

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. I would recommend in this unusual case that the Insurer seek clarification from the merit review service concerning the interpretation and application of section 38(3)(c) prior to ceasing payments.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 12 March 2015. The decision informed the applicant that his weekly payments of compensation would reduce to \$9.32 per week, with the decision becoming effective on and from 19 June 2015.¹ The applicant sought internal review on 25 March 2015 and the Internal Review Decision was dated 27 April 2015. That decision confirmed the earlier work capacity decision.
2. The applicant applied to the Authority for Merit Review on 20 May 2015 and they delivered findings and recommendations dated 26 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 is not entitled to any ongoing weekly payments.
3. The applicant made application to this office dated 14 July 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

¹ The merit review service described the work capacity decision as "reducing [the applicant's] weekly payments of compensation to nil." (See paragraph 14 of the merit review recommendation dated 26 June 2015.) This should be contrasted with paragraph 5 of page 5 of the work capacity decision which clearly refers to "an ongoing entitlement to wage benefits at the rate of \$9.32 (gross) per week." The effective date of 19 June 2015 also appears on page 5.

4. All of the above arose out of a recommendation by this office in 2014² which overturned a previous work capacity decision by the insurer on procedural grounds.
5. There is no need to restate the facts and circumstances surrounding the claim, which appear in the earlier recommendation and which are not in dispute.
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).

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 applied for a procedural review.
8. The applicant’s submissions go mainly to issues concerning the merits of his claim. Apart from making comments about the relative reliability of certain doctors, he predominantly complains about the effect of the legislation. Nothing of a procedural nature arises.

Submissions by the Insurer

9. The Insurer made no submissions.

The Decision

10. The decision of the Insurer complies with the legislation and the Guidelines. The errors previously noted by this Office were rectified the second time around.
11. The Insurer is entitled to continue making payments beyond 130 weeks if the worker complies with section 38(3) of the 1987 Act. There are three elements which must be satisfied, namely (a) a request for

² Reported as 21114 (recommendation 211 of 2014)

continuation of payments (the applicant is exempt from this requirement), (b) return to work for a minimum of 15 hours per week earning at least of \$173 per week and, most critically for present purposes:

*“(c) the worker is assessed **by the insurer** as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker’s current weekly earnings.”*

12. Clearly the Insurer believed the applicant had satisfied all relevant requirements, since it had determined that there was an ongoing liability to pay \$9.32 per week. Despite this, the merit reviewer made the following observations at paragraph 78:

[...] I am not satisfied that [the applicant] is incapable of undertaking further additional employment or work that would increase his current weekly earnings. Therefore he does not satisfy the requirements of section 38(3)(c) of the 1987 Act.

13. Respectfully it might be observed that this is an obvious error of law. The test in section 38(3)(c) clearly requires the judgment of the Insurer and no-one else to be taken into account. The opinion of the merit review service cannot be substituted for the opinion of the insurer.

14. Despite this obvious error, the recommendation of the merit review service is binding on the Insurer and cannot be reviewed by this office.

Finding

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

The Stay

16. 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. Accordingly the applicant should continue to be



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paid at the rate applicable immediately prior to the date of the work capacity decision until receipt by the parties of this recommendation.

RECOMMENDATION

17. The application for procedural review is dismissed.

18. I would recommend in this unusual case that the Insurer seek clarification from the merit review service concerning the interpretation and application of section 38(3)(c) prior to ceasing payments.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
25 August 2015