



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 6 August 2015.**
- c. The payments are to be back-dated to 6 August 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 27 April 2015. The insurer advised the applicant that his weekly payments of compensation would cease from 6 August 2015. The applicant sought internal review of the decision on 11 May 2015 and the Internal Review Decision dated 1 June 2015 confirmed the original work capacity decision.
2. The applicant then sought Merit Review from the Authority on 20 June 2015 and they delivered a decision dated 21 July 2015 finding that the applicant did not satisfy the special requirements in Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) for the continuation of weekly payments of compensation.
3. The applicant applied to this office for procedural review by way of application dated 24 July 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. On 27 April 1998 the applicant suffered injury to his right shoulder in the course of his employment as a driver. The applicant was unable to return to his pre-injury employment. He obtained alternative employment as an on-line picker packer and delivery driver. The applicant has also been in receipt of weekly payments of compensation.
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). The relevant version of the Guidelines came into effect on 11 October 2013.

Submissions by the applicant

6. 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.
7. The applicant has made submissions in respect of the medical evidence relied upon by the insurer, the issue of future treatment and the merit review decision.
8. I am only able to review the procedures undertaken by the insurer in making the work capacity decision. I am not able to have any regard for future treatment nor am I able to consider or review any aspect of the recommendation from the Workcover NSW Merit Review Service.

Submissions by the Insurer

9. The Insurer submitted that all procedures were followed correctly in making the work capacity decision and that all documents were provided.

The Decision

10. Pursuant to Guideline 5.3.2 the insurer informed the applicant that a work capacity assessment was completed on 16 April 2015. The

applicant was informed of the work capacity decision by letter dated 27 April 2015. The insurer has complied with the Guideline.

11. 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 each section in both pieces of legislation. As a result the applicant was advised that his payments would cease from 6 August 2015. This is in excess of the required notice period. The Insurer has complied with the legislation and the Guidelines.
12. Guideline 5.3.2 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 referenced Section 59A(1),(2) and (3). The insurer has advised the applicant that his entitlement to medical expenses will cease twelve months after his entitlement to weekly payments cease. Therefore, the insurer has particularised that the applicant's entitlement to payment of medical and related treatment expenses will cease on 6 August 2016 unless Section 59A(3) becomes relevant. The insurer has complied with the legislation and the Guidelines.
13. In accordance with the same Guideline the insurer has explained the relevant entitlement periods and informed the applicant that he has received 856 weeks of compensation payments. This places him after the second entitlement period and therefore his ongoing entitlements would be assessed pursuant to Section 38(3) of the 1987 Act.
14. The insurer has cited the special requirements of Section 38(3) of the 1987 Act at page 4 of the work capacity decision.
15. In accordance with Section 32A of the 1987 Act the insurer has determined that the vocational role of Pick Packer and Delivery Driver is suitable employment. The insurer relied upon a vocational assessment report dated 16 December 2014 to make this decision. The insurer also noted that the nominated treating doctor certified these duties as

suitable and the applicant was performing these duties in his present role. The insurer has complied with the Guidelines and legislation.

16. In accordance with Section 43(1)(a) of the 1987 Act the insurer has made a decision about the applicant's work capacity. The insurer has decided the applicant has the capacity to work 38 hours per week. The insurer referred to the certificates of capacity from the nominated treating doctor, the most recent of which was dated 10 April 2015, which certified the applicant to have capacity to work "full" hours (noted to be 38 hours) on "normal" days each week. The insurer has complied with the legislation and guidelines.
17. At page 9 of the work capacity decision the insurer has reviewed 12 weeks of the applicant's pay slips. It was noted that for 7 of the 12 weeks the applicant had not worked to his certified capacity. On the remaining 5 weeks the applicant did work to his capacity. Given the evidenced capacity the insurer deemed that the applicant was capable of undertaking further additional employment or work that would increase his current weekly earnings. The insurer had determined that the applicant had not fulfilled the special requirement of Section 38(3)(c) of the 1987 Act. In explaining this determination the insurer has complied with the Guidelines and the legislation.
18. Pursuant to Guideline 5.3.2 the insurer has also outlined the evidence considered in making the decision. The insurer has noted the author and the date and addressed key information. It is noted that the most recent medical evidence relied upon by the insurer with respect to the applicant's capacity were the certificates of capacity from the nominated treating doctor dated 9 January 2015 and 10 April 2015.
19. The decision of the Insurer dated 27 April 2015 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

Finding

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

The Stay

21. 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.

22. The work capacity decision was dated 27 April 2015. The applicant applied for internal review on 11 May 2015. The application was made within the 30 day requirement for the stay to operate immediately.

RECOMMENDATION

23. The application for procedural review is dismissed.

24. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 6 August 2015.

25. The payments are to be back-dated to 6 August 2015 in accordance with clause 30 Schedule 8 of the *Workers Compensation Regulation 2010*.

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

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