



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 17 May 2015.**
- c. The payments are to be back-dated from 17 May 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 5 February 2015. The insurer advised the applicant that his weekly payments of compensation would cease from 17 May 2015. The applicant sought internal review on 7 March 2015 and the Internal Review Decision was dated 27 March 2015 which confirmed the original decision.
2. The applicant then sought Merit Review from the Authority on 26 April 2015 and they delivered a decision dated 27 May 2015. The finding was that the applicant did not meet the special requirements in Section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act) and as a result was not entitled to ongoing payments of weekly compensation.
3. The applicant applied to this office for procedural review on 25 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 22 November 2013. 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. The relevant version of the Guidelines was dated 4 October 2013 and 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’s submissions are primarily:
 - that he previously applied for procedural review and was successful;
 - a decision has been made that he can work more hours however, additional hours are not available from his present employer;
 - he is only able to work for one employer;
 - he is required to pay for the fuel in the car and he works as much as possible.
9. I am only able to review the procedures undertaken by the insurer in making the work capacity decision. I am unable to consider any judgment or discretion exercised by the insurer in determining capacity to work and likewise I am unable to take into consideration availability of work.
10. The applicant’s submissions are not relevant to this procedural review.

¹ Reported and numbered as 21614

Submissions by the Insurer

11. The Insurer has made submissions in response to this application by email received 26 June 2015. The insurer submitted that the submissions of the applicant are merit based and the insurer maintains all procedures were correctly followed.

The Decision

12. In accordance with Guideline 5.3.2 the Insurer advised the applicant that work capacity assessments were completed on 3 May 2013 and 30 January 2015. The applicant was advised of the work capacity decision by letter dated 5 February 2015.
13. The same Guideline requires the Insurer to explain the relevant entitlement period. The Insurer informed the applicant that he had received 237 weeks of compensation payments at the time that the work capacity decision was made.
14. The applicant was then informed that his entitlement to ongoing weekly payments must be assessed under Section 38(3) of the 1987 Act and that he must comply with the special requirements of that section. The insurer has then set out those requirements at page 4 of the work capacity decision noting that the amount referred to in Section 38(3)(b) has been indexed from \$155 per week to \$173 per week.
15. In accordance with Section 32A and Section 43(1)(b) of the 1987 Act the insurer made a decision that suitable duties for the applicant were those of a driving instructor. It was noted that at the time of the work capacity decision the applicant was in such employment.
16. In accordance with Section 43(1)(a) the insurer determined that the applicant had capacity to work 38 hours per week. The most recent certificate of capacity certified that the applicant had capacity for some type of employment for normal hours (noted to be 38 hours per week). The restriction on the certificate was a 15kg lifting / carrying capacity.

17. A review of the applicant's pay slips in the period preceding the work capacity assessment reveal that he worked varying hours per week from as low as 8 hours to as high as 37 hours on one occasion. As the insurer had made a decision the applicant had capacity to work 38 hours per week it had also determined the applicant was able to undertake further work than he was presently undertaking and in doing so was able to increase his current weekly earnings.
18. As a result of this determination the applicant had not satisfied Section 38(3)(c) and therefore was not entitled to ongoing weekly payments of compensation.
19. The insurer complied with Guideline 5.3.2 and the relevant legislation by explaining to the applicant the entitlement periods, suitable employment, capacity to earn, current weekly earnings and his ongoing entitlements.
20. As the Insurer intended to discontinue the applicant's weekly payments Section 54(2)(a) of the 1987 Act requires at least three months and four working days' notice be given if payments are ceasing having regard to Section 76 of the *Interpretation Act* 1987. In this decision the Insurer referenced and explained both sections of each piece of legislation. As a result the applicant was advised that his weekly payments would cease from 17 May 2015 which is in excess of the required notice period. The Insurer has complied with the legislation and Guideline.
21. 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. The Insurer has noted in the decision that the applicant was assessed with 24% whole person impairment. Therefore the insurer has correctly advised the applicant that he is entitled to payment of pre-approved medical and related treatment expenses up until retirement age (which was noted to be on 24 April 2020). The insurer has complied with the Guideline and legislation.
22. The decision of the Insurer dated 5 February 2015 has displayed a careful consideration of the requirements of the Guidelines and the 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 5 February 2015. The applicant applied for internal review on 7 March 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 17 May 2015.

28. The payments are to be back-dated from 17 May 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
31 July 2015