

**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 9 July 2015.**
- c. The payments are to be back-dated to 9 July 2015 in accordance with clause 30 Schedule 8 of 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 1 April 2015. The insurer advised the applicant that her weekly payments of compensation would cease on 9 July 2015. The applicant sought internal review of the decision on 24 April 2015 and the Internal Review Decision was dated 21 May 2015. That decision confirmed the work capacity decision.
2. The applicant then sought Merit Review from the Authority on 3 June 2015 and they delivered a decision dated 9 July 2015 finding that the applicant did not satisfy the special requirements in Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) to be entitled to ongoing weekly payments of compensation.
3. The applicant applied to this office for procedural review by way of application dated 21 July 2015. I am satisfied that the applicant has

made the application for procedural review in the proper form and within time.

4. On 17 February 1998 the applicant sustained injury to her right wrist as the result of a fall in the course of her employment as a Head Chef. The applicant returned to work on light duties and underwent surgery in or about June 1998. The applicant did not return to duties with the pre-injury employer. Since that time the applicant has secured alternate employment at times and is presently taking medication. At the time of the work capacity decision the applicant was not working and was in receipt of weekly payments of compensation from the insurer.
5. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).
6. The relevant version of the Guidelines 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 submission is that she has an inability to perform the suitable duties which were determined by the insurer on the following grounds:
  - Inability to perform the duties of a kitchen hand; and
  - Inadequacy of re-training to re-enter workforce.
9. As stated above Section 44(1)(c) of the 1987 Act only allows me to review the procedures followed by the insurer in making the work capacity decision. Any decisions made by the insurer in respect of suitable duties and capacity are not issues which can be considered at this procedural review stage. The submissions by the applicant are not relevant to this procedural review.

## Submissions by the Insurer

10. The Insurer did not make submissions in response to this application.

## The Decision

11. Pursuant to Guideline 5.3.2 the insurer has informed the applicant that a work capacity assessment commenced on 9 March 2015 and concluded on 1 April 2015. The applicant was advised of the work capacity decision arising out of that assessment by letter dated 1 April 2015. The Insurer has complied with the Guideline.

12. 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 on 9 July 2015. This is in excess of the correct notice period. The Insurer has complied with the legislation and the Guidelines.

13. 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. At page 12 of the decision the insurer informed the applicant that in accordance with Section 59A(2) of the 1987 Act her entitlement to medical and related treatment expenses will cease 12 months after her entitlement to weekly payments cease. The insurer specified the date the applicant's entitlement to medical expenses will cease as 9 July 2016. The insurer further advised that should the applicant again become entitled to weekly payments of compensation she may be entitled to payment of medical and related treatment expenses under Section 59A(3) of the 1987 Act.

14. In accordance with the same Guideline the insurer has explained the relevant entitlement provisions and has informed the applicant that she has received 524 weeks of compensation payments. This places the

applicant after the second entitlement period and therefore her ongoing entitlements would be assessed pursuant to Section 38 of the 1987 Act.

15. The insurer has informed the applicant that her pre-injury average weekly earnings were subject to the transitional rate in Schedule 6 Part 19H Clause 2 of the 1987 Act as the applicant was an existing recipient.
16. In accordance with Section 32A of the 1987 Act the insurer identified suitable employment for the applicant as being an administration officer. The insurer relied upon an earning capacity assessment dated 16 April 2012, 6 August 2014 and a labour market analysis dated 4 February 2015 to make this decision. The insurer complied with the legislation and the Guidelines.
17. In accordance with Section 43(1)(a) of the 1987 Act the insurer determined that the applicant had the capacity to perform the above suitable duties for 16 hours per week. The insurer relied upon the certificate of capacity dated 28 March 2015 from the nominated treating doctor which certified the applicant had capacity to perform suitable duties for 4 hours per day 4 days per week. The insurer has complied with the Guidelines and the legislation.
18. In accordance with Section 43(1)(c) of the 1987 Act the insurer determined the applicant has an earning capacity of \$453.33 per week. The insurer relied upon a labour analysis report dated 4 February 2015 to make this decision. The insurer has complied with the legislation and the Guidelines.
19. I note that the applicant maintains that she is not qualified to perform duties as a kitchen hand and has not been adequately trained in computer skills by the insurer. As previously indicated at paragraph 9 above, I am only in a position to review the procedures of the Insurer and not any judgment or discretion exercised by the Insurer. I also do not have the capacity to review the findings and recommendations of the merit review service.
20. The insurer informed the applicant that her entitlement to ongoing payments of weekly compensation would be subject to the special conditions in Section 38(3) of the 1987 Act. The insurer informed the

applicant of these ‘*special conditions*’ at page 11 of the work capacity decision. In doing so the insurer has complied with Guideline 5.3.2 which requires the insurer to explain the relevant entitlement periods and reference the relevant legislation.

21. The applicant was informed that she had not complied with the special conditions contained in Section 38(3)(b) & (c) in that she had not returned to work for not less than 15 hours per week and was not earning at least \$173 per week.
22. The insurer has cited the various reports upon which it relies throughout the work capacity decision. The insurer cites the author of the report and provides the date. In keeping with the requirements of Guideline 5.3.2 the insurer has also listed the documents which it has reviewed and considered when making the work capacity decision at pages 13 and 14 of the decision.
23. The decision of the Insurer dated 1 April 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 1 April 2015. The applicant applied for internal review on 24 April 2015. The application was made within the 30 day requirement for the stay to operate immediately.

## **RECOMMENDATION**



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27. The application for procedural review is dismissed.
28. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 9 July 2015.
29. The payments are to be back-dated to 9 July 2015 in accordance with clause 30 Schedule 8 of the *Workers Compensation Regulation 2010*.
30. Such payments are to continue until the date of the receipt of this recommendation.

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