



**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 3 June 2015.**
- c. The payments are to be back-dated from 3 June 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 24 February 2015. The insurer advised the applicant that his weekly payments of compensation would cease from 3 June 2015. The applicant sought internal review on 26 March 2015 and the Internal Review Decision was dated 16 April 2015 which confirmed the original decision.
2. The applicant then sought Merit Review from the Authority on 18 May 2015 and they delivered a decision dated 17 June 2015. The finding was that the applicant did not satisfy the special requirements in Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) and therefore was not entitled to weekly payments of compensation after the second entitlement period.
3. The applicant applied to this office for procedural review on 13 July 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 25 October 2013. The applicant was successful and the work capacity decision was set aside by an earlier recommendation of this office<sup>1</sup>.
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).
7. The relevant version of the Guidelines was dated 4 October 2013 and came into effect on 11 October 2013.

### **Submissions by the applicant**

8. 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.
9. The applicant’s submissions relate to an inability to obtain further hours as well as his need for ongoing medical treatment. These submissions are not relevant to this procedural review.
10. I am only able to review the procedures undertaken by the insurer in making the work capacity decision. I am not allowed to consider any judgment or discretion exercised by the insurer in determining capacity nor am I able to have any consideration for the availability of employment.

### **Submissions by the Insurer**

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<sup>1</sup> Reported and numbered 22314

11. The Insurer has not made submissions in response to this application.

## The Decision

12. In accordance with Guideline 5.3.2 the Insurer advised the applicant that work capacity assessments were completed on 23 October 2013 and 18 February 2015. The applicant was advised of the work capacity decision by letter dated 24 February 2015.

13. The same Guideline requires the Insurer to explain the relevant entitlement period. The Insurer informed the applicant that he had received 533 weeks of compensation payments at the time that the work capacity decision was made.

14. The respondent has complied with the Guideline which requires the insurer to advise the date of the work capacity assessment and explain the relevant entitlement periods.

15. The applicant was then informed that his entitlement to ongoing weekly payments must be assessed under Section 38 of the 1987 Act and that he must comply with the special requirements of that section. The insurer has then set out the requirements of that section 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.

16. In accordance with Section 32A and Section 43(1)(b) of the 1987 Act the insurer made a decision that suitable employment for the applicant was a home shop assistant. It was noted that at the time of the work capacity decision the applicant was in that employment. The applicant was working between 22.25 and 28.92 hours per week.

17. In accordance with Section 43(1)(a) the insurer determined that the applicant had capacity to work 30 hours per week. This was in accordance with the most recent certificates of capacity from the nominated treating doctor which certified the applicant had capacity to work 6 hours per day for 5 days per week.

18. The insurer has complied with the Guidelines and legislation in determining suitable employment and capacity to work.

19. As a result of the insurer determining that the applicant had capacity to work 30 hours per week and given that his payslips establish that the applicant is working between 22.25 and 28.92 hours per week the insurer determined the applicant did not satisfy Section 38(3)(c) of the 1987 Act. Therefore the applicant was not entitled to ongoing payments of weekly compensation.
20. In accordance with Guideline 5.3.2 the insurer has clearly explained the line of reasoning for the decision, given brief reasons for the decision and referenced the relevant legislation.
21. 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 3 June 2015 which is the required notice period. The Insurer has complied with the legislation and Guideline.
22. 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 referenced Section 59A(2) of the 1987 Act and advised the applicant that he is entitled to claim medical and related treatment costs for 12 months from the date his weekly payments of compensation ceased. The insurer even clarified that the date upon which the applicant's entitlement to medical and related treatment expenses ceases as being 3 June 2016. The provisions of Section 59A (3) were also explained. The insurer has complied with the Guideline.
23. The decision of the Insurer dated 24 February 2015 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

## Finding

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

### **The Stay**

25. 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.

26. The work capacity decision was dated 24 February 2015. The applicant applied for internal review on 26 March 2015. The application was made within the 30 day requirement for the stay to operate immediately.

### **RECOMMENDATION**

27. The application for procedural review is dismissed.

28. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 3 June 2015.

29. The payments are to be back-dated from 3 June 2015 in accordance with clause 30 Schedule 8 to the *Workers Compensation Regulation 2010*.

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

Tracey Emanuel  
Delegate of the WorkCover Independent Review Officer  
10 August 2015