



RECOMMENDATION FOLLOWING AN APPLICATION FOR REVIEW OF THE INSURER'S WORK CAPACITY DECISION PURSUANT TO SECTION 44BB(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 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 7 August 2015. The decision informed the applicant that her weekly payments of compensation would cease on 7 November 2015. The applicant sought internal review on 27 August 2015 and the Internal Review Decision was dated 25 September 2015. That decision confirmed the work capacity decision.
2. The applicant then applied to the Authority for Merit Review on 13 October 2015 and they delivered findings and recommendations dated 12 November 2015. The Authority made a finding that the applicant did satisfy the special provisions under Section 38(3) of the Workers Compensation Act 1987 (1987 Act) however, such weekly compensation was calculated to be nil.
3. The applicant then made an application to this office dated 18 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 29 April 2013. The applicant was successful and the work capacity decision was set aside by an earlier recommendation of this office¹.

¹ Reported and numbered as 3113



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5. On 17 July 2007 the applicant sustained injury to her lower back after falling at a petrol station. The applicant was on a 'journey' in the course of her employment as a merchandise manager. The applicant returned to work on suitable duties until her employment was terminated in or about October 2010. In February 2013 the applicant obtained employment as a register supervisor with her pre-injury employer. She remains in that employment.
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 44BB(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 a procedural review the applicant has made the following submissions:
 - *'The Insurer has not given sufficient weight and consideration to the medical evidence for my long term injury of making this decision and will impact on my future earnings';*
 - *'The earnings from my pre-injury role is not what I am earning now and is affecting the future because of my medical limitations and no further education or training';*
 - *'The decision is harsh and unjust';*
 - *'The injury is long term injury and should be taken into consideration due to medical restrictions and unable to earn to my pre-injury role in the future and will affect me financially in the future'.*
9. In respect of the above submissions I note that the Insurer can undertake a work capacity assessment at any time. If the applicant's condition were to change in the future she can provide the Insurer with



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further information and a further work capacity assessment can be undertaken.

10. This procedural review is limited to reviewing the procedures of the Insurer in undertaking the work capacity assessment and in making the work capacity decision. I am unable to review any judgment or discretion exercised by the Insurer in the making of the actual decision. I am unable to take into consideration the personal circumstances of the applicant. The specific submissions made by the applicant are not relevant to this procedural review.

Submissions by the Insurer

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

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 advise the applicant of the date of the work capacity assessment. The Insurer informed the applicant that a work capacity assessment commenced on 17 July 2015 and was completed on 7 August 2015. She was advised of the work capacity decision by letter dated 7 August 2015.
14. The same Guideline requires the Insurer to advise the date when the work capacity decision will take effect and state the impact the decision has on the worker in terms of her entitlement to weekly payments and medical and related treatment expenses.
15. In the work capacity decision letter to the applicant the Insurer advised at paragraph 7.3 on page 8 of the decision under the heading '*notice period*' that '*section 54(2)(a) of the 1987 Act, an insurer is required to give 3 months' notice prior to terminating or reducing weekly payments. An additional 4 working days' notice has been provided in accordance with the postal service rule which is outlined in section 76(1)(b) of the Interpretation Act 1987.*'



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16. This is a correct explanation of the notice period. However, the Insurer on this occasion has hand delivered the work capacity decision to the applicant. The Insurer has advised the applicant that her payments will cease on 7 November 2015. Despite the above paragraph advising that an additional 4 working days notice has been provided, it has not.
17. The notice period provided by the Insurer is correct. The inclusion of the aforementioned paragraph provides information which is not relevant to this decision. However, the inclusion of this information is not sufficient to render the decision invalid.
18. 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 7 November 2016 which is 12 months after her entitlement to weekly payments ceases. The Insurer has provided an adequate explanation of the legislation which was in place at the time the decision was made.
19. The Insurer is also required to inform the applicant of the relevant entitlement periods. The Insurer advised the applicant that she has received 347 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 5 of the decision.
20. The Insurer also informed the applicant that as she was in receipt of weekly payments immediately before 1 October 2012 she was considered to be an *existing recipient* and her pre-injury average weekly earnings were subject to the transitional provisions of Clause 8 Division 2 Pat 19H of Schedule 6 of the 1987 Act.
21. It was noted by the Insurer that the applicant had returned to work for 38 hours per week in suitable duties as a register supervisor and was earning \$822.55 per week. The applicant had been performing these duties since 5 February 2013. Both the suitable duties and work capacity were approved by the nominated treating doctor most recently in the certificate of capacity dated 28 May 2015.



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22. The Insurer advised the applicant that she had complied with the special requirements set out in Section 38(3)(b) & (c) and as a result her ongoing entitlements were subject to Section 38(7). The Insurer explained the algorithm used to calculate the applicant's ongoing entitlement to weekly compensation at page 6 of the decision. The calculation resulted in the applicant being entitled to compensation of \$nil per week.

23. The decision of the insurer dated 7 August 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 are to continue until receipt of this decision.

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
14 December 2015