



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 3 August 2015.**
- c. The payments are to be back-dated from 3 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 27 April 2015. The decision informed the applicant that her weekly payments of compensation would cease on 3 August 2015. The applicant sought internal review on 27 May 2015 and the Internal Review Decision was dated 22 June 2015. That decision confirmed the original work capacity decision.
2. The applicant applied to the Authority for Merit Review on 22 July 2015 and they delivered findings and recommendations dated 21 August 2015. The Authority made a finding that the applicant did not satisfy the special requirements contained in Section 38(3) of the Workers Compensation Act 1987 (the 1987 Act) for the continuation of weekly payments.
3. The applicant then made application to this office dated 17 September 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.



Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

4. The applicant had previously sought procedural review of a work capacity decision dated 4 July 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 provided 8 pages of extensive submissions including:
 - Although the applicant has returned to work she experiences an increase in her pain levels when she returns home and this impacts upon her daily living activities;
 - The applicant has been assessed as being able to work 8 hours per week and as such has returned to suitable duties for 8 hours per week. Therefore, her entitlement to weekly payments and medical expenses should not cease; and
 - Liability was accepted for the claim and the applicant was informed that she would receive weekly payments of compensation until she attained retirement age.
9. In accordance with Section 44 of the 1987 Act I am unable to review any discretion exercised or decisions made by the Authority in respect of capacity to work or suitable duties. I am also unable to take into consideration the effect that the work capacity assessment or decision

¹ Reported and numbered as 2314



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impacts upon the applicant either physically or financially. I am only to ensure that the insurer has correctly followed the procedures in making this work capacity decision.

Submissions by the Insurer

10. The Insurer has not provided any submissions in response to this application.

The Decision

11. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
12. 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 commenced on 24 April 2015 and was completed on 27 April 2015. The applicant was informed of the work capacity decision by letter dated 27 April 2015. The insurer has complied with the Guideline.
13. The same Guideline requires the insurer to explain the relevant entitlement periods. The insurer has informed the applicant that she has received in excess of 130 weeks of compensation payments and as a result her ongoing entitlements will be subject to the provisions of Section 38(3) of the 1987 Act. The insurer sets out the relevant special provisions of that section at page 7 of the work capacity decision.
14. In accordance with Section 32A and Section 43(1)(a)&(b) of the 1987 Act the insurer has determined that the role the applicant is presently performing, being that of a Primary School Literary Assistant is suitable employment. It was noted that at the time of the decision the applicant was performing these duties. The nominated treating doctor had certified those duties as suitable and assessed the applicant to have capacity to work 2 hours per day 4 days per week. In making this decision the insurer has complied with the legislation and the Guidelines.
15. As the applicant had received in excess of 130 weeks of compensation payments her ongoing entitlement is subject to Section 38(3) of the 1987



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Act. The special provisions require the applicant to return to work for a period of not less than 15 hours per week and be in receipt of at least \$155 per week.

16. At page 8 of the work capacity decision the Insurer decided that the applicant has current capacity and is able to engage in, and in fact has engaged in, suitable employment for 8 hours per week. However, as the applicant has not returned to work for the required 15 hours per week she is not entitled to ongoing weekly payments as a result of Section 38(3) of the 1987 Act.
17. Unfortunately for this applicant despite the fact that she is working to her certified capacity, and it is conceded that she does not have the capacity to increase her current working hours, there is no discretion which can be exercised by the insurer to continue paying her weekly payments of compensation. The legislation does not allow for payments of weekly compensation to continue in this applicant's case.
18. 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 3 August 2015. This is the required notice period. The Insurer has complied with the legislation and the Guidelines.
19. 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 4 August 2016 as the cessation date for the applicant's entitlement to medical and related treatment expenses. 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.



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20. The decision of the insurer dated 27 April 2015 has displayed a careful consideration of the requirements of the Guidelines and 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 27 April 2015 and the applicant applied for internal review 27 May 2015. The applicant has made the application for internal review within the 30 day period so the stay does 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 3 August 2015.

25. The payments are to be back-dated from 3 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
19 October 2015