

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 her weekly payments at the rate applicable prior to 17 April 2015.**
- c. The payments are to be back-dated to 17 April 2015 in accordance with clause 30 Schedule 8 of 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 12 January 2015. The insurer advised the applicant that her weekly payments of compensation would reduce to \$220.44 per week on 17 April 2015. The applicant sought internal review of the decision on 21 January 2015 and the Internal Review Decision was dated 20 February 2015. That decision reduced the applicant's weekly payments to \$189.22 per week.
2. The applicant then sought Merit Review from the Authority on 24 March 2015 and they delivered a decision dated 28 May 2015 finding that the applicant is entitled to weekly payments of compensation in accordance with to Section 37(3) of the *Workers Compensation Act 1987* (the 1987 Act).
3. The applicant applied to this office for procedural review by way of application dated 3 June 2015. Taking into consideration Section 76(1)(b) of the *Interpretation Act 1987* by allowing 4 business days for

receipt of the Merit Review decision I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. On 20 September 2010 the applicant sustained injury to her lower back in the course of her employment as a process worker. She underwent a laminectomy in or about 2012. The applicant returned to work but due to the unavailability of suitable duties from 11 November 2013 she has not worked since that time.
5. The work capacity decision indicates that the applicant was an existing recipient of weekly payments of compensation immediately before 1 October 2012 and this issue is not disputed.
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).
7. The relevant version of the Guidelines came into effect on 11 October 2013.

Submissions by the applicant

8. 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 requested a procedural review.
9. The applicant’s submission was that she did not agree that she could perform administration work as was determined by the Insurer in the Work Capacity Decision.
10. As stated above Section 44(1)(c) of the 1987 Act only allows me to review the procedure followed by the insurer in making the work capacity decision. Any decisions made by the insurer in respect of suitable duties and capacity are not issues which can be considered at this procedural review stage. The submissions by the applicant are not relevant to this procedural review.

Submissions by the Insurer

11. The Insurer made submissions dated 10 June 2015 in response to this application. The Insurer has responded to the applicant's submissions and likewise those submissions are not relevant to procedural review. The insurer has also provided a useful chronology of correspondence between the parties.

The Decision

12. Pursuant to Guideline 5.3.2 the insurer has informed the applicant that a work capacity assessment was completed on 8 January 2015. The applicant was advised of the work capacity decision arising out of that assessment by letter dated 12 January 2015. The Insurer has complied with the Guideline.

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 Section 54(2)(a) of the 1987 Act. As a result the applicant was advised that her payments would reduce from 17 April 2015. This is the correct notice period. The Insurer has complied with the legislation and the Guidelines.

14. Guideline 5.3.2 also requires the insurer to advise the applicant of the impact the decision has on her entitlement to medical and related treatment expenses. The Insurer has correctly informed the applicant that as she continues to have an entitlement to weekly payments of compensation then reasonably necessary medical and treatment expenses will continue to be paid.

15. In accordance with the same Guideline the insurer has explained the relevant entitlement provisions and has informed the applicant that she has received 80 weeks of compensation payments which place her in the second entitlement period and therefore her ongoing entitlements would be assessed pursuant to Section 37(2) of the 1987 Act.

16. The insurer has informed the applicant that her pre-injury average weekly earnings were subject to the transitional rate in Schedule 6 Part 19H Clause 2 of the 1987 Act as the applicant was an existing recipient.
17. In accordance with Section 32A of the 1987 Act the insurer identified suitable employment for the applicant as being an administrative assistant. The insurer determined that the applicant had the capacity to perform these suitable duties for 25 hours per week and had an earning capacity of \$557.88 per week. I note that the applicant maintains that she is not qualified to perform administrative duties however, as previously indicated at paragraph 10 above I am only in a position to review the procedures of the Insurer and not any judgment or discretion exercised by the Insurer.
18. The insurer informed the applicant at page 3 of the work capacity decision how her entitlement under Section 37(2) of the 1987 Act was calculated. The calculation was in accordance with the legislation and Guidelines.
19. The insurer has cited the various reports upon which it relies throughout the work capacity decision. The insurer cites the author of the report and provides the date. In keeping with the requirements of Guideline 5.3.2 the insurer has also listed the documents which it has reviewed and considered when making the work capacity decision at page 5 of the decision.
20. The decision of the Insurer dated 12 January 2015 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

Finding

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

The Stay



22. 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.

23. The work capacity decision was dated 12 January 2015. The applicant applied for internal review on 21 January 2015. The application was made within the 30 day requirement for the stay to operate immediately.

RECOMMENDATION

24. The application for procedural review is dismissed.

25. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 17 April 2015.

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

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

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
2 July 2015