



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 statutory stay 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 3 July 2015. The decision informed the applicant that her weekly payments of compensation would cease from 10 October 2015. The applicant sought internal review and the Internal Review Decision was dated 28 August 2015.
2. The applicant applied to the Authority for Merit Review on 24 September 2015 and they delivered findings and recommendations dated 21 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 in accordance with Section 38(7) was calculated to be nil.
3. The applicant then made application to this office dated 12 November 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 30 December 2009 the applicant sustained injury to her right knee in the course of her employment as a customer service / administrative assistant. In or about April 2010 she underwent an arthroscopy and ultimately had a total knee replacement on 21 July 2011. The applicant continued working with her pre-injury employer until the company went into liquidation in June 2011. In or about August 2012 the applicant obtained part time employment as a teacher's aide. She was performing this employment at the time of the work capacity decision.



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5. The applicant has subsequently alleged a consequential injury to her left knee. This claim is the subject of a Section 74 notice dated 18 August 2015.
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 requesting the procedural review the applicant has submitted that the Insurer has not followed “*appropriate timing*” and that her consequential injury has not stabilised.
9. I am unable to review any discretion or judgment exercised by the Insurer in making decisions in respect of capacity to work. I am also unable to review the Internal Review Decision and recommendations and findings made by the Authority at Merit Review. My review is limited to ensuring that the Insurer has followed proper procedures in making the work capacity decision.

Submissions by the Insurer

10. By way of email dated 13 November 2015 the Insurer advised that they did not wish to make any submissions.

The Decision

11. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
12. In this work capacity decision the Insurer informed the applicant that in accordance with Section 43(1)(a) of the 1987 Act it has made a decision



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that she has capacity to work in suitable employment on a full time basis. In making this decision the Insurer has preferred the medical opinion contained within the earning capacity assessment report dated 7 May 2015 over the certificate of capacity of the nominated treating doctor dated 9 June 2015 which assessed the applicant to have capacity to work 25 hours per week.

13. It is within the discretion of the Insurer to prefer one medical opinion over another. I am not in a position to review any discretion or judgment exercised by the Insurer. I am only able to review the procedure used by the Insurer and in this instance the Insurer has followed the Guidelines and legislation.
14. The next decision made by the Insurer was in accordance with Sections 32A and 43(1)(b) of the 1987 Act that the position of teacher's aide was suitable employment. The Insurer relied upon the certificate of capacity and earning capacity assessment in making this decision. It was also noted that the applicant had been performing these duties on a part time basis since August 2012.
15. Again I am not in a position to review any discretion or judgment used by the Insurer in determining what constitutes suitable employment. I note that the Insurer has complied with the legislation and the Guidelines.
16. In determining the amount the applicant is able to earn in suitable employment pursuant to Section 43(1)(c) the Insurer has relied upon the earning capacity assessment. The Insurer has assessed the applicant to have the capacity to earn \$850 per week in suitable employment as a teacher's aide. It was noted that the applicant's current earnings were \$714 per week. The Insurer has complied with the legislation.
17. In complying with Guideline 5.3.2 the Insurer has informed the applicant that she had received 234 weeks of compensation payments and as a result her ongoing entitlement is assessed in accordance with Section 38(3) of the 1987 Act. The special provisions of Section 38(3) are set out at pages 3 and 4 of the work capacity decision. The Insurer has correctly noted that the amount in Section 38(3)(b) has been indexed to \$173.00 per week.



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18. The Insurer then explained to the applicant that as she had not been assessed as being incapable of undertaking further additional employment as required by Section 38(3)(c) she is not entitled to ongoing payments of weekly compensation.
19. Guideline 5.3.2 requires the Insurer to advise the date when the decision takes effect. Section 54(2)(a) of the 1987 Act and Section 76(1)(b) of the *Interpretations Act 1987* 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 10 October 2015. This is the required notice period.
20. In respect of the impact this decision has on the applicant's entitlement to medical and related treatment expenses the Insurer has correctly referred to Sections 59A(2) and (3) of the 1987 Act and informed the applicant that her entitlement to medical and related treatment expenses would cease twelve months after her entitlement to weekly payments cease. The Insurer provided the applicant with the correct explanation of the legislation in force at the time of the decision.
21. The decision of the Insurer dated 3 July 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation.

Finding

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

RECOMMENDATION

23. The application for procedural review is dismissed.
24. Such weekly payments as the applicant is receiving by virtue of the statutory stay are to continue until receipt of this decision.



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