

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 of a work capacity decision is dismissed.**
- b. The work capacity decision of the Insurer dated 26 March 2014 is confirmed.**
- c. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 3 July 2014.**
- d. The payments are to be back-dated to 3 July 2014 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014 (Amendment Regulation)*.**
- e. Such payments are to continue until the date of receipt of this recommendation in accordance with clause 30(3) of the Amendment Regulation.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 26 March 2014. The decision reduced the applicant's weekly payments to nil effective from 3 July 2014. The applicant sought internal review and the Internal Review Decision (IRD) was dated 19 May 2014. She then sought Merit Review from the Authority on 18 June 2014 and they delivered a decision dated 10 July 2014 confirming the work capacity decision. The applicant then applied for procedural review on 11 August 2014.
2. I am satisfied that the applicant has made the application for Procedural Review in the proper form and within time.
3. The applicant had previously sought procedural review of a work capacity decision dated 24 May 2013. The applicant was successful and the work capacity decision was set aside by an earlier

recommendation of this office¹. The facts and circumstances concerning the background to the claim are set out in the aforementioned recommendation and need not be repeated.

Submissions by the applicant

4. 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.*”
5. One issue raised by the applicant was that superannuation contributions were not made on her behalf during the period in which she received weekly payments of compensation as the employer considered her to be on ‘leave without pay’. This issue is an industrial matter and cannot be dealt with in the review.
6. The applicant disputes that she received weekly payments of compensation for the stated period of 160 weeks. She advises that the actual period was “128 weeks and 21 days.” Either calculation accepts that the applicant was in receipt of weekly payments for a period of greater than 130 weeks. This is the appropriate period upon which to assess the worker under *Section 38* of the 1987 Act.
7. Other submissions by the applicant were not relevant to procedural review.

Submissions by the Insurer

8. The Insurer has not made any submissions in response to this application.

The Decision

9. The insurer has taken considerable care to overcome the deficiencies in the original decision dated 24 May 2013. It is noted:

¹ Reported and numbered as 3313.

- The correct notice period has been given and the applicant has been advised of the effect the decision has on her entitlement to medical and related treatment expenses. Sections 54(2), 59A,(2) and (3) of the 1987 Act have been explained and referenced;
- Section 38 of the 1987 Act is the correct Section under which the applicant is to be assessed as at the time of the decision dated 26 March 2014 the applicant had been in receipt of weekly payments of compensation for in excess of 130 weeks.

10. There are no procedural errors identifiable in the decision.

11. On 3 September 2014 the *Workers Compensation Amendment (Existing Claims) Regulation 2014* (the Amendment Regulation) was published. Clause 26 of the Amendment Regulation provides that Part 2 “takes effect on and from 1 October 2012.”

12. Clause 30 of the Amendment Regulation, which is in part 2 and therefore is deemed to have been in effect since 1 October 2012, is in the following terms:

30 Stay of work capacity decisions

- (1) A review under section 44 (Review of work capacity decisions) of the 1987 Act of a work capacity decision made in respect of an existing claim 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.
- (2) This clause applies to an internal review under section 44 (1) (a) of the 1987 Act only if the application for internal review is made by the worker within 30 days after the worker receives notice from the insurer of the work capacity decision to be reviewed.
- (3) The stay under this clause operates from the time the application for review is made until the worker is notified of the findings of the review (or the application for review is withdrawn).

(4) This clause applies despite section 44 (4) of the 1987 Act, which is deemed to be amended to the extent necessary to give effect to this clause.

13. It must follow that the applicant is entitled to the full benefit of the Amendment Regulation and therefore the Insurer should restore the applicant to the payments being received immediately prior to the payments ceasing or being reduced as a result of the original decision and the subsequent internal review decision.

FINDING

14. I find that no procedural error occurred in this matter.

RECOMMENDATION

15. The application for procedural review of a work capacity decision is dismissed.

16. The work capacity decision of the Insurer dated 26 March 2014 is confirmed.

17. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 3 July 2014.

18. The payments are to be back-dated to 3 July 2014 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014* (Amendment Regulation).

19. Such payments are to continue until the date of receipt of this recommendation in accordance with clause 30(3) of the Amendment Regulation.

20. These recommendations are binding on the Insurer: see section 44(3)(h) of the 1987 Act.

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
25 September 2014