

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 applicant is to be reinstated to her weekly payments at the rate applicable as at 30 January 2014.**
- b. **The payments are to be back-dated to 30 April 2014, by virtue of clause 30 of schedule 8 to the *Workers Compensation Regulation 2010*.**
- c. **Such payments are to continue until such time as the Insurer commences (or commenced) payments in accordance with the recommendation of the merit review service of the Authority.**

Introduction and background

1. The applicant purportedly seeks procedural review of a work capacity decision made by the Insurer on 22 October 2013. The decision advised the applicant that her weekly payments of compensation would cease on 30 January 2014. The applicant belatedly sought internal review and the Internal Review Decision (IRD) was dated 8 April 2014. The IRD upheld the original work capacity decision. The applicant sought Merit Review on or about 30 April 2014 and the Authority issued the Merit Review recommendation on 18 September 2014. The applicant made application to this office on 21 October 2014.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. The applicant clearly did not apply for internal review within 30 days of receiving the original work capacity decision. This has implications which will be discussed below.
4. The applicant was in receipt of weekly payments immediately before 1 October 2012 and according to *Clause 8 of Part 19H of Schedule 6 of the *Workers Compensation Act 1987* (the 1987 Act)* the Insurer is required 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)*. The relevant version of the *Guidelines* came into effect on 11 October 2013.

Submissions by the applicant

6. 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 set out various “Grounds” for seeking a review, which in part recite the history of the review process and appear thus:
 - On 22.10.13 the insurer issued a work capacity decision reducing the worker’s weekly payments to \$0 as from 30 January 2014. A merit review decision was issued on 18.9.14, received by the applicant worker the following day, which overturned the work capacity decision. The Authority in its merit review assessed that the worker had no current work capacity and is entitled to weekly payments of \$768.40.
 - Notwithstanding the merit review decision made by the authority, the insurer has only applied weekly payments as from the date the merit review decision was made and not for the periods since 31.2.14 where (*sic*) she was certified to be unfit.
 - The worker was certified unfit for employment from 27.12.13 to 12.3.14 as set out in paragraph numbered 28 of the Authority’s decision. By applying payments from 18.9.14, the insurer is being procedurally incorrect and a procedural review is sought to review the payments for the period from 30 January 2014 to 18.9.14. A binding recommendation that payments be paid from 30 January 2014 is sought.

Submissions by the Insurer

7. The Insurer has not provided submissions in response to the application.

The Decision

8. The Insurer made a decision which was overturned on merit review. The applicant does not seek to disturb the merit review decision, but does seek a “procedural review” of the payments to the worker for a period from 31 January 2014 to 18 September 2014.
9. This office does not have the jurisdiction to review the “decision” of the merit review service. On my reading of the merit review recommendation, no date was specified for the commencement of payments. The Act specifies that an Insurer is to make a decision consistent with the recommendation of the Authority. Ideally the decision would be made quickly following the recommendation, but this is also something not subject to procedural review by this office.
10. At the time of the original decision, section 44(4) provided that an application for review of a work capacity decision did not operate as a stay, thereby allowing insurers to terminate weekly payments even while their decisions were under review. This situation was subsequently remedied retrospectively in the case of existing recipients (such as the applicant) by regulation.

A Recent Development

11. On 3 September 2014 the *Workers Compensation Amendment (Existing Claims) Regulation 2014* (the Amendment Regulation) was published. Clause 26 of the *Amendment Regulation* provided that Part 2 “takes effect on and from 1 October 2012.” The *Amendment Regulation* now appears in Schedule 8 to the *Workers Compensation Regulation 2010*.
12. Clause 30 of schedule 8, 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.

13. 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 a delay of approximately six months between the work capacity decision and the application for internal review. Clearly the applicant fails to satisfy the requirement of seeking internal review within 30 days. I take this to be fatal to her claims for any back-payment prior to the application for merit review. Therefore the Insurer should restore the applicant to the payments being received immediately prior to 30 January 2014, but those payments should only be back-dated from 30 April 2014, which was when the merit review application was received. This is in accordance with clause 30(3). The payments should continue at that rate until the recommendation of the merit review service comes (or came) into effect.

RECOMMENDATION

14. The applicant is to be reinstated to her weekly payments at the rate applicable as at 30 January 2014.
15. The payments are to be back-dated to 30 April 2014, by virtue of clause 30 of schedule 8 to the *Workers Compensation Regulation 2010*.
16. Such payments are to continue until such time as the Insurer commences (or commenced) payments in accordance with the recommendation of the merit review service of the Authority.



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