

**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 15 December 2014.**
- c. The payments are to be back-dated to 15 December 2014 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.**
- 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 September 2014. The decision advised the applicant that his weekly payments of compensation would cease from 15 December 2014. The applicant sought internal review of the decision and the Internal Review Decision was dated 21 October 2014. The applicant then sought Merit Review from the Authority on 31 October 2014 and they delivered a decision dated 26 November 2014 upholding the work capacity decision. The applicant then applied to this office for procedural review on 8 December 2014.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. On 12 March 2012 the applicant suffered injury to his back when he slipped and fell while carrying a large metal pole in the course of his employment. The applicant was unable to return to duties with that employer. In August 2012 the applicant commenced a work trial as a sound engineer. That trial led to an offer of employment as part of a Jobcover Placement program. That employment ceased in October 2013. The applicant has not worked since that time.

4. The applicant was in receipt of weekly payments immediately before 1 October 2012. Accordingly Clause 8 of Part 19H of Schedule 6 to the *Workers Compensation Act 1987* (the 1987 Act) required the Insurer to conduct a work capacity assessment.
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).
6. The relevant version of the Guidelines came into effect on 11 October 2013. That publication stated that the Guidelines provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessments and decisions.
7. Once the Insurer has conducted a first assessment then the Insurer is required to make a work capacity decision. Where that decision involves a reduction in the weekly benefits payable to the injured worker then the Insurer is required to give proper notice to the worker (Section 54(2)(a) of the 1987 Act).

### **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. The applicant’s main submission is that he is unable to work in excess of 20 hours per week due to visa restrictions. The applicant has also made submissions in respect of the insurer’s failure to evaluate all available and relevant evidence, failure to ensure the decision meets the respective return to work plan and failure of the insurer to ensure that the decision makers have appropriate expertise.

### **Submissions by the Insurer**

9. The Insurer has not made submissions in response to this application.

### **The Decision**

10. Guideline 5.3.2 requires the insurer to advise the date of the work capacity decision. The insurer has advised the applicant that the work capacity assessment commenced on 31 July 2014 and the assessment concluded on 5 September 2014. On that date the work capacity decision was made and the applicant was advised of the decision by letter of the same date. The insurer has complied with the Guideline.
11. 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(2)(a) and (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 15 December 2014 which is in excess of the required notice period.
12. It is noted that the Internal Review Decision dated 21 October 2014 reduces the notice period under Section 54(2)(a) of the 1987 Act to 12 December 2014. This notice period is still in accordance with the legislative requirement. The insurer has complied with the Guideline and legislation.
13. Guideline 5.3.2 requires the insurer to explain the relevant entitlement periods. The insurer has informed the applicant that he has received 131 weeks' worth of compensation payments. Therefore his ongoing entitlements would be assessed pursuant to Section 38 of the 1987 Act. The insurer has explained the 'special requirements' of Section 38(3)(b) and (c) which must be fulfilled for the applicant to be entitled to ongoing weekly payments. The insurer has also noted that the amount referred to in subsection (3)(b) has been indexed from \$155 per week to \$173 per week. The insurer has complied with the Guideline.
14. The same Guideline also requires the insurer to advise the applicant of the impact the decision has on his entitlement to medical and related treatment expenses. In this decision the insurer has referenced and explained *Section 59A(2) and (3)*. The applicant was advised that payment of his pre-approved medical and related treatment expenses would cease 12 months after the cessation of his entitlement to weekly payments. It was also explained that the applicant may again become entitled to payment of medical expenses by virtue of *Section 59A(3)* of the 1987 Act. The Insurer has complied with the Guideline.
15. The applicant's submissions that the insurer has failed to evaluate all relevant evidence, has failed to tailor a return to work plan and has not ensured the decision makers have the appropriate expertise are all tied to the submission that the insurer has failed to take into account the

applicant's visa restrictions in that he cannot work in excess of 20 hours per week.

16. The insurer has determined that the applicant has a current work capacity of 32 hours per week. At the time the work capacity decision was made the applicant was not working. The applicant's ongoing entitlements are to be determined by Section 38(3). For the applicant to be entitled to ongoing weekly payments one of the pre-conditions is that he must be working "*not less than 15 hours per week*." In this case the applicant is not working at all and therefore fails to meet this precondition.
17. The minimum requirement of working "*not less than 15 hours per week*" as required in Section 38(3) is within the legal constraints of the applicant's visa.
18. The argument that the applicant is under a legal disability to work the 32 hours per week as assessed by the insurer loses its relevance when he is working no hours at all. The insurer has followed the correct procedure in determining that the applicant has no ongoing entitlement to weekly payments of compensation as he has failed to comply with Section 38(3)(b) of the 1987 Act.
19. The decision of the Insurer dated 5 September 2014 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

## **Finding**

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

## **RECOMMENDATION**

21. The application for procedural review is dismissed.
22. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 15 December 2014.
23. The payments are to be back-dated to 15 December 2014 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.



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

Tracey Emanuel  
Delegate of the WorkCover Independent Review Officer  
6 January 2015