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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 2 July 2015.**
- c. The payments are to be back-dated to 2 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 26 March 2015. The decision informed the applicant that his weekly payments of compensation would be reduced to \$194.27 per week from 2 July 2015. The applicant requested an internal review by application dated 29 March 2015 received by the insurer on 1 May 2015. The internal review decision was dated 26 May 2015 and confirmed the original work capacity decision. The only difference being that the '*transitional rate*' used to calculate the applicant's pre-injury earnings and ongoing entitlement had been indexed as at April 2015 and the amount the applicant was entitled to in weekly payments of compensation had increased slightly to \$204.27 per week.
2. The applicant applied to the Authority for Merit Review on 25 June 2015 and they delivered findings and recommendations dated 20 July 2015. The Authority made a finding that the applicant satisfied the special requirements for continuation of weekly payments and pursuant to Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) the



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applicant is entitled to ongoing compensation payments at the rate of \$204.27 per week.

3. The applicant then made application to this office dated 13 August 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. The applicant had previously sought procedural review of a work capacity decision dated 31 December 2013. The applicant was successful and the work capacity decision was set aside by an earlier recommendation of this office¹.
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 made over two pages of submissions in response to a work capacity decision which has been decided *in his favour*. The applicant’s submissions include:
 - Although the Insurer has decided that the applicant has complied with Section 38(3) of the 1987 Act the applicant points out that he did not comply with Section 38(3)(a). The applicant submits that as he was not required to comply with Section 38(3)(a) the insurer had erred in referencing the Section at page 3 of the decision.

¹ Reported and numbered as 11114



Guideline 5.3.2 requires the Insurer to reference the relevant legislation. As Section 38(3)(a) is part of the relevant section being 38(3) the insurer was obliged to reference the entire Section. The Insurer was correct in advising the applicant that he had met the special requirements of the Section. The insurer is not obliged to inform a worker that he had not complied with a section that was not relevant to him particularly, when the insurer was not taking issue with the point. The difference between the applicant's situation in this instance and the decision to which he refers in his submissions is that in the circumstances of that case Section 38(3)(a) of the 1987 Act did not apply to the worker as he was an existing recipient yet the insurer was relying upon the non-compliance of that section to discontinue the worker's payments. That was an error. I do not consider in this instance that the insurer has made an error by referring to the entire section and concluding that the applicant has complied with the special conditions.

- That the insurer has determined that the duties of a storeman are suitable duties however the applicant submits that there is no evidence to come to that decision.

As referred to above I am only able to review the procedures undertaken by the insurer and not any discretion exercised by the insurer in coming to a decision with respect to suitable duties. Furthermore, I note that the applicant is performing suitable duties with the employer in which he performs "1 hour of batching work per shift leaving me a residual of 4 hours sitting behind management doing nothing." The provision of suitable duties by an employer is an issue which is not relevant to procedural review.

The remaining submissions by the applicant are not relevant to procedural review.

Submissions by the Insurer

9. The Insurer has provided submissions dated 17 August 2015 in response to the application and the applicant's submissions.

The Decision



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10. The relevant WorkCover Work Capacity Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
11. In accordance with the legislation and the Guidelines the insurer informed the applicant that he was an existing recipient of weekly compensation payments and as such his pre-injury average weekly earnings are taken to be the transitional amount as set out in Schedule 6 Part 19H Division 1 Clauses 1 and 2 of the 1987 Act.
12. Pursuant to Section 43(1)(a) of the 1987 Act the Insurer has made a decision in respect of the applicant's current work capacity. The insurer decided that the applicant has the current capacity to work 20 hours per week. The insurer relied upon the certificate of capacity from the applicant's nominated treating doctor dated 25 February 2015. It was also noted that the applicant was working 20 hours per week with the pre-injury employer. The insurer has complied with the Guidelines and the legislation.
13. In accordance with Section 43(1)(b) and Section 32A of the 1987 Act the insurer has made a decision in respect of what constitutes suitable employment for the applicant. The insurer determined the applicant was able to perform duties as a store person. It is noted that the applicant has returned to the pre-injury employer performing suitable duties. The insurer has complied with the legislation and the Guidelines.
14. Pursuant to Section 43(1)(c) of the 1987 Act the insurer has determined that the applicant is able to earn \$584.05 per week. The insurer has relied upon the wage records of the applicant for the period 2 February to 22 March 2015 to make this decision. The insurer has complied with the Guidelines and the legislation.
15. In accordance with Guideline 5.3.2 the insurer is to explain to the applicant of the relevant entitlement periods. The insurer has informed the applicant that he has received 155 weeks of compensation payments and as such his entitlements will be assessed under Section 38 of the 1987 Act.
16. The insurer has explained the special requirements of Section 38(3) on page 3 of the work capacity decision. The insurer was satisfied that the



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applicant had complied with the special requirements which would entitle him to ongoing payments of weekly compensation after the entitlement period.

17. It is noted that the applicant submitted that the insurer made an error and that he had not complied with Section 38(3)(a). As discussed above this section did not apply to the applicant as he was an existing recipient and as such there was no requirement for compliance. The applicant had complied with Section 38(3)(b) & (c). The insurer has not made a procedural error by informing the applicant that he had complied with the section and that he was entitled to ongoing payments of weekly compensation.
18. The insurer referenced the relevant legislation and clearly explained the line of reasoning for the decision and provided a working out of the algorithm used in Section 38(7) to calculate the applicant's ongoing entitlements.
19. In accordance with Section 54(2)(a) and (4) of the 1987 Act the insurer informed the applicant that the reduction in weekly payments would take effect from 2 July 2015. This is the correct notice period. The insurer has complied with the legislation and Guidelines.
20. Guideline 5.3.2 requires the insurer to advise the worker of the effect the decision will have on his entitlement to medical and related treatment expenses. The insurer has correctly informed the applicant that he will continue to be entitled to reasonable and necessary medical and treatment expenses in accordance with Section 60 of the 1987 Act.
21. The decision of 26 March 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation.

Finding

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

The Stay



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23. 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

24. The application for procedural review is dismissed.

25. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 2 July 2015.

26. The payments are to be back-dated to 2 July 2015 in accordance with clause 30 Schedule 8 of the *Workers Compensation Regulation 2010*.

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

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