

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 of the work capacity decision of the Insurer is dismissed.**
- b. **The applicant is to be reinstated to her weekly payments at the rate applicable immediately prior to 6 October 2014.**
- c. **The payments are to be back-dated to 6 October 2014 in accordance with Clause 30 of Schedule 8 to the *Workers Compensation Regulation 2010*.**
- d. **Payments are to continue until receipt of this recommendation by the parties.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 30 June 2014. The decision advised the applicant that her weekly payments of compensation would cease on 6 October 2014. The applicant sought internal review on 15 July 2014 and an Internal Review Decision (IRD) subsequently issued dated 22 August 2014. She sought Merit Review on or about 19 September 2014. The Merit Review Service of the WorkCover Authority (Authority) issued findings and recommendations on 10 October 2014.
2. The applicant made application for a procedural review to this office on 04 November 2014. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. The applicant appears to have suffered injury to the neck and both shoulders in the course of her employment as a machine operator. A notional date of injury is agreed between the parties, being 27 October 1999. The applicant returned to work on restricted duties but was eventually terminated in 2003 when restricted duties were "no longer available." She is currently employed part-time as an out of school hours childcare worker.

4. As the applicant was in receipt of weekly payments immediately before 1 October 2012. Accordingly *Clause 8 of Part 19H of Schedule 6* to 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)*.

Submissions by the applicant

6. Section 44(1)(c) of the *Workers Compensation Act 1987* (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 made submissions which are not relevant to procedural review. These include calling into question the suitability of suggested suitable duties, noting that the insurer did not consider the changed hours of employment for which the applicant was certified fit (down from 30 to 25 hours per week), and suggesting that the “realistic availability” of suitable employment was given no weight by the Insurer. All of these issues were addressed in the course of merit review.
7. More to the point of procedural review, the assertion is made that the applicant should have been told that whereas section 38 of the 1987 Act applies to her circumstances, section 39 does not. Given that section 39 does not apply, I can see no reason why the applicant needs to be told that an irrelevant section is irrelevant.

Submissions by the Insurer

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

The Decision

9. The *WorkCover Work Capacity Guidelines* relevant to making this work capacity decision came into effect on 11 October 2013.
10. *Schedule 8 Clause 23 of the Workers Compensation Regulation 2010* (the Regulation) states that an Insurer must make a work capacity decision as soon as practicable after the work capacity assessment.

11. The Insurer advised the applicant that an assessment of her work capacity was conducted on 30 June 2014. This followed the correct fair notice period. The relevant legislative provisions were cited.
12. The work capacity was clearly expressed and set out the relevant statutory requirements for a worker in the position of the applicant. While the applicant had received in excess of 600 weeks of payments, her claim was to be assessed in accordance with the requirements of section 38.
13. The correct notice period was given, with the relevant statutory provisions referred to and quoted.
14. All information considered in making the decision was disclosed. The reasoning process for the decision reached was fully set out. The applicant was told the following:

“You are currently working as a child carer worker (*sic*) but your payslips confirm you are not working to your full capacity of 30 hours per week.”
15. During the course of merit review it was noted that the same doctor who had certified the applicant as fit for 30 hours work per week had downgraded the hours to 25 per week. But at merit review it was still found to be the case that the applicant was not working to that certified capacity. Accordingly, nothing appears to turn on the question of the changed certification.
16. The Insurer cited and correctly explained the effect of section 59A(2) and 59A(3), including informing the applicant that she could be entitled to further payments of medical and related expenses during the course of any subsequent period of receipt of weekly payments which might arise due to changed circumstances.
17. The applicant is entitled to the benefit of clause 30 of Schedule 8 of the *Workers Compensation Regulation 2010*. Clause 30 is deemed to have been in effect as of 1 October 2012. It follows that a “stay” applies to the cessation of payments until the conclusion of the review process under section 44. Accordingly the applicant is entitled to continue to receive her weekly payments at the rate prior to the decision being made between the date of cessation of payments and the date of receipt of this recommendation. Thereafter the decision of the Insurer to terminate payments can come into effect.



FINDING

18. Under the legislation the Insurer can make an assessment of the applicant's work capacity and then a decision about that work capacity, but they must comply with the legislation, the Regulation and the *Guidelines* in order to produce a procedurally correct result. In the current instance there have been no breaches of the legislation or the *Guidelines* which are to be treated as delegated legislation.

RECOMMENDATION

19. The application for procedural review of the work capacity decision of the Insurer is dismissed.
20. The applicant is to be reinstated to her weekly payments at the rate applicable immediately prior to 6 October 2014.
21. The payments are to be back-dated to 6 October 2014 in accordance with Clause 30 of Schedule 8 to the *Workers Compensation Regulation* 2010.
22. Payments are to continue until receipt of this recommendation by the parties.

Delegate of the WorkCover Independent Review Officer
17 December 2014