

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 injured worker (the applicant) seeks procedural review of a work capacity decision made by a licensed scheme agent (the Insurer).
2. The applicant was employed as a data entry operator and suffered injury to both hands and wrists on or about 6 September 2010. There is no dispute about the injury having occurred in the course of employment. The Applicant returned to work for some periods after the date of injury. It is not clear what periods, but it is clear there were some periods as the Insurer notes in the decision of 24 May 2013 that she had been paid, as at that date, 108.6 weeks of weekly payments. The Insurer paid weekly benefits for all relevant periods and the applicant was an existing recipient of weekly payments of compensation immediately prior to 1 October 2012.
3. On 24 May 2013 the Insurer advised the applicant in writing of a work capacity decision which had been made on that date. She was advised that her entitlement to ongoing weekly payments of workers compensation would be terminated since she was found to have no entitlement under section 38 of the *Workers Compensation Act 1987* (1987 Act). She was told the following things:
 - The relevant entitlement periods in the legislation were clearly and correctly explained.
 - It was noted that the applicant does not currently work and has received weekly payments for 108.6 weeks.
 - “As a result of your work capacity assessment, a decision has been made that you are no longer entitled to weekly payments under the new section 38 of the *Workers Compensation Act 1987*.”¹

¹ No date or range of dates was given for any “assessment” - Cf: *Workers Compensation Regulation 2010*, schedule 8, clauses 22-23 and 1987 Act, schedule 6, Part 19H, clauses 6 and 9.

- “Any entitlement you may have to payment of pre-approved reasonable and necessary medical and other expenses, until 15 August 2014, will not be affected.”²
 - “Your entitlement to weekly payments at your current rate must cease within three months of this decision – please refer to section 54(2)(a).”³
 - “Weekly payments have been paid to you for **108.6** weeks to date and therefore your entitlement to weekly payments must be reassessed under Section 38 of the *Workers Compensation Act 1987*”
4. On 18 July 2013 the Insurer wrote to the applicant advising that an Internal Review had upheld the original decision. This letter made no reference whatsoever to the effect of the decision on medical benefits, did not refer to any date of assessment and (a point in its favour) avoided repeating the error of misrepresenting section 54(2) (a).
 5. The applicant applied to the WorkCover Authority for a Merit Review of the Insurer’s decision on about 12 August 2013 and in a recommendation dated 30 September 2013 the merit reviewer upheld the original decision of the Insurer. The merit reviewer found that the applicant has no entitlement to weekly benefits in accordance with section 38 of the 1987 Act.
 6. On 30 October 2013, the applicant requested the Independent Review Officer to undertake a review of the decision of the Insurer pursuant to Section 44(1)(c) of the 1987 Act. I am satisfied that the applicant has made that application within the time provided by that section and on the correct form.

The Applicant’s Stated Grounds for Procedural Review

7. The applicant’s grounds for pursuing procedural review are:

² A classic example of antenantiosis, where a proposition appears in the negation of its opposite.

³ Precisely the opposite of what the section says.

- (i) The Applicant has done all that has been asked of her in relation to rehabilitation;
- (ii) The Applicant only has a capacity to work 12 hours and not 18 hours as referred to in s 38 of the *Workers Compensation Act 1987*;
- (iii) Surgery has been proposed but it carries risk that the condition may be worse after that surgery;
- (iv) That the amendments to the legislation made in 2012 should not apply retrospectively.

8. The Insurer was invited to make submissions but did not do so.

Legislation

9. Section 44(1)(c) of the 1987 Act limits the scope of procedural review to a review only of:

the insurer's procedures in making the work capacity decision and not of any judgement or discretion exercised by the insurer in making the decision.⁴

Therefore while it remains the case that no discretion is unreviewable,⁵ the Insurer's discretion when making a work capacity decision appears only to be reviewable in the course of merit review or Judicial review.

The procedures to be followed by the Insurer are set out in *WorkCover Work Capacity Guidelines* and *WorkCover Review Guidelines*.⁶ Both sets of *Guidelines* are said to be delegated legislation and therefore must be complied with in order for a work capacity decision to be validly made. Given the overall beneficial nature of the 1987 Act and the serious consequences to workers if decisions are made incorrectly,

⁴ Judgement is misspelt in the Act as "judgment."

⁵ See *Padfield v Minister of Agriculture, Fisheries and Food*. [1968] AC 997

⁶ A short-hand name for *Guidelines for Work Capacity Decision Internal Reviews by Insurers and Merit Reviews by the Authority*.

strict compliance with the *Guidelines* is required.

Process of the Insurer

10. The decision reached by the Insurer does not appear to be within the range of available decisions, despite being upheld by the merit review service. The applicant has not been paid for more than 130 weeks, having been paid for only 108.6 weeks as at the date of the Decision. The Decision states that it was to take effect on 31 August 2013. That is a period of 14.1 weeks. That would take the number of weeks to 123, not 130. As such the appropriate section to calculate the amount payable is section 37.

11. Pursuant to section 37(3) the rate of pay is calculated as:

(3) *The weekly payment of compensation to which an injured worker who has current work capacity and has returned to work for less than 15 hours per week (or who has not returned to work) is entitled during the second entitlement period is to be at the rate of:*

(a) $(AWE \times 80\%) - (E + D)$, or

(b) $MAX - (E + D)$,

whichever is the lesser.

Section 35 explains the code:

(1) *For the purposes of the provisions of this Subdivision used to determine the rate of weekly payments payable to an injured worker in respect of a week:*

AWE means the worker's pre-injury average weekly earnings.

D (or a deductible amount) means the sum of the value of each non-pecuniary benefit (if any) that is provided by the employer to a worker in respect of that week (whether or not received by the worker during the relevant period), being a non-pecuniary benefit provided by the employer for the benefit of the worker or a member of the family of the worker.

E means the amount to be taken into account as the worker's earnings after the injury, calculated as whichever of the following is the greater amount:

- (a) *the amount the worker is able to earn in suitable employment,*
- (b) *the workers current weekly earnings.*

MAX means the maximum weekly compensation amount.

12. If the Applicant had been paid for 130 weeks then section 38 of the Act would be the applicable section of the Act to calculate entitlement. Being an existing recipient of weekly payments immediately prior to 1 October 2012, the applicant is subject to the transitional rate in Schedule 6, Part 19H, clause 2 of the 1987 Act. However, such considerations are of no interest on procedural review where the main relevant consideration is not *why* a decision is made, but *how* it is made.⁷

My Reasons:

13. The applicant's stated grounds for seeking procedural review can be dealt with shortly. The first three issues raised by the applicant go to the merits of the case and are not appropriate for procedural review. Then the Applicant raises the retrospectivity of the Amending legislation but again that is not appropriate for procedural review.
14. Since procedural review requires a scrutiny of the decision-making processes of the Insurer, including an examination of compliance with legislation and *Guidelines*, rather than a consideration of submissions made by either party, the review process may proceed despite the absence of relevant submissions from either party. Any demonstrable error⁸ on the part of the Insurer may invalidate the decision.
15. There are in my view several breaches of the *Guidelines* which either individually or taken together are sufficient to invalidate the work capacity decision made by the Insurer.
- The work capacity decision letter made no reference to the true impact of the decision on the applicant's entitlement to medical and

⁷ For a related and recent discussion of the distinction see *Minister for Immigration and Citizenship v Li* (2013) 297 ALR 225 per Gageler, J at 253.

⁸ For a recent examination of "demonstrable error" see *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] NSWSC 1792 (11 December 2013) at paragraphs 39-56.

related treatment expenses. The only reference was a statement ostensibly seeking to reassure the applicant that her entitlements would remain unaffected until a date in 2014. This is did not say that the effect of the decision is that 12 months after the last payment of weekly benefits, the entitlement to medical benefits would automatically come to an end under section 59A(2). Similarly there was no reference to section 59A(3).

- The same can be said of the letter advising the outcome of internal review, which made no reference to medical benefits.
- Neither letter referred to section 59A(2) and (3).
- Collectively this constitutes four errors on the part of the Insurer, since each instance of failure to explain the impact of the decision and reference the legislation is duplicated.
- The description of the effect of section 54(2)(a) in the first letter is a complete misrepresentation of the notice provision, and incorrectly states that payments must cease “within 3 months” of the work capacity decision, whereas the true effect of the section is to say that the payments **may not cease** until three months have elapsed following the provision of notice. That is, the Insurer has styled the section as a maximum payment provision, rather than a minimum notice provision.
- This was compounded by no mention being made of section 54 in the letter advising the outcome of Internal Review. It is therefore another duplicated error.
- The relevant *Guideline* is 5.4.2 which requires the Insurer to:
 - Reference the relevant legislation.
 - State the impact of the decision on the worker in terms of their entitlement to weekly payments, entitlement to medical and related treatment expenses and return to work obligations.

There is no indication of the date on which the assessment was conducted. While this was not a requirement of the

Guidelines at the date of the work capacity decision, it has subsequently been added to the 8 October 2013 iteration.⁹ Despite this it constitutes an unfairness to the applicant, since the Insurer is required to make a decision “as soon as practicable” after a work capacity assessment¹⁰ and absent being told of the date of assessment the applicant cannot know whether or not this has been done.

- The work capacity decision letter of 24 May 2013 refers to section 38 payments. The internal review letter of 18 July 2013 states “... you are currently in receipt of Section 40 entitlement.” (sic) I assume that this is a reference to section 40 of the 1987 Act. Such a reference can only confuse the Applicant, particularly in the poor way in which it is expressed.
16. There also appears to be fundamental error in that the insurer relies upon section 38 before the Applicant has reached 130 weeks of incapacity even when the notice period is added. I find this to be a fundamental procedural error.
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 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.

Immediacy of Entitlement

18. A worker who has satisfied the provisions of the 1987 Act has an immediate entitlement to compensation. In *Speirs v Industrial Relations Commission (NSW)* (2011) 81 NSWLR 348 Giles, JA (Allsop, P and

⁹ In the *Guidelines* gazetted on 8 October 2013 such an omission would be a breach of the dodecalogue now appearing in the newly numbered *Guideline* 5.4.3.

¹⁰ See cl 23, schedule 8 of the *Regulation*.

Hodgson JA agreeing) reviewed the various references to entitlement in the 1987 Act and arrived at the following conclusion [at paragraph 85]:

[I]n my opinion ‘entitled to’ in the definition in s 240(2) of the [1987 Act] does not mean entitlement established by a determination of the Workers Compensation Commission or the District Court, or by decision of the Board. The entitlement is **a right subsisting in law** when there has been injury satisfying s 4 and s 9A of the [1987 Act]. It may be recognised and given effect without tribunal or court determinations, as will commonly be the case.

Since the immediate entitlement to compensation is a right subsisting in law, it is hard to see on what basis clause 21 of Schedule 8 to the *Workers Compensation Regulation 2010* presumes to impose a three month “notice period” prior to a worker receiving an increase in payments to which they would otherwise be immediately entitled. By “otherwise” I mean that anyone other than an existing recipient is entitled to an increase in benefits without the preclusion period in clause 21. I note also that section 33 of the 1987 Act requires compensation to be paid “during the incapacity” rather than at some later date. There is no Henry VIII clause making reference to an amendment to section 33 of the 1987 Act and it follows that clause 21 must be *ultra vires* to the extent that it conflicts with the section.

My Recommendation:

17. For the reasons set out above I recommend that the Insurer undertake another work capacity assessment and, if it arises, make another work capacity decision, according to the *Guidelines* as gazetted by the Authority and according to the relevant legislation.
18. Since the applicant was an existing recipient as at 1 October 2012, she remains entitled to receive her pre-transition rate of weekly benefits until such time as she is validly transitioned under the Act. This cannot happen until a valid notice under section 54 is issued. Accordingly she remains entitled to her former weekly payments until she is validly



transitioned and a section 54 notice issues and the relevant period of notice therein has expired.

19. Because the review process does not operate as a stay of the original decision, the applicant has not received weekly payments since 15 August 2013. Therefore it cannot be said that she “is receiving” compensation. This means that clause 21 of schedule 8 to the *Workers Compensation Regulation 2010* cannot apply. It follows that she must be restored to the correct pre-transition amount forthwith and back-dated to the date when the last payment was made, since there is no need for the effluxion of any notice period.¹¹
20. Noting the binding nature of these recommendations¹² I recommend that the Insurer takes my views into account, and I recommend that the Insurer immediately gives effect to them.

K A Garling
WorkCover Independent Review Officer
20 December 2013

¹¹ To the extent that clause 21 of schedule 8 of the *Regulation* conflicts with section 9 (“A worker ... shall receive compensation”) section 33 (“compensation... shall include a weekly payment **during the incapacity**”) and section 38(2) (“A worker ... is entitled to compensation”), it is *ultra vires*.

¹² See section 44(3)(h) of the 1987 Act – recommendations made by the Independent Review Officer are binding on the insurer and the Authority.