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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 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 19 June 2015. The decision informed the applicant that her weekly payments of compensation would cease from 26 September 2015. The applicant sought internal review on 18 August 2015 and the Internal Review Decision was dated 9 September 2015. That decision confirmed the original work capacity decision.
2. The applicant applied to the Authority for Merit Review on 21 September 2015 and they delivered findings and recommendations dated 19 October 2015. The Authority made a finding that the applicant did meet the special requirements under Section 38(3) of the *Workers Compensation Act 1987* (1987 Act) however ongoing compensation was calculated to be nil.
3. The applicant then made application to this office dated 9 November 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. The applicant had previously sought procedural review of a work capacity decision dated 19 November 2013. The applicant was



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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. In addition to making the application for procedural review the applicant has made the following submissions:
 - *Everyday working 6 hours 5 days a week is a struggle, I am forced to work in so much pain that effects my life as a whole;*
 - *I should not have to loose (sic) my weekly entitlement payments, I have been seeking a Lump Sum compensation payment for all pain and suffering I have and continue to live with since my first injury on 20/10/2010, I am getting to the point where I am unsure how much more I can work for and believe it will only get worse with age and work, I will need to have medical assistance and incur expenses for the rest of my life.*
9. I am only able to review the Insurer’s procedure with respect to making the work capacity decision. I am unable to take into consideration the applicant’s personal circumstance. The applicant’s submissions are not relevant to this procedural review.

¹ Reported and numbered as 22214



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Submissions by the Insurer

10. The Insurer has provided submissions by email dated 9 November 2015 that the submissions made by the applicant are not procedurally related and are outside the jurisdiction of WIRO.
11. I do agree that the submissions made by this applicant are not relevant to procedural review, however this Office has jurisdiction to perform a review in respect of the procedures undertaken by the Insurer by virtue of Section 44(1)(c) of the 1987 Act, which is not affected by the submissions of any party.

The Decision

12. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
13. 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 was completed on 16 June 2015 and she was advised of the work capacity decision by letter dated 19 June 2015.
14. The same Guideline 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. As a result the applicant was advised that her payments would cease from 26 September 2015. This is the required notice period.
15. In addition the Guideline requires 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 and explained Section 59A(2) and (3) of the 1987 Act and advised the applicant that her entitlement to medical expenses will cease on 26 September 2016 which is 12 months after her entitlement to weekly payments ceases.
16. The Insurer is also required to inform the applicant of the relevant entitlement periods. The Insurer advised the applicant that she has



received 148 weeks of compensation payments and her ongoing entitlements are subject to the special requirements contained in Section 38(3) of the 1987 Act. The special requirements of that section are set out at page 9 of the decision.

17. The Insurer correctly advised the applicant that Section 38(3)(b) requires her to return to work for not less than 15 hours and that she must earn at least \$173 per week (adjusted figure) and that Section 38(3)(c) requires her to be assessed as likely to continue to be indefinitely incapable of undertaking further additional employment that would increase her current weekly earnings.
18. In accordance with Section 43(1)(a) of the 1987 Act the Insurer has determined that the applicant has the capacity to work 30 hours per week in accordance with the work capacity certificate dated 21 May 2015 from the nominated treating doctor.
19. The Insurer has determined pursuant to Section 32A and Section 43(1)(b) of the 1987 Act that the vocation of paralegal (conveyancing clerk) is suitable employment. They relied upon a closure report from the rehabilitation provider confirming that the applicant had returned to this role with her pre-injury employer.
20. Pursuant to Section 43(1)(c) the Insurer assessed the applicant's capacity to earn to be \$1168.81 per week which is her actual weekly earnings.
21. In making the decision the Insurer concluded correctly that the applicant has complied with Section 38(3)(b) in that she has returned to work for not less than 15 hours per week and was earning at least \$173.00 per week. Furthermore the applicant had satisfied Section 38(3)(c) as the applicant was working to her full capacity. Therefore the applicant's ongoing entitlement was to be calculated in accordance with Section 38(7) of the 1987 Act.
22. At page 8 of the work capacity decision the Insurer explained to the applicant how it came to the decision using the algorithm in Section 38(7) of the 1987 Act that her ongoing weekly compensation payment was nil.



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23. The decision of the insurer dated 19 June 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation.

Finding

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

RECOMMENDATION

25. The application for procedural review is dismissed.

26. 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
2 December 2015