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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 7 August 2015.**
- c. The payments are to be back-dated from 7 August 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 30 April 2015. The decision informed the applicant that her weekly payments of compensation would cease on 7 August 2015. The applicant sought internal review on 21 May 2015 and the Internal Review Decision was dated 19 June 2015. That decision confirmed the original work capacity decision.
2. The applicant applied to the Authority for Merit Review on 3 July 2015 and they delivered findings and recommendations dated 6 August 2015. The Authority made a finding that the applicant did not meet the special requirements under Section 38 of the *Workers Compensation Act 1987* ("the 1987 Act").
3. The applicant then made application to this office dated 7 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 suffered injury to both shoulders during the course of her employment as a process worker. The accepted date of injury is 19 June 2010. The applicant returned to her pre-injury employer performing suitable duties however these duties were no longer available and the applicant's employment was terminated in March 2011. The applicant underwent surgery to the left shoulder on or about 28 June 2011. At the time of the work capacity decision the applicant was 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).

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 applied for a procedural review.
7. The applicant has submitted that she does not agree with the decision of the insurer and seeks '*further review*'.
8. 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 and earning capacity 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.

Submissions by the Insurer



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9. The Insurer has advised by email dated 10 August 2015 that they have no further submissions other than those addressed in the internal review and merit review process.

The Decision

10. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
11. 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 commenced on 8 April 2015 and completed on 29 April 2015. The applicant was informed of the work capacity decision by letter dated 30 April 2015. The insurer has complied with the Guideline.
12. The same Guideline requires the insurer to explain the relevant entitlement periods. The insurer has informed the applicant that she has received 194 weeks of compensation payments and as a result her ongoing entitlements will be subject to the provisions of Section 38 of the 1987 Act. The special provisions of that section are explained to the applicant on page 5 of the work capacity decision. The insurer has complied with the Guideline.
13. In accordance with Section 32A and Section 43(1)(b) of the 1987 Act the insurer has determined that the vocations of sales assistant, packer, process worker and assembler were all suitable employment. The insurer relied upon a vocational assessment report dated 4 March 2015 as well as an approval by the nominated treating doctor dated 19 March 2015. In making this decision the insurer has complied with the legislation and the Guidelines.
14. In accordance with Section 43(a) of the 1987 Act the insurer has determined that the applicant has the capacity to work 40 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.



15. In accordance with Section 43(1)(c) of the 1987 Act the insurer determined that the applicant could earn \$929.10 per week as a process worker. The insurer relied upon the vocational assessment report dated 4 March 2015. The insurer has complied with the legislation and Guidelines.
16. At page 5 of the work capacity decision the insurer has explained to the worker that as she is not working, and has been assessed as having capacity, she has not complied with the special requirements of Section 38(3) of the 1987 Act and as a result she is not entitled to ongoing payments of weekly compensation.
17. Guideline 5.3.2 also 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 from 7 August 2015. This is the required notice period. The Insurer has complied with the legislation and the Guidelines.
18. 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 particularised the date of 7 August 2016. 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.
19. The decision of the insurer dated 30 April 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation.

Finding



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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 30 April 2015 and the applicant applied for internal review 21 May 2015. The applicant made the application for review within the 30 day period for the stay to operate immediately.

RECOMMENDATION

23. The application for procedural review is dismissed.

24. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 7 August 2015.

25. The payments are to be back-dated from 7 August 2015 in accordance with clause 30 Schedule 8 to the *Workers Compensation Regulation 2010*.

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

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