



**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 10 May 2015.**
- c. The payments are to be back-dated to 10 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 3 February 2015. The insurer advised the applicant that his weekly payments of compensation would cease on 10 May 2015. The applicant sought internal review of the decision on 16 February 2015 and the Internal Review Decision dated 18 March 2015 confirmed the original work capacity decision.
2. The applicant then sought Merit Review from the Authority on 1 April 2015 and they delivered a decision dated 19 May 2015 finding that the applicant did not satisfy the special requirements in Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) for the continuation of weekly payments of compensation.
3. The applicant applied to this office for procedural review by way of application dated 12 June 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. On 25 February 2011 the applicant suffered injury to his left ankle when he fell from a ladder in the course of his employment as a painter. The applicant subsequently underwent three surgical procedures at the hands of Dr K. He has not worked since his injury. At the time of the work capacity decision the applicant was in receipt of weekly payments of compensation from the insurer.
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.

### **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 requested a procedural review.
8. The applicant has submitted the insurer:
  - Failed to advise that “*if needed, an accredited interpreter should be engaged to assist in giving effective communication*” given that he has limited skills in English and this information would have been essential;
  - Wrongly advised that “*each party bear their own legal costs in relation to the decision*”;
  - Failed to clearly show how the new entitlement has been calculated. The insurer also failed to provide the applicant its calculation of his PIAWE and Earnings.
9. These submissions are addressed in the *decision* below.

### **Submissions by the Insurer**

10. The Insurer made the following submissions received by this office on 18 June 2015:

- In all instances where a decision has been advised to the applicant an interpreter has been arranged. It should be noted that in all instances the applicant has not been available and has failed to return calls. The insurer notes that the applicant has a legal representative who could have advised him that he is entitled to an interpreter. The insurer advised the applicant in the actual work capacity decision that he may seek assistance from an interpreter;
- The insurer relies upon Section 44(6) of the 1987 Act which states that solicitors are not entitled to recover any costs which have been incurred in connection with a requested review of a work capacity decision;
- The insurer has not discussed PIAWE as it is not relevant to the decision.

## The Decision

11. Pursuant to Guideline 5.3.2 the insurer informed the applicant that a work capacity assessment commenced on 28 August 2014 and completed on 3 February 2015. The applicant was informed of the work capacity decision by letter dated 3 February 2015. The insurer has complied with the Guideline.

12. 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 the workers compensation legislation. As a result the applicant was advised that his payments would cease from 10 May 2015. This is the required notice period. The Insurer has complied with the legislation and the Guidelines.

13. Guideline 5.3.2 also 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(1),(2) and

- (3). The insurer has advised the applicant that his entitlement to medical expenses will cease twelve months after his entitlement to weekly payments cease. Therefore, his entitlement to payment of medical and related treatment expenses will cease on 10 May 2016 unless Section 59A(3) becomes relevant. The insurer has complied with the legislation and the Guidelines.
14. In accordance with the same Guideline the insurer has explained the relevant entitlement periods and informed the applicant that he has received 207 weeks of compensation payments. This places him after the second entitlement period and therefore his ongoing entitlements would be assessed pursuant to Section 38(3) of the 1987 Act.
15. The insurer has cited and explained the special requirements of Section 38(3) of the 1987 Act at page 12 of the work capacity decision.
16. In accordance with Section 32A of the 1987 Act the insurer has determined that the vocational roles of data entry and bookkeeper are suitable employment options. The insurer relied upon a vocational rehabilitation report dated 17 November 2014 to make this decision. The insurer has complied with the Guidelines and legislation.
17. Section 44(1)(c) of the 1987 Act only allows me to review the insurer's procedures in making the work capacity decision and not any judgment or discretion exercised by the insurer. Therefore any decision such as the appropriateness of the suitable duties is not within my discretion to review. I can only review that the correct procedures were followed by the insurer in coming to its decision.
18. In accordance with Section 43(1)(a) of the 1987 Act the insurer has made a decision about the applicant's work capacity. The insurer has decided the applicant has the capacity to work 38 hours per week. The insurer has preferred the opinions of the rehabilitation assessor, Dr S (Injury Management Consultant) and Dr B (Independent Medical Examiner) over that of the applicant's nominated treating doctor who assessed the applicant's capacity to work to be 5 hours per day for three days per week. As stated in the preceding paragraph I am only to review the procedures of the insurer and it has complied with the

relevant legislation and Guidelines in assessing the applicant's work capacity.

19. It was noted by the insurer that the applicant was not working not less than 15 hours per week (*the applicant was not working*) and he was not in receipt of current weekly earnings of at least \$173 per week (*the applicant was earning nil*). The insurer then explained to the applicant that as he had not satisfied the special requirements of Section 38(3)(b) of the 1987 Act he is not entitled to ongoing weekly payments of compensation.
20. 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.
21. The applicant has submitted that the insurer failed to advise him that if required an interpreter could be made available to assist him. It is noted that the applicant was in receipt of weekly payments of compensation for over 200 weeks and during that time I note he must have been in contact with the insurer either directly or via an interpreter to conduct his claim. Additionally, the work capacity decision advises the applicant that if required he should contact an interpreter to assist him. Finally, the applicant has been able to navigate the review process without prejudice. I dismiss this submission from the applicant.
22. The applicant's next submission was that the insurer wrongly advised him that "*each party bear their own legal costs in relation to this decision.*" I refer to Section 44(6) of the 1987 Act which states that "*a legal practitioner acting for a worker is not entitled to be paid or recover any amount for costs incurred in connection with a review under this section of a work capacity decision of an insurer.*" Whilst the insurer may have expressed it differently in the decision it was correct in informing the applicant that the insurer would not be covering any legal costs he may have incurred. I am not satisfied that this submission from the applicant is sufficient to set aside the work capacity decision.
23. The final submission from the applicant was that the insurer failed to show how the new entitlement was calculated and failed to provide the

calculation of PIAWE. As the applicant failed to satisfy the requirements of Section 38(3)(b) of the 1987 Act he is not entitled to any ongoing weekly compensation. There are no calculations. It is sufficient to advise the applicant he has no entitlement.

24. Finally, in respect of PIAWE, it is not necessary to calculate this as the applicant failed to establish an ongoing entitlement. In any event it is noted that the applicant is an existing recipient and his PIAWE would be the transitional amount pursuant to Schedule 6 Part 19H Clause 2 of the 1987 Act. I do not accept the applicant's submission.

25. The decision of the Insurer dated 3 February 2015 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

## **Finding**

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

## **The Stay**

27. 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.

28. The work capacity decision was dated 3 February 2015. The applicant applied for internal review on 16 February 2015. The application was made within the 30 day requirement for the stay to operate immediately.

## **RECOMMENDATION**

29. The application for procedural review is dismissed.

30. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 10 May 2015.



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31. The payments are to be back-dated to 10 May 2015 in accordance with clause 30 Schedule 8 of the *Workers Compensation Regulation 2010*.
32. Such payments are to continue until the date of the receipt of this recommendation.

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