

**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 3 July 2015.**
- c. The payments are to be back-dated to 3 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 27 March 2015. The insurer advised the applicant that her weekly payments of compensation would cease on 3 July 2015. The applicant sought internal review of the decision on 24 April 2015 and the Internal Review Decision was dated 19 May 2015. That decision confirmed the cessation of the applicant's weekly payments however it altered the decision in respect of suitable duties from library assistant to sales assistant.
2. The applicant then sought Merit Review from the Authority on 15 June 2015 and they delivered a decision dated 13 July 2015 finding that the applicant did not satisfy the special requirements in Section 38(3) 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 27 July 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 30 October 2000 the applicant suffered injury to her back, shoulder and neck in the course of her employment. The applicant returned to her pre-injury employer performing suitable duties until she was medically retired on or about 14 February 2006. In or about 2010 the applicant obtained employment as a production line worker for a period of 3 to 4 months. Apart from that period the applicant has not been gainfully employed and has remained 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 submissions are as follows:
  - The insurer’s decision has changed multiple times;
  - The employment options identified are impossible to find or non-existent; and
  - The decision has not taken into consideration psychological and stress issues.
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 applicant's second and third submissions are not relevant to procedural review.

10. In respect of the applicant's submission that the insurer's decision has changed multiple times. I note that Guideline 5.1 allows a work capacity decision to be made at many points throughout the life of a claim. Therefore, as long as the decision is logical, rational, reasonable and more likely than not be correct then more than one work capacity decision can be made by the insurer.

### **Submissions by the Insurer**

11. The insurer made submissions dated 30 July 2015 to the application. The insurer conceded that the work capacity decision which is the subject of this review is the third work capacity decision made in respect of this applicant. As stated above the insurer is entitled to make more than one work capacity decision.
12. The insurer has submitted that the remaining submissions of the applicant are relevant only to merit review. I agree with this submission of the insurer.

### **The Decision**

13. Pursuant to Guideline 5.3.2 the insurer has informed the applicant that a work capacity assessment concluded on 25 March 2015. The applicant was advised of the work capacity decision arising out of that assessment by letter dated 27 March 2015. The Insurer has complied with the Guideline.
14. 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 3 July 2015.

This is the correct notice period. The Insurer has complied with the legislation and the Guidelines.

15. 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 pages 3 and 4 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 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. The insurer has complied with the Guideline and legislation.
16. In accordance with the same Guideline the insurer has explained the relevant entitlement provisions and has informed the applicant that she has received 647 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.
17. 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.
18. In accordance with Section 32A and Section 43(1)(b) of the 1987 Act the insurer identified suitable employment for the applicant as retail sales assistant, receptionist and library assistant. The insurer relied upon an earning capacity assessment dated 8 December 2014 to make this decision. The insurer complied with the legislation and the Guidelines. For the purposes of this work capacity decision the insurer has selected the role of library assistant to be the relevant suitable employment. In the internal review the insurer selected the relevant suitable employment to be sales assistant. Both of these decisions were procedurally correct.
19. In accordance with Section 43(1)(a) of the 1987 Act the insurer determined that the applicant had the capacity to perform suitable duties for 20 hours per week. The insurer relied upon the certificate of capacity valid from 11 March 2015 to 7 April 2015 from the nominated treating doctor. The doctor certified the applicant fit to perform suitable duties for

4 hours per day, 5 days per week with restrictions. In determining capacity the insurer has complied with the Guidelines and the legislation.

20. In accordance with Section 43(1)(c) of the 1987 Act the insurer determined the applicant has an earning capacity of \$509.32 per week in the work capacity decision and \$450.60 per week in the internal review decision. The insurer relied upon the same earning capacity assessment report referred to above to make these decisions. The insurer has complied with the legislation and the Guidelines.

21. 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 3 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.

22. The applicant was informed by the insurer that she had not complied with the special conditions contained in Section 38(3) for the following reasons:

- *"You have not returned to work for a period of at least 15 hours per week and you are not in receipt of current weekly earnings of at least \$173 per week.*
- *You have been assessed as capable of undertaking further additional employment that would increase your current weekly earnings."*

In explaining the above the insurer has complied with the Guidelines and the legislation.

23. 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 page 8 of the decision.

24. The decision of the Insurer dated 27 March 2015 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

## **Finding**

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

## **The Stay**

26. 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.

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

## **RECOMMENDATION**

28. The application for procedural review is dismissed.

29. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 3 July 2015.

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

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

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