

**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 dated 29 August 2014 is dismissed.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 29 August 2014, in accordance with the requirements of clause 30 of schedule 8 to the *Workers Compensation Regulation 2010*.**
- c. The payments are to be back-dated to 04 December 2014.**
- d. Such payments are to continue until such time as the parties receive notice of this recommendation and cease thereafter.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 29 August 2014. The decision advised the applicant that his weekly payments of compensation would cease "effective from 4 December 2014." The applicant sought internal review and the Internal Review Decision was dated 29 September 2014. The decision was affirmed. He then sought Merit Review on or about 14 October 2014 and the Authority issued the Merit Review recommendation on 16 November 2014. Merit review partially upheld the applicant's objections to the original decision, finding that he was entitled to ongoing payments in the sum of around \$58 per week. The applicant made application to this office on 26 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 facts and circumstances of this matter were summarised in WIRO recommendation 2913. As a result of that recommendation, the current sequence of decisions was undertaken by the Insurer. These

subsequent decisions are governed by later iterations of the Guidelines and amended regulations.

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 has made submissions which are substantially not relevant to procedural review. In particular, he rejects the findings of the merit review service in relation to possible earnings on the basis that GST has not been discounted from gross figures. Such considerations cannot be subject to procedural review and this office has no jurisdiction to review recommendations of the merit review service in any event.

Submissions by the Insurer

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

The Decision

8. The decision by the Insurer was informed by earlier recommendations of the merit review service and this office. It seems that the limitations attending the original 2013 decisions have been successfully addressed by the Insurer. Specifically, the correct notice period was given, the applicant was advised that he had received 343 weeks of payments, the “special requirements” in section 38 were referenced and explained (rather than being snowcloned as before), the use of the transitional amount was explained, sections 32A and 35 were explained and not merely referred to, the applicant’s age was not confusingly portrayed, all reports relied upon were shown to the applicant prior to the decision

being made and section 59A was properly explained. In every such respect, the decision dated 29 August 2014 was properly done, in contradistinction to the 2013 version.

9. Given that this office cannot consider the matters raised by the applicant for the reasons set out at paragraph 6, no procedural errors are identified.
10. On 3 September 2014 the *Workers Compensation Regulation 2010* (the Regulation) was amended. Clause 30 in schedule 8 to the Regulation provides that a worker is to receive the benefit of a “stay” of the Insurer’s work capacity decision for the duration of any review under section 44 of the 1987 Act. The regulation is amended retrospectively with effect from 1 October 2012. Internal review, merit review and procedural review are the relevant steps and in this case the applicant is entitled to the full benefit of the stay until receipt of this recommendation.

FINDING

11. 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 the Insurer has complied.

RECOMMENDATION

12. The application for procedural review of the work capacity decision of the Insurer dated 29 August 2014 is dismissed.
13. The applicant is to be reinstated to his weekly payments at the rate applicable as at 29 August 2014, in accordance with the requirements of clause 30 of schedule 8 to the *Workers Compensation Regulation 2010*.
14. The payments are to be back-dated to 04 December 2014.
15. Such payments are to continue until such time as the parties receive notice of this recommendation and cease thereafter.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
24 December 2014



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