



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 17 May 2015.**
- c. The payments are to be back-dated from 17 May 2015 in accordance with clause 30 Schedule 8 to the *Workers Compensation Regulation 2010*.**
- 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 5 February 2015. The decision informed the applicant that his weekly payments of compensation would cease on 17 May 2015. The applicant sought internal review on 17 February 2015 and the Internal Review Decision was dated 27 February 2015. That decision confirmed the original work capacity decision.
2. The applicant applied to the Authority for Merit Review on 23 March 2015 and they delivered findings and recommendations dated 8 May 2015. The Authority made a finding that the worker did meet the special requirements for the continuation of weekly payments after the second entitlement period contained in Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) however his entitlement was calculated to be nil.
3. The applicant then made application to this office dated 26 May 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. The applicant had previously sought procedural review of work capacity decisions dated 17 April 2013 and 18 November 2013. The applicant was successful and the work capacity decisions were set aside by earlier recommendations of this office¹.
5. The facts and circumstances concerning the background of this claim are set out in the aforementioned recommendations and need not be repeated.
6. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).

Submissions by the applicant

7. 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 applied for a procedural review.
8. The applicant’s submissions are that the insurer failed to:
 - *Advise how to access the required form, Work capacity – application for internal review by insurer (catalogue no. WC03304). The insurer failed to refer to the catalogue number as specified by the guidelines;*
 - *Properly outline the evidence considered in making the decision, noting the author, the date and the key information. All evidence considered should be referred to, regardless of whether or not it supports the decision. The insurer does not provide an outline of the documents considered. Further the insurer refers to ‘various dates’ when noting the certificate of capacity of Dr [name withheld] the applicant submits that ‘various dates’ does not provide a date or sufficiently identify the documents used.*
 - *Failed to comply with the guidelines when issuing its fair notice (please refer to paragraph 5.2 of the guidelines).*

¹ Reported and numbered as 1013 and 5114

9. The applicant has then recited paragraph 5.2 of the Guidelines as further submissions.

Submissions by the Insurer

10. The Insurer has provided submissions dated 26 May 2015 submitting that the work capacity decision dated 5 February 2015 complies with all relevant guidelines.

The Decision

11. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
12. Guideline 5.3.2 requires the insurer to advise the applicant of the date of the work capacity assessment. The insurer informed the applicant that work capacity assessments were performed on 11 April 2013, 11 November 2013 and 28 January 2015. As a result of the most recent assessment the applicant was informed of the work capacity decision by way of letter dated 5 February 2015.
13. The same Guideline requires the insurer to advise the date when the decision takes effect. 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(1)(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 advised that his payments would cease from 17 May 2015. This is in excess of the required notice period. The Insurer has complied with the legislation and the Guidelines.
14. The same Guideline requires the insurer to advise the applicant of the impact the decision has on his entitlement to medical and related treatment expenses. The Insurer has referenced Section 59A(2) of the 1987 Act and advised the applicant that his entitlement to medical expenses will cease 12 months after his entitlement to weekly payments ceases. The insurer has even cited the date of cessation of medical and treatment expenses as being 17 May 2016. The insurer has complied with the legislation and the Guidelines.

15. Guideline 5.3.2 also requires the insurer to inform the applicant of the relevant entitlement periods. The insurer advised the applicant that he has received 156 weeks' worth of compensation payments and his ongoing entitlements are subject to the requirements contained in Section 38(3) of the 1987 Act. The special requirements of that section are explained by the insurer at page 3 of the decision.
16. The insurer correctly advised that Section 38(3)(a) of the 1987 Act does not apply to the applicant as he was an existing recipient of compensation. It was noted that the applicant is presently employed as a Traffic Emergency Patroller on a full time basis with current weekly earnings of \$1277.18 gross per week.
17. The insurer concluded that the applicant had complied with the special requirements of Section 38(3)(b) and (c) of the 1987 Act in that he had returned to work for not less than 15 hours per week, is earning in excess of \$173.00 per week (as indexed). The applicant's ongoing entitlements were then calculated in accordance with Section 38(7) of the 1987 Act.
18. The insurer correctly explained to the applicant that he was an existing recipient and in accordance with Schedule 6 Part 19H clause 9(3) of the 1987 Act that he is subject to the transitional rate for his pre-injury average weekly earnings which are deemed to be \$972.90 per week.
19. The insurer has provided an explanation of the calculation pursuant to Section 38(7) at page 5 of the work capacity decision. This calculation results in an entitlement of nil. The insurer has complied with the legislation and relevant Guidelines.
20. In responding to the applicant's submissions it is noted that he submits that the Insurer failed to advise of the catalogue number for the internal review application form. I note that the insurer annexed a copy of the "*Application for Review by Insurer*" form to the actual decision. Furthermore a hyperlink was imbedded in the letter which also provided online access to the document. This is sufficient for the insurer to comply with Guideline 5.3.2 which requires the insurer to "*advise of the*

process available for requesting review of the decision and how to access the required form.”

21. The applicant has also submitted that the insurer failed to outline the evidence considered in making the decision. The insurer under the heading “*The review of the above information indicates:*” provides a two and a half page explanation of the medical evidence and certificates of capacity used to assess the applicant’s present entitlements. This included referring to the applicant commencing full time employment on 7 January 2013 as a Traffic Emergency Patroller with a base weekly wage rate of \$1221.10 per week which had been indexed annually. At the time the work capacity decision was made the applicant was earning \$1277.18 per week. I have reviewed the work capacity decision and I am satisfied that the insurer has complied with the Guidelines and provided sufficient reasoning for its decision.
22. The applicant has further submitted that the insurer has failed to comply with paragraph 5.2 of the Guidelines which are the fair notice provisions. It was noted in the work capacity decision that three work capacity assessments had been completed and three subsequent work capacity decisions were made. I am satisfied that the applicant was aware of the work capacity assessments being performed and he was aware of the processes. The insurer has complied with the Guidelines.
23. The decision of the insurer dated 5 February 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation.

Finding

24. There are no procedural errors identifiable in the decision. The insurer has complied with the Guidelines and relevant legislation.

The Stay

25. Clause 30 Schedule 8 of the *Workers Compensation Regulation 2010* 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.



26. The work capacity decision was dated 5 February 2015. The applicant applied for internal review on 17 February 2015. The application was made within the 30 day requirement for the stay to operate immediately.

RECOMMENDATION

27. The application for procedural review is dismissed.

28. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 17 May 2015.

29. The payments are to be back-dated from 17 May 2015 in accordance with clause 30 Schedule 8 to the *Workers Compensation Regulation* 2010.

30. Such payments are to continue until the receipt of this recommendation.

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
25 June 2015