



AMENDED 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 work capacity decision of the insurer dated 13 August 2013 is affirmed.**
- b. **The applicant is to be reinstated to her weekly payments at the rate applicable immediately prior to 22 November 2013.**
- c. **The reinstatement of payments is to be back-dated 22 November 2013, by virtue of clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.**
- d. **The payments are to continue at that rate until such time as the merit review recommendation is effectuated (or was effectuated).**

Introduction and Background

1. The applicant seeks procedural review of a work capacity decision made by the insurer dated 13 August 2013. This decision terminated the applicant's weekly payments from 22 November 2013. An internal review confirmed the original decision. The applicant sought internal review on 9 September 2013, but the Insurer abandoned the internal review process following a telephone conversation. The applicant again sought internal review on 30 June 2014, and the Insurer received that second application on or about 9 July 2014. The internal review decision which issued was dated 5 August 2014. The applicant sought merit review on 7 August 2014 and a recommendation was issued on 1 September 2014. The applicant succeeded on merit review, the Authority recommending that the applicant be paid 80% of the transitional rate due to having no work capacity. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
2. The applicant was injured in the course of self-employment as a beautician. The nature of the injury appears to be a herniation, exacerbated by a surgical repair which was not ideal in execution.

Submissions by the applicant

3. The applicant submitted that the insurer had told her and her doctor that the pain she was experiencing was “not real” and that she would benefit from a stay “in a mental hospital.” Disgraceful though such alleged conduct would be, it forms no part of my role to examine complaints of this nature. The applicant also purports to seek “compensation about the way [her] case was handled in the first instance.” Again, such considerations form no part of my role. Beyond this the applicant remarks only that she seeks back-dated payments from the insurer and approval for future surgery.

Submissions by the Insurer

4. The Insurer provided a chronology, some internal file notes and short responses to the applicant’s submissions. Included in the submissions is a reference to a Section 74 Notice issued in relation to claimed medical expenses. This is another area beyond my jurisdiction.

CONSIDERATION

5. The decision by the Insurer was made after a fair notice call and discussion about the assessment process. The Insurer disclosed when the assessment had taken place. The relevant legislative provisions were explained and quoted where required. All information relied upon was disclosed. There is nothing on the face of the decision which is procedurally objectionable.

A Recent Development

6. On 3 September 2014 the *Workers Compensation Amendment (Existing Claims) Regulation 2014* (the Amendment Regulation) was published. Clause 26 of the Amendment Regulation provides that Part 2 “takes effect on and from 1 October 2012.”
7. Clause 30 of the Amendment Regulation, which is in part 2 and therefore is deemed to have been in effect since 1 October 2012, is in the following terms:

30 Stay of work capacity decisions

- (1) A review under section 44 (Review of work capacity decisions) of the 1987 Act of a work capacity decision made in respect of an existing claim 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.
- (2) This clause applies to an internal review under section 44 (1) (a) of the 1987 Act only if the application for internal review is made by the worker within 30 days after the worker receives notice from the insurer of the work capacity decision to be reviewed.
- (3) The stay under this clause operates from the time the application for review is made until the worker is notified of the findings of the review (or the application for review is withdrawn).
- (4) This clause applies despite section 44 (4) of the 1987 Act, which is deemed to be amended to the extent necessary to give effect to this clause.

It must follow that the applicant is entitled to the benefit of the Amendment Regulation, albeit this is subject to the very large exception in clause 30(2). In this case there was ostensibly a delay of considerably more than 10 months between the work capacity decision and the application for internal review. This would normally disentitle the applicant to a stay prior to application for merit review, however in this case there can be no serious dispute that a work capacity decision was made on 13 August 2013 and that the worker sought internal review within 30 days of that date on 9 September 2013. Clause 30(2) of the **Amendment Regulation 2014** simply requires a worker to have sought internal review within 30 days of the original decision. No exception is created for grounds on which review is sought or for any unilateral decision by the insurer to terminate internal review.

8. Therefore the Insurer should restore the applicant to the payments being received immediately prior to 22 November 2013. The payments should

continue until the recommendation of the merit review service comes into effect.¹

FINDING

9. I find that the Insurer has followed the procedures as set out in the legislation and the WorkCover Guidelines. Therefore the work capacity decision is validly made.

RECOMMENDATION

10. The work capacity decision of the insurer dated 13 August 2013 is affirmed.
11. The applicant is to be reinstated to her weekly payments at the rate applicable immediately prior to 22 November 2013.
12. The payments are to commence from 22 November 2013 and continue at the former rate until such time as the merit review recommendation is effected (or was effected).
13. This recommendation is binding on the insurer: see section 44(3)(h) of the 1987 Act.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
14 October 2014

¹ Or, if the merit review recommendation has already been effected, the date when that occurred.