

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 1 January 2015.**
- c. **The payments are to be back-dated to 1 January 2015 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 19 September 2014. The insurer advised the applicant that her weekly payments of compensation would cease from 1 January 2015. The applicant sought internal review of the decision and the Internal Review Decision was dated 13 November 2014. The applicant then sought Merit Review from the Authority on 27 November 2014 and they delivered a decision dated 19 December 2014 upholding the work capacity decision. The applicant then applied to this office for procedural review on 16 January 2015.
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 her right arm in the course of her employment as a data entry clerk. The agreed date of injury is 15 November 2001. The applicant underwent surgery in or about May 2002. After a period of recuperation the applicant eventually returned to her pre-injury hours working suitable duties. The applicant's employment was terminated in or about March 2004. The applicant has not been employed since that time.

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 *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.

Submissions by the applicant

7. 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 are that the Insurer failed to correctly reference the legislation, failed to advise the applicant of the start of the work capacity decision, advise the applicant that her benefits were terminated instead of being reduce to \$0.00 and provide the worker with a copy of documents requested by the worker.

Submissions by the Insurer

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

The Decision

9. Guideline 5.3.2 requires the Insurer to advise the date of the work capacity assessment. The insurer has advised the applicant that the work capacity assessment concluded on 18 September 2014 and that as a result of that assessment a work capacity decision was made. The applicant was advised of the work capacity decision by letter dated 19 September 2014. The Insurer has complied with the Guideline.
10. The same Guideline requires the Insurer to explain the relevant entitlement periods. The Insurer has informed the applicant that she has received 696 weeks’ worth of compensation payments. Therefore her ongoing entitlements would be assessed pursuant to Section 38 of the 1987 Act. The Insurer has explained the ‘*special requirements*’ of

Section 38(3)(b) and (c) which must be fulfilled for the applicant to be entitled to ongoing weekly payments.

11. The Insurer has explained that a functional assessment was undertaken on 13 June 2014 and it was established that the applicant had a current functional capacity to work 8 hours a day, 5 days per week in a light level occupation. Dr Levett, nominated treating doctor, indicated that he was in agreement with this assessment of capacity. The insurer informed the applicant that as she was not working to capacity, was not working on average at least 15 hours per week and not earning in excess of \$173.00 per week she had not complied with Section 38(3)(b) and (c) of the 1987 Act. The Insurer has referenced the relevant legislation and explained the line of reasoning for the decision in accordance with Guideline 5.3.2.
12. As the Insurer intended to reduce and/or discontinue the applicant's weekly payments 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 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 weekly payments would cease from 1 January 2015 which is the required notice period. The Insurer has complied with the legislation.
13. The Guideline also requires the insurer to advise the applicant of the impact the decision has on her entitlement to medical and related treatment expenses. The Insurer has referenced Section 59A(2) of the 1987 Act and advised the applicant that her entitlement to medical expenses will cease 12 months after her entitlement to weekly payments. The provisions of Section 59A(3) were also explained. The Insurer has complied with the Guideline.
14. The applicant submitted that as the Insurer advised that her payments were to be reduced to \$0 instead of advising that they were terminated then as a result the reduction should not impact her entitlement to medical and related expenses. The work capacity decision informs the applicant on page 8 at paragraph 6 that "*your weekly payments of compensation will be discontinued as of 1 January 2015.*" This notification has the same impact as advising that weekly payments have been terminated and the applicant's submission in respect of her medical and treatment expenses fails.
15. The applicant also submitted that the Insurer failed to reference the legislation. As discussed earlier in this decision the Insurer has

complied with the Guidelines in that it has properly referenced the relevant legislation.

16. A further submission made by the applicant is that the Insurer failed to provide a copy of documents as requested by the worker. The applicant has not particularised the documents which have not been provided and it is noted that on page 8 paragraph 7 the Insurer stated “*Any documents or information that have not already been provided to you can be provided on request.*” In the absence of evidence of particular documents being requested by the worker and not being produced by the Insurer the applicant’s submission fails.
17. The decision of the Insurer dated 19 September 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 Stay

19. Clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014* 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.
20. The work capacity decision was dated 19 September 2014. The applicant applied for internal review on 22 October 2014. Allowing the four working days’ for delivery of the notice having regards to Section 76 of the Interpretation Act 1987 the applicant has lodged the application within the 30 day requirement for the stay to operate immediately.

RECOMMENDATION

21. The application for procedural review is dismissed.
22. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 1 January 2015.



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23. The payments are to be back-dated to 1 January 2015 in accordance with clause 30 of the Workers Compensation Amendment (Existing Claims) Regulation 2014.
24. Such payments are to continue until the date of the receipt of this recommendation.

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
23 February 2015