

## **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.**

##### **Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 4 December 2014. The decision informed the applicant that his weekly payments of compensation would cease on 12 March 2015. The applicant sought internal review on 11 March 2015<sup>1</sup> and the Internal Review Decision was dated 10 April 2015. That decision confirmed the earlier work capacity decision.
2. The applicant applied to the Authority for Merit Review on or about 4 May 2015 and they delivered findings and recommendations dated 3 June 2015. The Authority made a finding that the worker did not meet the special requirements for the continuation of weekly payments after the second entitlement period contained in Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) and consequently confirmed the earlier decisions of the Insurer.
3. The applicant then made application to this office dated 17 June 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. This is the second application by this worker and the facts and circumstances surrounding the claim remain as set out in the earlier recommendation reported and numbered as 18314 (# 183 of 2014). There is no need to repeat the contents of that earlier recommendation. The work capacity decision by the Insurer dated 4 December 2014 was made in light of the earlier recommendation of this Office.

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<sup>1</sup> This was considerably more than 30 days after receipt by the worker of the work capacity decision, a circumstance which has ramifications under clause 30(2) of Schedule 8 to the *Workers Compensation Regulation 2010*.

### **Submissions by the applicant**

5. 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.

### **Submissions by the Insurer**

6. The Insurer advised that it has received communication from the applicant about the commencement of subsequent employment in early June 2015. It is foreshadowed that another work capacity decision may well ensue.

### **The Decision**

7. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
8. Guideline 5.3.2 requires the Insurer to advise the applicant of the reasons for the decision, the evidence relied upon in reaching the decision and to explain the impact of the decision on his rights.
9. The same Guideline 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(2) of the 1987 Act and advised the applicant that his entitlement to medical expenses will cease 12 months after his entitlement to weekly payments ceases. The failure to correctly explain section 59A (or to give any explanation about section 59A) was the cause of this Office finding fault with the earlier work capacity decision of the Insurer. That error has been remedied in the subsequent decision dated 4 December 2014.

### **Finding**

10. I find that there are no procedural errors identifiable in the decision. The insurer has complied with the Guidelines and relevant legislation.

### **The Stay**



11. 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.
12. A pre-condition of the stay being applied to the period concerning internal review by the Insurer is that the worker must apply for internal review within 30 days of receipt of the work capacity decision. In the instant case the worker did not apply for internal review until more than three months had elapsed. The consequence is that the stay cannot apply for the period of internal review.
13. Since the application for internal review was made the day before the period of notice expired, the entitlement of the applicant to receive weekly payments had expired prior to the conclusion of Internal Review and therefore prior to the application for Merit Review.
14. It follows that the worker is not entitled to any reinstatement of payments for the period of section 44 review in this instance.

## **RECOMMENDATION**

15. The application for procedural review is dismissed.

Wayne Cooper  
Delegate of the WorkCover Independent Review Officer  
30 July 2015