

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 her weekly payments at the rate applicable prior to 8 November 2014.**
- c. The payments are to be backdated to 8 November 2014.**
- d. Such payments are to continue until a new work capacity decision is made in accordance with the recommendations from the Merit Review Authority dated 14 November 2014.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 30 July 2014. The decision advised the applicant that her weekly payments of compensation would be reduced from \$373.50 to \$262.64 per week from 8 November 2014. The applicant sought internal review of the decision and the Internal Review Decision was dated 19 September 2014. That decision further decreased the applicant's entitlement to \$212.80 per week. That reduction would occur from 27 December 2014.
2. The applicant then sought Merit Review from the Authority on 20 October 2014 and they delivered a decision dated 14 November 2014 recommending the applicant's ongoing entitlement to weekly compensation be increased to \$268.00.
3. The applicant then applied to this office for procedural review on 18 December 2014. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 21 November 2004 the applicant suffered injury to her back whilst in the course of her employment. At the time of the work capacity decision the applicant was in receipt of weekly payments in the sum of \$373.50 as a result of proceedings in the Workers Compensation Commission.

5. The applicant was not in receipt of weekly payments immediately before 1 October 2012 and therefore was not an “existing recipient.” This raises the interesting spectre of competing definitions. The definition clause in schedule 8 of the *Workers Compensation Regulation 2010* (clause 25) says only this:

“In this part **existing claim** means a claim for compensation in respect of an injury made before 1 October 2012.”

The emphasis here is on the date when a claim was made, not the receipt of compensation itself. Since the worker had made the claim in 2004, this was clearly an “existing claim” as defined in clause 25 of schedule 8 to the *Workers Compensation Regulation 2010* because it had been made prior to 1 October 2012.

The applicant’s proceedings were listed before the Workers Compensation Commission on 13 December 2013 at which time an agreement was reached that the applicant would receive \$373.50 per week. It is not clear from the documents before me whether this payment was backdated. In any event the applicant was not in receipt of such payment as at 1 October 2012.

6. Section 44A of the *Workers Compensation Act 1987* (“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. That publication stated that the Guidelines provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessments and decisions.
8. 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

9. 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 has submitted that the agreement between the Insurer and her arising from the previous Workers Compensation Commission proceedings was not considered when making the work capacity decision and merit review also failed to consider this issue. In addition she submitted there were no current records available with respect to her rate of pay at the time of the injury or comparable earnings. These submissions are not relevant to procedural review.

Submissions by the Insurer

10. The Insurer has made submissions in response to this application which were received by this office on 22 December 2014. It is accepted that the applicant was not an existing recipient.

The Decision

11. 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 was completed on 25 July 2014. The applicant was advised of the work capacity decision by way of letter dated 30 July 2014. The Insurer has complied with the Guideline.
12. 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 her payments would reduce from 8 November 2014. This is the required notice period and the Insurer has complied with the Guideline.
13. In the internal review decision dated 19 September 2014 the Insurer reduced the applicant’s weekly payments further and as required provided a further notice period up until 27 December 2014. The Insurer has complied with the Guideline.
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. In this decision the Insurer has referenced and

explained Section 59A(2) and (3). The applicant was advised that payment of her pre-approved medical and related treatment expenses would cease 12 months after the cessation of her 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. Although this information is not strictly relevant to the applicant at this time the information provided is correct and does not constitute a breach of the regulations. We note that in this particular case the applicant's weekly payments of compensation were not going to cease and therefore her entitlement to medical and related expenses are not impacted by the decision.

15. The Guidelines also require the Insurer to explain the relevant entitlement periods, reference the relevant legislation, state the decision and give brief reasons for making the decision. The applicant has been informed that she received 502 weeks of payments of compensation and that her claim is to be assessed under Section 38(6) of the 1987 Act.
16. The applicant has submitted that her comparable earnings should be assessed at the rate of \$373.50 with CPI adjustments from December 2010 not the \$335.00 per week concluded by the Merit Review Authority. I am unable to review the decision of the Merit Review as I am limited by Section 44(1)(c) of the 1987 Act to reviewing only the Insurer's procedures in making the work capacity decision and not any judgment or discretion exercised in making the decision.
17. The Insurer has referred to Section 38(6) of the 1987 Act and provided an explanation including a step by step algorithm as to how the applicant's weekly payment entitlement was calculated. The Insurer also referenced Section 82A of the 1987 Act which deals with indexation of weekly payments and the appropriate CPI figure which should be applied.
18. The decision of the Insurer dated 30 July 2014 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

Stay

19. Clause 30 of schedule 8 to the *Workers Compensation Regulation 2010* provides for a stay of any work capacity decision by an insurer while any such decision is the subject of review pursuant to section 44 of the 1987 Act, as long as the decision relates to an "existing claim." There is no specific (or even implied) requirement that the claim be made by an "existing recipient." Accordingly the stay referred to in clause 30 must



apply to the present case. For this reason the applicant should continue to receive compensation at the rate applicable immediately prior to the date of purported reduction of benefits arising out of the original work capacity decision until such time as this current recommendation is received by the applicant. In this case the applicant should be restored to her former benefits from 8 November 2014.

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 her weekly payments at the rate applicable prior to 8 November 2014.
23. The payments are to be backdated to 8 November 2014.
24. Such payments are to continue until receipt by the applicant of a copy of this recommendation and a new work capacity decision is made in accordance with the recommendations from the Merit Review Authority.

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