

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 her weekly payments at the rate applicable prior to 28 November 2014.**
- c. The payments are to be back-dated to 28 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 22 August 2014. The insurer advised the applicant that her weekly payments of compensation would cease from 28 November 2014. The applicant sought internal review of the decision and the Internal Review Decision was dated 26 September 2014. The original decision was upheld. The applicant then sought Merit Review from the Authority on 21 October 2014 and they delivered a recommendation dated 18 November 2014. This also resulted in no change to the original decision. The applicant then applied to this office for procedural review on 28 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 sustained an injury to her back on 26 May 1999 during the course of her employment as a cleaner. The applicant remained with the employer until 2000. In 2003 the applicant obtained alternate

employment performing ironing duties for varying hours per week. She remains in that employ.

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. The applicant’s submissions include incorrect referencing of legislation and documentation by the insurer as well as the failure of the insurer to comply with the relevant legislation and regulations. Predominantly the submissions are based on a view that the legislation is unclear or unfair or that the Insurer has arbitrarily applied a discretion when determining work capacity. The latter goes to the merits of the case and is irrelevant to procedural review, whereas the former cannot be the subject of review in any event. The remaining submissions are not relevant to procedural review.

Submissions by the Insurer

9. The Insurer has made submissions in response to this application which were received by our office on 1 December 2014.

The Decision

10. Guideline 2.3 requires that the Insurer's decision should be "*timely, informed and evidence based.*" Guideline 5.3.2 also requires the insurer to advise the date of the work capacity assessment.
11. The insurer informed the applicant that her work capacity assessment was conducted on 22 August 2014 and the work capacity decision was made at that time. The applicant was advised by the decision by letter dated that day. The Insurer has complied with the Guideline.
12. *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 her payments would cease from 28 November 2014 which is the correct notice period. The Insurer has complied with the Guideline and the legislation.
13. The same Guideline also requires the insurer to advise the applicant of the impact the decision has on her entitlement to medical and related treatment expenses. In this decision the insurer has referenced and explained *Section 59A(2) and (3)* and explained the applicant's entitlements. 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.
14. Guideline 5.3.2 requires the Insurer to explain the relevant entitlement periods and legislation. The applicant was advised that she has been in receipt of weekly payments of compensation for 794 weeks. The insurer informed the applicant that her ongoing entitlements would be assessed pursuant to *Section 38* of the 1987 Act.

15. The insurer conceded that the applicant currently earns an average of \$188.77 per week which is in excess of the amount required by Section 38(3)(b). However, as the insurer has decided that the applicant has the capacity to work 20 hours per week in suitable employment and earn \$500 per week she does not meet the requirements under Section 38(3)(c) of the 1987 Act. The correct section of the legislation has been referenced and explained.
16. The decision of the Insurer dated 22 August 2014 has displayed a careful consideration of the requirements of the Guidelines and the legislation. The submissions made by the applicant go mainly to merits issues or the legislation itself, neither of which can be subject to procedural review.

Finding

17. 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.

RECOMMENDATION

18. The application for procedural review is dismissed.
19. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 28 November 2014.
20. The payments are to be back-dated to 28 November 2014 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.
21. Such payments are to continue until the date of the receipt of this recommendation.

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