

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 3 November 2014.**
- c. The payments are to be back-dated to 3 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 24 July 2014. The decision advised the applicant that his weekly payments of compensation would cease from 3 November 2014. The applicant sought internal review of the decision and the Internal Review Decision (IRD) was dated 5 September 2014. The IRD maintained the original decision. The applicant then sought Merit Review from the Authority on 17 September 2014 and they delivered a decision dated 15 October 2014. The applicant then applied to this office for procedural review on 10 November 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 suffered injury to his back on 17 October 1998 during the course of his employment stacking cartons of beer in a bottle shop. After receiving medical treatment the applicant was able to return to work. On 9 February 2005 the applicant picked up a carton of beer and experienced severe back pain. The applicant underwent a laminectomy and discectomy on 17 June 2005. The applicant returned to work however in August 2011 the bottle shop closed. The applicant remained

with the employer performing suitable duties. In July 2012 the applicant underwent further surgery by way of a left sided L4/5 discectomy. In June 2013 the applicant found employment as a waiter and then in or about November 2013 as a retail assistant. He maintains employment as both and is presently working on average 16 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. 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 has requested a procedural review.

Submissions by the Insurer

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

The Decision

10. *Guideline 5.3.2* requires the insurer to state the impact the decision has on the applicant's entitlement to weekly payments. In this decision the applicant has been advised that his weekly entitlements have been reduced to nil from 3 November 2014.
11. *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 be reduced from 3 November 2014 which is the correct notice period. The Insurer has complied with the Guidelines and legislation.
12. 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. In this decision the insurer has referenced and explained *Section 59A(1), (2) and (3)*. The applicant was advised that payment of his pre-approved medical and related treatment expenses would cease 12 months after the cessation of his entitlement to weekly payments. It was also explained that the applicant may again become entitled to payment of medical expenses by virtue of *Section 59A(3)* of the 1987 Act. The insurer has complied with the *Guideline*.
13. *Guideline 2.3* requires that the Insurer's decision should be "*timely, informed and evidence based.*"
14. The insurer advised the applicant that his work capacity assessment was completed on 21 July 2014 and he was advised of the work capacity decision by letter dated 24 July 2014. The Insurer has complied with the *Guideline*.
15. *Guideline 5.3.2* requires the Insurer to explain the relevant entitlement periods and legislation. The insurer informed the applicant that his entitlements would be assessed pursuant to *Section 38* of the 1987 Act. The insurer explained *Section 38(3)* in detail and even notes that the amount referenced in *Section 38(3)(b)* of \$155 per week has since been indexed to \$173 per week. The insurer has complied with the *Guideline*.
16. *Section 44B* of the 1987 Act identifies the nature of the evidence upon which work capacity can be assessed. This includes a certificate of capacity. In this case the insurer refers to the most recent certificate of capacity from Dr Calaizis, the applicant's nominated treating doctor, dated 24 June 2014 which notes that the applicant has a capacity to

work 5 hours per day 5 days per week. The insurer has complied with the legislation.

17. The decision of the Insurer dated 24 July 2014 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

Finding

18. There are no procedural errors identifiable in the decision. The insurer has complied with the Guidelines and relevant legislation. The application for procedural review is dismissed.

Regulatory Stay

19. 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.”

20. 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.

21. It must follow that the applicant is entitled to the full benefit of the Amendment 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.

RECOMMENDATION

22. The application for procedural review is dismissed.

23. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 3 November 2014.

24. The payments are to be back-dated to 3 November 2014 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.

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

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