

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 8 July 2015.**
- c. **The payments are to be back-dated from 8 July 2015 in accordance with clause 30 Schedule 8 to 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 27 March 2015. The decision informed the applicant that her weekly payments of compensation would cease on 8 July 2015. The applicant sought internal review on 7 April 2015 and the Internal Review Decision was dated 21 April 2015. That decision confirmed the original work capacity decision.
2. The applicant applied to the Authority for Merit Review on 15 May 2015 and they delivered findings and recommendations dated 12 June 2015. The Authority made a finding that the applicant did not meet the special requirements under Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) and therefore was not entitled to ongoing payments of weekly compensation.
3. The applicant then made application to this office dated 19 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 had previously sought procedural review of a work capacity decision dated 7 January 2014. The applicant was successful and the work capacity decision was set aside by an earlier recommendation of this office¹.
5. The facts and circumstances concerning the background of this claim are set out in the aforementioned recommendation and need not be repeated.
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).

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 applied for a procedural review.
8. The applicant’s submission that she considers she should remain in receipt of weekly payments of compensation as she continues to receive medical treatment is not relevant to procedural review. She also advises that the Insurer did not respond to her application for Merit Review within 7 days.
9. I am only able to review the insurer’s procedure with respect to making the work capacity decision. The applicant’s submission that she is still receiving medical treatment is not relevant to procedural review.
10. The Insurer’s failure to respond to the applicant’s merit review application within the proper timeframes was an issue to be dealt with by the Authority at the time of the merit review.

Submissions by the Insurer

¹ Reported and numbered as 6614

11. The Insurer has provided submissions dated 24 June 2015. The insurer submits that the applicant remains entitled to ongoing medical treatment insofar as the provisions of Section 59A of the 1987 Act provide and that they did not receive the applicant's merit review application until 29 May 2015 and that was the reason for the delay in their response.

The Decision

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

13. Guideline 5.3.2 requires the insurer to advise the applicant of the date of the work capacity assessment. The insurer informed the applicant that a work capacity assessment was completed on 26 March 2015. As a result of that assessment the applicant was informed of the work capacity decision by way of letter dated 27 March 2015. The insurer has complied with the Guideline.

14. 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 8 July 2015. This is in excess of the required notice period. The Insurer has complied with the legislation and the Guidelines.

15. Pursuant to Guideline 5.3.2 the insurer is to advise the applicant of the impact the decision has on her entitlement to medical and related treatment expenses. The Insurer has referenced Section 59A(2) of the 1987 Act and advised the applicant that her entitlement to medical expenses will cease 12 months after her entitlement to weekly payments ceases. The insurer has also referenced and explained Section 59A(3) of the 1987 Act. The insurer has complied with the legislation and the Guidelines.

16. Guideline 5.3.2 also requires the insurer to inform the applicant of the relevant entitlement periods. The insurer advised the applicant that she

has received 218 weeks of compensation payments and her ongoing entitlements are subject to the special requirements contained in Section 38(3) of the 1987 Act. The special requirements of that section are explained by the insurer at page 3 of the decision.

17. The insurer correctly advised the applicant that Section 38(3)(b) requires her to return to work for not less than 15 hours and that she must earn at least \$173 per week (adjusted figure). It was also advised that Section 38(3)(c) requires that the applicant be assessed as likely to continue to be indefinitely incapable of undertaking further additional employment that would increase her current weekly earnings.
18. In accordance with Section 32A of the 1987 Act the insurer had determined that the vocations of general clerk, call centre operator and receptionist were all suitable employment. The insurer based its decision upon a vocational assessment report dated 3 December 2014. The applicant's nominated treating doctor also approved of the vocations in written approval dated 15 December 2014.
19. In accordance with Section 43(1)(a) of the 1987 Act the insurer made a decision about the applicant's capacity. The insurer determined the applicant had the capacity to work 21 hours per week. This was supported by the certificate of capacity issued by the nominated treating doctor dated 18 February 2015.
20. Finally in accordance with Section 41(1)(c) of the 1987 Act the insurer made a decision about the amount the applicant is able to earn in suitable employment. At page 2 of the decision the Insurer determined the applicant could earn \$528.78 per week performing suitable duties of a general clerk.
21. The insurer concluded that the applicant had not complied with the special requirements of Section 38(3)(b) and (c) of the 1987 Act in that she had not returned to work for not less than 15 hours per week and was not earning in excess of \$173.00 per week (as indexed). Finally the applicant was assessed as having capacity to undertake additional work that would increase her current earnings. The applicant had not complied with the special provisions contained in Section 38(3)(b) and (c) of the 1987 Act.

22. The decision of the insurer dated 27 March 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation.

Finding

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

The Stay

24. 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.

25. The work capacity decision was dated 27 March 2015. The applicant applied for internal review on 7 April 2015. The application was made within the 30 day requirement for the stay to operate immediately.

RECOMMENDATION

26. The application for procedural review is dismissed.

27. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 8 July 2015.

28. The payments are to be back-dated from 8 July 2015 in accordance with clause 30 Schedule 8 to the *Workers Compensation Regulation 2010*.

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

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