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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 29 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 5 May 2015 and the Internal Review Decision dated 29 May 2015 confirmed the original work capacity decision.
2. The applicant then sought Merit Review from the Authority on 25 June 2015 and they delivered a decision dated 22 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) 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.



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4. On 18 August 2007 the applicant suffered injury to both shoulders during the course of his employment as a production manager. The applicant underwent a rotator cuff repair in 2008. He returned to his pre-injury employer on suitable duties and his employment was terminated in 2010. The applicant has undergone two further surgeries to his left shoulder in or about 2010 and 2012. At the time of the work capacity decision the applicant was in receipt of weekly payments of compensation from the insurer.
5. The applicant also suffered injury to his back on or about 7 May 2010. The applicant has undergone physiotherapy and had investigations performed but insists that his back condition has not improved.
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). 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 has made the following submissions:
 - The insurer and merit review have failed to take into consideration the medical evidence from the applicant’s treating specialist and general practitioner;
 - Most of the insurer’s decision was based upon a report from Dr K and he provided an unfair assessment; and
 - The work capacity decision has been based upon one injury and not as a whole injury covering both claims.

Submissions by the Insurer



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9. The Insurer provided submissions dated 31 July 2015. The insurer made the following submissions:
- They took into consideration all available medical evidence on file;
 - The insurer's decision was not based solely upon the report of Dr K;
 - The insurer made a work capacity decision *"on 29 April 2015 for [the applicant's] injury dated 18 August 2007 and injury dated 7 May 2010 on 8 May 2015. In [the applicant's] Application for Internal Review dated 5 May 2015 he requested to have the work capacity decision dated 29 April 2015 reviewed, which is in relation to his shoulder injury on claim number [18848XXXX]."*

The Decision

10. Guideline 5.3.2 requires the insurer to inform the applicant the date of the work capacity assessment. On this occasion the applicant was informed that the work capacity assessment was completed on 28 April 2015 and the applicant was notified of the decision by letter dated 29 April 2015.
11. In accordance with the same Guideline the insurer has explained the relevant entitlement periods and informed the applicant that he has received 204 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.
12. The insurer has cited the special requirements of Section 38(3) of the 1987 Act at page 3 of the work capacity decision.
13. In accordance with Section 32A of the 1987 Act the insurer has determined that the vocational role of car park attendant is suitable employment. The insurer relied upon a case conference between a functional assessment provider and the nominated treating doctor as well as a supplementary labour analysis report dated 30 March 2015 in determining the nature of the suitable employment.
14. 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



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decided the applicant has the capacity to work 12 hours per week. The insurer referred to a *“fax response dated 30 March 2015”* from the nominated treating doctor approving the suitable employment option and a certificate of capacity also from the nominated treating doctor certifying the applicant with the capacity to perform suitable duties for 4 hours for 3 days per week till 14 May 2015.

15. As stated earlier I am only in a position to review the procedure the insurer used in coming to its decision. I am unable to review the judgment or discretion exercised by the insurer. Those are issues which cannot be reviewed in this forum. Likewise I am unable to review any recommendations or decision made by the WorkCover NSW Merit Review Service.
16. In making the decisions in respect of both suitable duties and capacity the insurer has relied upon supporting evidence from both Dr K and the applicant's nominated treating doctor. The insurer has actually preferred the evidence of the nominated treating doctor with respect to capacity over that of Dr K. For those reasons I do not accept the submissions of the applicant that the insurer failed to take into consideration the medical evidence of his general practitioner and specialist and that the decision was based solely upon the report of Dr K.
17. The insurer has correctly advised the applicant that as he was not working 15 hours per week, not earning \$173 per week and had not maximised his earning capacity he did not meet all of the requirements to be entitled to ongoing weekly payments of compensation in accordance with Section 38(3) of the 1987 Act.
18. Section 54(2)(a) of the 1987 Act and the Guidelines require 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 the required notice period. The Insurer has complied with the legislation and the Guidelines.
19. 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



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treatment expenses. The insurer has referenced Section 59A(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 unless Section 59A(3) becomes relevant. The insurer has complied with the legislation in force at the time, and the Guidelines.

20. The remaining submission from the applicant is that this work capacity decision only took into consideration one injury (shoulders) whereas all of his injuries (including the back injury) should have been considered when making the decision.
21. The insurer has submitted that two work capacity decisions have been made. The decision which is the subject of this review and a further decision dated 8 May 2015 in respect of the back injury.
22. For the purposes of a work capacity decision the insurer is to assess the capacity of a **worker**, not the injuries suffered on either the same or different dates. Otherwise there is the anomaly of an insurer transitioning 'parts' of a worker rather than the worker. In this instance the insurer has transitioned the applicant's 'shoulders' and in the work capacity decision which is not the subject of this review the insurer attempted to transition the applicant's 'back'.
23. However, the *Workers Compensation Amendment (Weekly Payments) Regulation 2015* amends Schedule 8 of the *Workers Compensation Regulation 2010* to include a provision at Clause 17A which transitions all workers who were existing recipients of weekly payments immediately before 1 September 2015.
24. As the worker is in receipt of weekly payments of compensation this Regulation has the effect of transitioning the worker. Therefore, whether the work capacity decision has actually transitioned 'part' or the 'whole' worker is no longer an issue.
25. The decision of the Insurer dated 29 April 2015 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

Finding



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

The Stay

27. 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.

28. The work capacity decision was dated 29 April 2015. The applicant applied for internal review on 5 May 2015. The application was made within the 30 day requirement for the stay to operate immediately.

RECOMMENDATION

29. The application for procedural review is dismissed.

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

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

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

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
1 September 2015