accordance with the WorkCover Guidelines and ensure that the proper notice of its decision be given to the applicant.
18. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 4 June 2013 until such time as he is properly transitioned. Those payments should continue from 4 September 2013 being the date on which they ceased.



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KA GARLING  
WorkCover Independent Review Officer

24 December 2013

My recommendation is binding upon the Insurer (Section 44(h) of the 1987 Act)