



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.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 30 June 2015. The decision informed the applicant that her weekly payments of compensation would cease on 6 October 2015. The applicant sought internal review from the Insurer on 29 July 2015 and the Internal Review Decision was dated 24 August 2015. That decision confirmed the work capacity decision.
2. The applicant applied to the Authority for Merit Review on 21 September 2015 and they delivered findings and recommendations dated 15 October 2015. The Authority made a finding that the applicant did not satisfy the special provisions under Section 38(3) 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 21 October 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 1 April 2012 the applicant suffered injury to her lower back in the course of her employment as an Enrolled Nurse. The applicant returned to suitable duties with the pre-injury employer however she suffered an aggravation and a further period of total incapacity in or about August



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2013. The applicant remains employed however the employer has not been able to provide suitable duties since that time. At the time of the work capacity decision the applicant was 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. In addition to requesting the procedural review the applicant has made the following submissions:
 - She has a secondary psychological injury which has impacted upon her ability to do things and has reduced her capacity to work;
 - She also suffers from anxiety, nervousness and has difficulty sleeping. She also experiences a lack of interest in things and feels irritable and agitated. This has caused conflict in her relationship;
 - Her treating neurological surgeon’s opinion regarding work capacity was not considered;
 - Treating doctors have recommended a new MRI but the requests have been ignored;
 - She attends a treating chiropractor every fortnight for treatment and this was not referred to in the decision;
 - She does not agree with the selection of medical receptionist or administrative assistant as suitable employment options;
 - She was not offered the positions of employment referred to in the decision; and
 - She has been looking for employment without success.



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8. I am unable to review any discretion or judgment exercised by the Insurer in making decisions in respect of capacity to work or suitable employment options. My review is limited to ensuring that the Insurer has followed proper procedures in making the work capacity decision.
9. I am unable to consider any requests for treatment which have not been responded to by the Insurer. This is an issue which should be referred back to the Insurer.
10. I cannot take into consideration that the applicant has been attempting to obtain employment but that to date she has been unsuccessful. My review is solely limited to the procedures undertaken by the Insurer in making the work capacity decision.

Submissions by the Insurer

11. The Insurer has made the following submissions dated 28 October 2015 in response to this application:
 - Merit Review has upheld the decision;
 - The assessment of the applicant's capacity to work was based upon the nominated treating doctor's opinion which did take into consideration psychological issues; and
 - The treating psychologist has only commented on the applicant's fitness to return to her pre-injury employment.

The Decision

12. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
13. Guideline 5.3.2 requires the Insurer to explain the relevant entitlement periods. The Insurer informed the applicant that she had received 123 weeks of compensation payments at the time that the work capacity decision was made. By the time the decision comes into effect the applicant will have received 131 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.



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14. In accordance with the same Guideline the insurer has also referenced and explained the relevant legislation, being Section 38 of the 1987 Act, at pages 2 and 3 of the work capacity decision.
15. Pursuant to Sections 32A and 43(1)(b) of the 1987 Act the Insurer considered the vocations of Enrolled Nurse, Pathology Collector, Medical Receptionist and Administrative Assistant/Customer Service Officer to be suitable employment for the applicant. The Insurer based this decision upon a Functional Capacity Evaluation Report and the approval obtained from the applicant's nominated treating doctor. The insurer has complied with the Guidelines and legislation when making this decision.
16. In her submissions the applicant stated that she did not agree with the suitable employment options of a Medical Receptionist or Administrative Assistant. I am unable to review the discretion or judgment used by the Insurer in making these types of decisions. I note that the Insurer has based its decision upon evidence which is accepted by Guideline 4 and Section 44B of the 1987 Act. The decision as to suitable employment is procedurally correct.
17. In accordance with Section 43(1)(a) the Insurer made a decision that the applicant had current work capacity of 20 hours per week. The Insurer, in making this decision, accepted the evidence the nominated treating doctor. The Insurer has complied with the Guidelines and legislation.
18. The applicant has submitted that her secondary psychological injury was not taken into consideration when the work capacity decision was being made. I note that the Insurer has accepted the assessment on the certificates of capacity from the nominated treating doctor as the applicant's capacity to work. This is 5 hours per day and 4 days per week. Given that the applicant has retained the same nominated treating doctor throughout the entirety of the claim the Insurer is entitled to accept that the doctor would assess the applicant's capacity with reference to all of her injuries including psychological.
19. 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



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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 20 hour week. It was noted by the Insurer that the applicant would be able to earn at least \$606.80 per week in suitable employment (Endorsed Enrolled Nurse). The Insurer has complied with the Guidelines and Legislation.

20. Based upon the aforementioned decisions the Insurer informed the applicant, at pages 3 and 10 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 20 hours per week and she had not returned to work in any capacity.
21. The applicant has made submissions that she has attempted to obtain employment and wants to return to work but this is difficult as a result of her injury and the availability of suitable employment. Unfortunately, I am unable to take these issues into consideration when determining whether the Insurer has followed the correct procedure when making the work capacity decision.
22. 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 6 October 2015. The Insurer has provided the applicant with the proper notification and notice period.
23. 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.
24. The decision of the Insurer dated 30 June 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation.



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Finding

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

RECOMMENDATION

26. The application for procedural review is dismissed.

27. 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.

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