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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 her weekly payments at the rate applicable prior to 8 June 2015.**
- c. The payments are to be back-dated from 8 June 2015 in accordance with clause 30 Schedule 8 to 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 February 2015. The decision informed the applicant that her weekly payments of compensation would cease on 8 June 2015. The applicant sought internal review on 7 April 2015 and the Internal Review Decision was dated 4 May 2015. That decision confirmed the original work capacity decision.
2. The applicant applied to the Authority for Merit Review on 2 June 2015 and they delivered findings and recommendations dated 6 July 2015. The Authority made a finding that the applicant did not meet the special requirements under Section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act).
3. The applicant then made application to this office dated 3 August 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. The applicant had previously sought procedural review of a work capacity decision dated 31 July 2013. The applicant was successful and the work capacity decision was set aside by an earlier recommendation of this office<sup>1</sup>.
5. The facts and circumstances concerning the background of this claim are set out in the aforementioned recommendation and need not be repeated.
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 has submitted 11 pages of submissions. The applicant’s submissions include:
  - Insufficient notice being given for the work capacity decision;
  - The production and consideration of additional wage material;
  - The assessment of the insurer as to the applicant’s capacity to work;
  - The assessment of earning capacity;
  - Information provided to the WorkCover NSW Merit Review Service and their consideration of such material.
9. I am only able to review the insurer’s procedure with respect to making the work capacity decision. Any decision with respect to suitable employment, capacity to work; earning capacity and consideration of wage material is within the discretion of the insurer and not the subject of procedural review. I am not in a position to review the internal review decision by the insurer. Likewise, I am unable to review any findings or recommendations made by the Merit Review Service.

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<sup>1</sup> Reported and numbered as 8114



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10. In respect of the first submission made by the applicant the insurer advised that a fair notice telephone call was made to the applicant on 9 January 2015 and a letter was sent the same day advising of the insurer's intention to perform a work capacity assessment. This was confirmed in the applicant's submissions noting that she received the letter on 13 January 2015. I am satisfied that the insurer provided the applicant with sufficient fair notice in accordance with Guideline 5.2.
11. The remaining submissions put forward by the applicant are not relevant to procedural review.

#### **Submissions by the Insurer**

12. The Insurer has provided submissions dated 10 August 2015 in response to the application. The insurer submitted that a fair notice telephone call was made and letter sent dated 9 January 2015. I accept that submission.
13. The remaining submissions by the insurer related to the applicant providing further documentation for consideration and documentation received by the merit review service. These submissions, albeit, responding to the applicant's submissions are not relevant to this procedural review.

#### **The Decision**

14. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
15. Guideline 5.3.2 requires the insurer to advise the applicant of the date of the work capacity assessment. The insurer informed the applicant that a work capacity assessment was completed on 26 February 2015. As a result of that assessment the applicant was informed of the work capacity decision by letter dated 27 February 2015. The insurer has complied with the Guideline.
16. 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



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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 from 8 June 2015. This is the required notice period. The Insurer has complied with the legislation and the Guidelines.

17. Pursuant to Guideline 5.3.2 the insurer is to advise the applicant of the impact the decision has on her entitlement to medical and related treatment expenses. The Insurer has referenced Section 59A(2) of the 1987 Act and advised the applicant that her entitlement to medical expenses will cease 12 months after her entitlement to weekly payments ceases. The insurer has also referenced and explained Section 59A(3) of the 1987 Act. The insurer has complied with the legislation in force at the time, and the Guidelines.
18. Guideline 5.3.2 also requires the insurer to inform the applicant of the relevant entitlement periods. The insurer advised the applicant that she has received 544 weeks of compensation payments and as a result her ongoing entitlements are subject to the special requirements contained in Section 38(3) of the 1987 Act. The special requirements of that section are set out by the insurer at page 3 of the decision.
19. The insurer correctly advised the applicant that Section 38(3)(b) requires her to return to work for not less than 15 hours and that she must earn at least \$173 per week (adjusted figure). The insurer also advised that Section 38(3)(c) requires that the applicant be assessed as likely to continue to be indefinitely incapable of undertaking further additional employment that would increase his current weekly earnings.
20. In accordance with Section 32A and Section 43(1)(b) of the 1987 Act the insurer has determined that the vocations of bilingual community educator, medical receptionist and administration assistant were all suitable employment. The insurer has maintained this position since a functional assessment and earning capacity assessment report was obtained on 15 October 2013. It is noted within the decision that the applicant was working as an administrative assistant and bilingual



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community educator. The insurer has complied with the legislation and the Guidelines.

21. In accordance with Section 43(a) of the 1987 Act the insurer has determined that the applicant has the capacity to work 15 hours per week. This was in accordance with the work capacity certificate from the nominated treating doctor. The insurer has complied with the legislation and Guidelines.
22. The insurer has noted that the applicant has not complied with Section 38(3)(b) in that she has not returned to work for not less than 15 hours per week furthermore the applicant has not satisfied Section 38(3)(c) as the insurer decided that the applicant was not working to her full capacity.
23. The decision of the insurer dated 27 February 2015 has displayed a careful consideration of the requirements of the Guidelines and 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.

### **RECOMMENDATION**

26. The application for procedural review is dismissed.
27. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 8 June 2015.



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28. The payments are to be back-dated from 8 June 2015 in accordance with clause 30 Schedule 8 to the Workers Compensation Regulation 2010.

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

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