

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 his weekly payments at the rate applicable prior to 16 October 2014.**
- c. The payments are to be back-dated to 12 November 2014 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 8 July 2014. The insurer advised the applicant that his weekly payments of compensation would cease from 16 October 2014. The applicant sought internal review of the decision and the Internal Review Decision was dated 17 October 2014. The applicant then sought Merit Review from the Authority on 12 November 2014 and they delivered a decision dated 12 December 2014 upholding the work capacity decision. The applicant then applied to this office for procedural review on 8 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 his lower back whilst lifting boxes of food from the freezer during the course of his employment as a chef. Since that time the applicant has alternated between no capacity for work and partial capacity. Since the injury the applicant has performed duties as a sommelier, cleaner and product taster. At the time of the work capacity decision the applicant was performing duties for varying hours per week.

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 is that the insurer has failed to refer to all opinions and assessments sent to them for consideration. The applicant fails to particularise which documents had not been referred to in the decision.

Submissions by the Insurer

8. The Insurer made submissions in response to this application. The Insurer particularised the documents relied upon in making the work capacity decision and noted that they considered a further two reports submitted by the applicant in their internal review. Those reports were from Elizabeth Hudson, physiotherapist, dated 29 July 2014 and Dr Griggs dated 4 July 2014.

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 16 June 2014 and that as a result of that assessment a work capacity decision was made. The applicant was advised of the work capacity decision by letter dated 8 July 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 his payments would cease from 16 October 2014 which is in excess of the required notice period. The Insurer has complied with the legislation.
11. Guideline 5.3.2 requires the Insurer to explain the relevant entitlement periods. The Insurer has informed the applicant that he has received 402 weeks' worth of compensation payments. Therefore his 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 noted the indexed amount of \$173 per week when explaining the requirements of Section 38(3)(b).
12. The Insurer has explained that although the applicant has returned to work performing suitable duties his nominated treating doctor had certified him fit to perform duties 5 hours per day, 5 days per week with restrictions. The insurer informed the applicant that as he was not working to capacity, was not working on average not less than 15 hours per week and not earning in excess of \$173.00 per week he had not complied with Section 38(3)(b) and (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 his entitlement to medical and related treatment expenses. The Insurer has referenced Section 59A(2) of the 1987 Act and advised the applicant that his entitlement to medical expenses will cease 12 months after his entitlement to weekly payments. The provisions of Section 59A(3) were also explained. The Insurer has complied with the Guideline.
14. The decision of the Insurer dated 8 July 2014 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

Finding

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

The Stay

16. 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.

17. The work capacity decision was dated 8 July 2014. The applicant applied for internal review on 21 September 2014. That is outside the 30 day requirement for the stay to operate immediately. In this particular case the stay operates from the time the application is made to the Authority for merit review until the worker is notified of the findings of this review.

RECOMMENDATION

18. The application for procedural review is dismissed.
19. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 16 October 2014.
20. The payments are to be back-dated to 12 November 2014 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.
21. Such payments are to continue until the date of the receipt of this recommendation.

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