

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 1 October 2014.**
- c. **The payments are to be back-dated to 1 October 2014 in accordance with clause 30 of Schedule 8 to the *Workers Compensation Regulation 2010*.**
- d. **Such payments are to continue until the date of receipt of this recommendation.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 26 June 2014. The decision advised the applicant that his entitlement to weekly payments would cease from 1 October 2014. The applicant sought internal review of the decision and the Internal Review Decision (IRD) was dated 15 August 2014. He then sought Merit Review from the Authority on 28 August 2014 and they delivered a decision dated 8 October 2014. He then applied to this office for procedural review on 22 October 2014.
2. I am satisfied that the applicant has made the application for Procedural Review in the proper form and within time.
3. On 29 September 2011 the applicant suffered injury to his lower back whilst moving a pot of potatoes on a stove. Liability was accepted. The applicant initially returned to duties for a "few days" but his back and leg pain was "too severe." The applicant has not worked since that time.
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. That publication stated that the *Guidelines* provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessments and decisions.
7. Once the Insurer has conducted a first assessment then the Insurer is required to make a work capacity decision. Where that decision involves a reduction in the weekly benefits payable to the injured worker then the Insurer is required to give proper notice to the worker (*Section 54(2)(a)* of the 1987 Act).

Submissions by the applicant

8. *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 made submissions which have been reviewed but the submissions annexed to the application sent to this office were not relevant to procedural review.

Submissions by the Insurer

9. The Insurer made submissions in response to this application which were received by our office on 7 November 2014. Those submissions have been reviewed.

The Decision

10. The decision of the Insurer dated 26 June 2014 displayed a careful consideration of the requirements of the *Guidelines* and the legislation.
11. The applicant was advised that the work capacity assessment was completed on 23 June 2014 and that the work capacity decision was made on 26 June 2014.
12. *Guideline 2.3* requires that the Insurer's decision should be "*timely, informed and evidence based.*" The Insurer has complied with this *Guideline*.
13. The applicant was given the correct notice period in accordance with *Section 54(2)(a)* of the 1987 Act being 3 months and four working days having regard to *Section 76(2)(a)* and *(b)* of the *Interpretation Act 1987*. In this decision the applicant was advised that his payments would cease on 1 October 2014.
14. *Guideline 5.3.2* requires the Insurer to explain the relevant entitlement periods and legislation. The decision informs the applicant that he has received 132.4 weeks' worth of weekly payments and as such his entitlements are assessed under *Section 38* of the 1987 Act. The decision then provides an adequate explanation of how that Section works.
15. The Insurer has advised the applicant of the impact that the decision has on his entitlement to medical and related treatment expenses with reference to *Sections 59A(2)* and *59A(3)* of the 1987 Act.
16. 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." The Amendment Regulation now appears in and forms part of Schedule 8 to the *Workers Compensation Regulation 2010* (the Regulation).
17. *Clause 30* of the Schedule 8 to the 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.

18. It must follow that the applicant is entitled to the full benefit of the Regulation and therefore the Insurer should restore the applicant to the payments being received immediately prior to the payments ceasing or being reduced as a result of the original decision and the subsequent internal review decision.

FINDING

19. I find that there were no procedural errors by the Insurer during the work capacity assessment and decision-making process.

RECOMMENDATION

20. The application for procedural review is dismissed.
21. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 1 October 2014.
22. The payments are to be back-dated to 1 October 2014 in accordance with clause 30 of Schedule 8 to the *Workers Compensation Regulation* 2010.



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23. Such payments are to continue until the date of receipt of this recommendation.

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
4 December 2014