

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 his weekly payments at the rate applicable prior to 16 December 2014.**
- c. **The payments are to be back-dated to 16 December 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 9 September 2014. The decision advised the applicant that his weekly payments would cease from 16 December 2014. The applicant sought internal review of the decision and the Internal Review Decision was dated 22 October 2014. The applicant then sought Merit Review from the Authority on 31 October 2014 and they delivered a decision dated 26 November 2014. The applicant then applied to this office for procedural review on 5 December 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 lower back as a result of the nature and conditions of his employment as a bar assistant. The deemed date of injury was 10 June 1999. The applicant's employment was terminated in April 2007. At the time the work capacity decision was made the applicant was employed as a gaming attendant with a different employer.

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).

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 requested a procedural review and has made submissions that the insurer has incorrectly calculated weekly earnings, the reports relied upon are out of date and the insurer has made procedural errors. The first of these submissions is not relevant to this review. The remaining two submissions are addressed below.

Submissions by the Insurer

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

The Decision

8. The *WorkCover Work Capacity Guidelines* relevant to making this work capacity decision came into effect on 11 October 2013.
9. 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.
10. The insurer informed the applicant that his work capacity assessment commenced on 15 August 2014 and was completed on 9 September 2014. He was advised of the work capacity decision by letter dated 9 September 2014. The Insurer has complied with the Guideline.
11. Guideline 5.3.2 requires the insurer to explain the relevant entitlement periods. The applicant was informed that he had received 392.20 weeks of weekly payments which places him in the post-second entitlement

period and his ongoing entitlements were subject to Section 38 of the 1987 Act. The insurer has complied with this Guideline.

12. In addition the above Guideline requires the insurer to reference the relevant legislation and clearly explain the line of reasoning for the decision. The insurer has explained Section 38 of the 1987 Act and the way in which it applies to the applicant. The *'transitional amount'* has also been explained together with the appropriate definitions for *'current work capacity'* and *'suitable employment'*.
13. 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(1)(b) of the *Interpretation Act 1987*. The insurer has provided the correct notice period and complied with the relevant legislation.
14. Guideline 5.3.2 also requires the insurer to state the impact of decision on the worker in terms of their entitlement to medical and related treatment expenses. The insurer has informed the applicant that his entitlement to reasonable medical and treatment expenses is effected by Section 59A (2) and (3) of the 1987 Act.
15. The applicant has submitted that the medical reports relied upon by the Insurer are out of date. The WorkCover Certificate of Capacity relied upon to assess the applicant's capacity for work was dated 1 July 2014. In addition the insurer has relied upon payslips of the applicant, evidencing hours worked, dating from 19 May 2014 to 11 August 2014. The work capacity assessment commenced on 15 August 2014 and the work capacity decision was made on 9 September 2014. The evidence relied upon by the insurer is both relevant and current.
16. The decision of the Insurer dated 9 September 2014 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

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.



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19. The applicant is to be reinstated his weekly payments at the rate applicable prior to 16 December 2014.
20. The payments are to be back-dated to 16 December 2014 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.
21. Such payments are to continue until the receipt of this recommendation.

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