

**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 11 May 2015.**
- c. The payments are to be back-dated to 11 May 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 2 February 2015. The insurer advised the applicant that her weekly payments of compensation would cease on 11 May 2015. The applicant sought internal review of the decision on 25 February 2015 and the Internal Review Decision dated 13 March 2015 confirmed the original work capacity decision.
2. The applicant then sought Merit Review from the Authority on 12 April 2015 and they delivered a decision dated 13 May 2015 finding that pursuant to Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) the applicant was not entitled to weekly payments of compensation.
3. The applicant applied to this office for procedural review by way of application dated 5 June 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. On 16 March 1997 the applicant suffered injury to her neck and back whilst transferring a patient from a shower chair to a lounge chair in the course of her employment as a nurse. The applicant continued working performing suitable duties until her employment was terminated in 1998 when suitable duties were no longer available. The applicant underwent surgery to her cervical spine in 2005, 2007 and 2010. The applicant has received permanent impairment compensation representing 33% permanent impairment of the neck, 16% permanent impairment of the back and 15% loss of use of the left arm at or above the elbow.
5. Since July 2009 the applicant has been working casually as a retail assistant as well as being in receipt of weekly payments of compensation from the Insurer.
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 has submitted that the insurer erred in completing the work capacity assessment on 28 January 2015 and making the work capacity decision simultaneously. She submits that a notice period of 3 months should elapse between the two processes. I note that Section 54(2)(a) of the 1987 Act only requires the notice period to be given for the reduction or cessation of weekly payments not as a notice period of the work capacity assessment taking place.
10. The applicant submitted that she is a seriously injured worker. There is no evidence on the papers before me that the insurer has agreed that the applicant is a seriously injured worker or that she has been

assessed as having 30% WPI. This is an issue which is not appropriate for procedural review.

11. The applicant has submitted that the medical evidence before the Insurer and Authority does not support the decision. This is an issue which goes to the judgment and discretion exercised by the Insurer and is not the subject of procedural review.
12. The applicant has also submitted that the medical evidence as to her capacity is not current. However, it is noted that the insurer has used the current payslips provided by the applicant to assess her working hours for the purpose of assessing her entitlements under Section 38(3) of the 1987 Act. The insurer has complied with the Guidelines and legislation.
13. 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. I am only in a position to review the procedures undertaken by the insurer in making the work capacity decision.

Submissions by the Insurer

14. The Insurer has not made any submissions in respect of this application.

The Decision

15. Pursuant to Guideline 5.3.2 the insurer has informed the applicant that a work capacity assessment was completed on 28 January 2015. The applicant was advised of the work capacity decision arising out of that assessment by letter dated 2 February 2015. The Insurer has complied with the Guidelines.
16. 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 her payments would cease from 11 May 2015. This is in excess of the required notice period. The Insurer has complied with the legislation and the Guidelines.

17. 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 informed the applicant that it is considered that her injury has resulted in a permanent impairment greater than 20%. Therefore, the insurer has correctly advised the applicant that she continues to have an entitlement to medical and related treatment expenses until she reaches retirement age. The insurer has complied with the Guidelines and legislation.
18. In accordance with the Guideline the insurer has explained the relevant entitlement periods and the Insurer has informed the applicant that she has received 484 weeks of compensation payments which places her after the second entitlement period and therefore her ongoing entitlements would be assessed pursuant to Section 38(3) of the 1987 Act.
19. The insurer has cited Section 38(3) of the 1987 Act. The insurer also noted that the applicant was working on a casual basis. The insurer referred to Section 40 of the 1987 Act when calculating the average number of hours worked by the applicant each week. In accordance with Section 40(1) the insurer has reviewed the preceding 12 weeks of payslips and noted that for 9 of the 12 weeks the applicant worked less than 15 hours per week. This period was greater than the four week period allowed in that section. Therefore, the insurer determined the applicant was not working at least 15 hours per week and did not meet the requirement in Section 38(3)(b) of the 1987 Act.
20. The insurer noted that the applicant was certified with the capacity to work 16 hours per week but was not consistently working to that capacity. Therefore the insurer concluded that the applicant was not incapable of undertaking further additional employment or work to increase her current weekly earnings and did not meet the requirement in Section 38(3)(c) of the 1987 Act.

21. The insurer made a work capacity decision that the applicant was not entitled to ongoing weekly payments of compensation as she did not meet the requirements of Section 38(3)(b) and (c) of the 1987 Act. The insurer has complied with the Guidelines and legislation.
22. Pursuant to Guideline 5.3.2 the insurer has also outlined the evidence considered in making the decision. The insurer has noted the author and the date and addressed key information.
23. The decision of the Insurer dated 2 February 2015 has displayed a careful consideration of the requirements of the Guidelines and the 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 2 February 2015. The applicant applied for internal review on 25 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 her weekly payments at the rate applicable prior to 11 May 2015.
29. The payments are to be back-dated to 11 May 2015 in accordance with clause 30 Schedule 8 of the *Workers Compensation Regulation 2010*.



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

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