



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. **Such weekly payments as the applicant is receiving by virtue of the stay arising out of clause 30 of Schedule 8 to the *Workers Compensation Regulation 2010* are to continue until receipt of this decision in accordance with the requirements of section 43(1) of the *Workers Compensation Act 1987* and any period of notice given therein has expired.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 1 July 2015. The decision informed the applicant that her weekly payments of compensation would cease on 8 October 2015. The applicant sought internal review on 13 July 2015 and the Internal Review Decision was dated 28 July 2015. That decision confirmed the work capacity decision.
2. The applicant applied to the Authority for Merit Review on 26 August 2015 and they delivered findings and recommendations dated 25 September 2015. The Authority made a finding that the applicant did not satisfy the special provisions under Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) in order to be entitled to ongoing weekly payments of compensation.
3. The applicant then made an application to this office dated 9 September 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 29 October 1996 the applicant suffered injury to her lower back whilst transferring a patient in the course of her duties as a nurse. The applicant returned to work on suitable duties however in 1998 those duties were no longer available and her employment was terminated. In



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2010 the applicant obtained part time employment as a nursing assistant with an alternate employer. She remains employed in this role. At the time of the work capacity decision the applicant was also in receipt of weekly payments of compensation.

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 noted in her application that merit review concluded she was not working more than 15 hours per week. The applicant has submitted that she has increased her working hours to 20 hours per week.
8. I am unable to review any discretion exercised by the Insurer in making decisions in respect of capacity to work. My review is limited to ensuring that the Insurer has followed proper procedures in making the work capacity decision. I am also unable to review any aspect of the Merit Review conducted by the Authority. If the applicant’s position has changed since the making of the work capacity decision in respect of the amount of hours worked and work capacity this is an issue which is to be directed to the Insurer.

Submissions by the Insurer

9. The Insurer has made submissions dated 15 October 2015 in response to this application. The insurer has submitted that fair notice of the decision was provided, the correct notice period was given for the cessation of payments and Merit Review upheld the decision that the applicant is not entitled to ongoing payments of weekly compensation.

The Decision



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10. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
11. Guideline 5.3.2 requires the Insurer to explain the relevant entitlement periods. The Insurer informed the applicant that she had received 479 weeks of compensation payments and as a result her entitlement to ongoing payments of compensation is subject to compliance with the special provisions set out in Section 38(3)(b) & (c) of the 1987 Act.
12. In accordance with the same Guideline the insurer has also referenced and explained the relevant legislation, being Section 38 of the 1987 Act, at page 3 of the work capacity decision.
13. Pursuant to Sections 32A and 43(1)(b) of the 1987 Act the Insurer considered the vocations of Assistant in Nursing, Activities Officer and Respite Care Worker to be suitable employment for the applicant. The Insurer based this decision upon an Earning Capacity Assessment.
14. In accordance with Section 43(1)(a) the Insurer made a decision that the applicant had current work capacity of 38 hours per week. The Insurer, in making this decision, accepted the evidence of an Independent Medical Consultant over that of the nominated treating doctor. This was within the discretion of the Insurer to do so and therefore, the decision was procedurally correct.
15. As stated previously I am unable to review any discretion or judgement exercised by the Insurer in making the work capacity decision I am only able to review the procedures of the Insurer in coming to its decision. I do note that the Internal Review Decision maintained that the applicant had current capacity to work of 38 hours however Merit Review preferred the opinion of the nominated treating doctor in that the applicant had capacity to work 20 hours per week.
16. The Insurer has then made a decision with respect to the amount the applicant is able to earn in keeping with Sections 35(1) and 43(1)(c) of the 1987 Act. The Insurer has particularised the amount the applicant would be able to earn in each of the vocations considered suitable employment based upon a 38 hour week. It was noted by the Insurer



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that the applicant would be able to earn at least \$887.30 per week in suitable employment (Respite Care Worker).

17. Based upon the aforementioned decisions the Insurer informed the applicant, at page 3 of the work capacity decision, that as she does not meet all of the requirements of Section 38(3) of the 1987 Act she is no longer entitled to weekly payments of compensation. Most notably, the insurer made a decision that the applicant was able to work full time and she was only working 15 hours per week.

18. As required by the Guidelines and Section 54(2) of the 1987 Act and Section 76(1)(b) of the *Interpretations Act 1987* the Insurer has informed the applicant that her entitlement to weekly payments will cease on 8 October 2015. The Insurer has provided the applicant with the proper notification and notice period.

19. The Insurer is also required to advise the applicant of the impact that the decision has on her entitlement to medical and related treated expenses. The Insurer has correctly referred to Section 59A(2) of the 1987 Act and informed the applicant that her entitlement to medical and related treatment expenses will cease twelve months after her entitlement to weekly payments ceases. Furthermore, the Insurer informed the applicant of Section 59A(3) should that Section become relevant.

20. The decision of the Insurer dated 1 July 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation.

Finding

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

RECOMMENDATION

22. The application for procedural review is dismissed.

23. Such weekly payments as the applicant is receiving by virtue of the stay arising out of clause 30 of Schedule 8 to the *Workers Compensation Regulation 2010* are to continue until receipt of this decision in accordance with the requirements of section 43(1) of the *Workers*



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Compensation Act 1987 and any period of notice given therein has expired.

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
30 October 2015