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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 work capacity decision by the Insurer dated 28 January 2015 is set aside.**
- 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 a new decision is made 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 28 January 2015. The Insurer concedes that the correct date of the decision should be 26 June 2015. The decision informed the applicant that her weekly payments of compensation would cease on 9 September 2015. The applicant sought internal review on 14 July 2015. It is submitted by the Insurer that the case manager did not receive the application for review and therefore an Internal Review Decision was not made.
2. The applicant applied to the Authority for Merit Review and they delivered findings and recommendations dated 23 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 15 October 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. On 1 June 2001 the applicant sustained injury to her left shoulder whilst carrying a monitor in the course of her employment as an IT Customer Support Officer. The applicant continued to work until 6 September 2006 at which stage she suffered an aggravation. Her employment was terminated on 29 May 2007 at which time she had no capacity for work. At the time of the work capacity decision the applicant was not working and 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. In addition to requesting a procedural review the applicant has submitted that the date on the work capacity decision is incorrect and thus has resulted in confusing information being contained in the decision.

Submissions by the Insurer

8. The Insurer has made submissions in respect of this application dated 19 October 2015. The Insurer has conceded that the work capacity decision has the incorrect date and should have been dated 26 June 2015.

The Decision

9. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.



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10. Guideline 5.3.2 requires the Insurer to advise the applicant the date the decision will take effect and state the impact the work capacity decision will have on the applicant's entitlement to weekly payments.
11. The work capacity decision is dated 28 January 2015. The Insurer has conceded the correct date should be 26 June 2015.
12. At page 4 of the work capacity decision the Insurer has advised the applicant that they will continue to pay her weekly compensation for a period of 3 months from the *"date of this notice"* with the addition of *"four working days to allow for postage and your receipt of this notice."*
13. The above notice provisions were given in accordance with Section 54(2)(a) and 54(4) of the 1987 Act and Section 76(1)(b) of the *Interpretations Act 1987*.
14. The Insurer has then advised the applicant that she *"will only continue to be entitled to weekly compensation payments until 9 September 2015 at which time your entitlement to weekly payments will terminate..."*
15. If the correct date of the work capacity decision is accepted to be 26 June 2015 as submitted by the Insurer then the incorrect notice period has been provided. The minimum notice period should have been 2 October 2015.
16. By providing the applicant with the incorrect notice period the Insurer has failed to comply with both the legislation and the Guidelines.
17. Guideline 5.3.2 also requires the Insurer to inform the applicant of the impact the work capacity decision has on her entitlement to medical and related treatment expenses. The Insurer has informed the applicant that her entitlement to such expenses will cease 12 months *"from the effective date listed above."*
18. As the Insurer has provided the incorrect date for the cessation of weekly payments it follows that the Insurer has also provided the incorrect notice period for the cessation of the applicant's medical and related treatment expenses pursuant to Section 59A(2) of the 1987 Act.



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19. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 28 January 2015.

Finding

20. Under the legislation the Insurer can make an assessment of the applicant's work capacity and then a decision about that work capacity, but they must comply with the legislation, the Regulation and the Guidelines in order to produce a procedurally correct result. In the current instance there have been breaches of the legislation and the Guidelines which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

RECOMMENDATION

21. The work capacity decision by the Insurer dated 28 January 2015 is set aside.

22. 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 a new decision is made in accordance with the requirements of section 43(1) of the Workers Compensation Act 1987 and any period of notice given therein has expired.

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
10 November 2015