

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 work capacity decision of the Insurer dated 26 February 2015 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 3 June 2015.**
- c. The payments are to be back-dated to 3 June 2015.**
- d. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.**

Introduction and background

1. A work capacity decision dated 26 February 2015 was sent to the applicant advising her that her entitlements to weekly payments would cease from 3 June 2015. The applicant requested an internal review on 9 March 2015. The insurer issued an internal review decision dated 15 April 2015. That decision confirmed the work capacity decision.
2. The applicant applied for merit review by the Authority on 28 April 2015. They delivered a decision dated 29 May 2015 which found that the applicant did not satisfy the special requirements of Section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act) and was not entitled to ongoing payments of weekly compensation.
3. The applicant then made application to this office dated 9 June 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. The applicant was employed as a parking patrol officer from 1997 until she was medically retired on 4 December 2001. On 1 December 2000 the applicant suffered an injury to her hip muscle whilst marking cars in

the course of her employment. The applicant has been in receipt of weekly payments of compensation and has not returned to work.

5. 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

6. 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.*”
7. The applicant has requested a procedural review.
8. The applicant’s primary submission is that at the time of her employment she was a Crown Officer, Special Constable Parking Patrol Officer and as such is not subject to the amendments. The applicant relies upon Clause 25 of Schedule 6, Part 19H, Division 3 of the 1987 Act. Clause 25 is in these terms:

25 Police officers, paramedics and firefighters

The amendments made by the 2012 amending Act do not apply to or in respect of an injury received by a police officer, paramedic or firefighter (before or after the commencement of this clause), and the Workers Compensation Acts (and the regulations under those Acts) apply to and in respect of such an injury as if those amendments had not been enacted.

9. If the applicant comes within this clause, she cannot be transitioned onto the new benefits regime by the Insurer. It is a question of law whether or not the applicant can be entitled to exemption from the amendments as provided. Under Section 105 of the *Workplace Injury Management and Workers Compensation Act 1998* the Workers Compensation Commission of NSW would appear to have exclusive original jurisdiction to decide the point. This issue has been addressed previously by an

earlier recommendation of this office.¹ This is not an issue which can be considered at procedural review.

10. The applicant has also made submissions in respect of the Insurer's decision as to how many hours per week she can work as well as the consideration of medical reports. As referred to above, Section 44 of the 1987 Act only allows me to review the insurer's procedures and not any judgment or discretion exercised by the insurer. These submissions made by the applicant are not relevant to procedural review.

11. Likewise, the applicant has made submissions in respect of the internal review decision and the merit review decision by the Authority. The only document which I am able to review under Section 44 of the 1987 Act is the work capacity decision.

Submissions by the Insurer

12. The Insurer provided submissions dated 16 June 2015 in response to the application. The Insurer's submissions addressed the issues of whether the applicant was exempt from the amended scheme and whether she could be transitioned. The Insurer has submitted that this issue should be determined by the Workers Compensation Commission.

13. The Insurer has also submitted that the applicant's issues in respect of deterioration of her medical condition and request of further medical evidence are not matters which can be dealt with at procedural review.

The Decision

14. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.

15. Guideline 5.3.2 requires the Insurer to advise the applicant of the date the work capacity decision will take effect.

16. Section 54(2)(a) of the 1987 Act requires at least three months and four business 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

¹ Reported and numbered as 1313

decision the Insurer has referenced and explained both sections of each piece of legislation.

17. However, the insurer has informed the applicant that her payments will cease on 3 June 2015. This date is incorrect. Three months and four business days actually takes the notice period to 4 June 2015.
18. The insurer has failed to comply with the Guidelines and the legislation and this error is sufficient to set aside the work capacity decision.

Finding

19. 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 a breach of the legislation and the Guidelines which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

RECOMMENDATION

20. The work capacity decision of the Insurer dated 26 February 2015 is set aside.
21. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 3 June 2015.
22. The payments are to be back-dated to 3 June 2015.
23. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.

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