



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 1 January 2015.**
- c. The payments are to be back-dated to 1 January 2015 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.**
- 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 19 September 2014. The decision advised the applicant that her weekly payments of compensation would cease from 1 January 2015. The applicant sought internal review of the decision and the Internal Review Decision was dated 13 November 2014. The applicant then sought Merit Review from the Authority on 28 November 2014 and they delivered a decision dated 23 December 2014 upholding the work capacity decision. The applicant then applied to this office for procedural review on 5 January 2015.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. The applicant suffered injury to her back on 17 October 2008 during the course of her employment as a maintenance officer. In March 2009 the applicant underwent a laminectomy and discectomy. She participated in a graduated return to work program in an aged nursing home performing office duties. The applicant then underwent a spinal fusion in February 2011. By July 2011 the applicant had resumed modified duties until her employment was terminated in October 2012. The applicant then

obtained employment at a Bakery in March 2013 which she maintains to date.

4. The applicant was in receipt of weekly payments immediately before 1 October 2012. Accordingly Clause 8 of Part 19H of Schedule 6 to the *Workers Compensation Act 1987* (the 1987 Act) required the Insurer to conduct a work capacity assessment.
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).
6. The relevant version of the Guidelines came into effect on 11 October 2013.

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 requested a procedural review. The applicant’s submission seeks a review of all documentation in her file from 2008 to 2014 and for the reinstatement of her weekly payments. These submissions are not relevant for a procedural review.

Submissions by the Insurer

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

The Decision

9. Guideline 5.3.2 requires the Insurer to advise the date of the work capacity assessment. The insurer has advised the applicant that the work capacity assessment concluded on 18 September 2014. The Insurer advised the applicant that as a result of that assessment a decision was made and the applicant was advised of the work capacity decision by letter dated 19 September 2014. The Insurer has complied with the Guideline.

10. 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(2)(a) and (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 1 January 2015 which is in excess of the required notice period.
11. Guideline 5.3.2 requires the Insurer to explain the relevant entitlement periods. The Insurer has informed the applicant that she has received 284 weeks' worth of compensation payments. Therefore her ongoing entitlements would be assessed pursuant to Section 38 of the 1987 Act. The Insurer has explained the 'special requirements' of Section 38(3)(b) and (c) which must be fulfilled for the applicant to be entitled to ongoing weekly payments. The Insurer has also noted that the amount referred to in subsection (3)(b) has been indexed from \$155 per week to \$173 per week. The insurer has complied with the Guideline.
12. The Insurer has explained that although the applicant has returned to work performing duties in excess of the 15 hours per week required by Section 38(3)(b) her nominated treating doctor certified her fit to perform duties 7 hours per day, 4 days per week with restrictions. The insurer informed the applicant that she was not working to capacity and therefore had not complied with Section 38(3)(c) of the 1987 Act. The Insurer has referenced the relevant legislation and explained the line of reasoning for the decision in accordance with Guideline 5.3.2.
13. The same guideline also requires the insurer to advise the applicant of the impact the decision has on her entitlement to medical and related treatment expenses. The Insurer has correctly advised that as the applicant has been assessed as having a permanent impairment greater than 20% any entitlement she has to pre-approved reasonable and necessary medical and other expenses continues until retirement age.
14. The Insurer has advised the applicant that they will continue to provide support to assist with returning to work until 31 December 2014 if required. This is in accordance with the Guidelines.

15. The decision of the Insurer dated 19 September 2014 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

Finding

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

The Stay

17. Clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014* 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.

18. The stay operates from the time the application for review is made until the worker is notified of the findings of this review.

RECOMMENDATION

19. The application for procedural review is dismissed.

20. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 1 January 2015.

21. The payments are to be back-dated to 1 January 2015 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.

22. Such payments are to continue until the date of the receipt of this recommendation.

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
4 February 2015