

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 23 December 2014.**
- c. **The payments are to be back-dated to 23 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 16 September 2014. The decision advised the applicant that his weekly payments of compensation would cease from 23 December 2014. The applicant sought internal review of the decision and the Internal Review Decision was dated 29 October 2014. The applicant then sought Merit Review from the Authority on 18 November 2014 and they delivered a decision dated 8 December 2014 confirming the original work capacity decision. The applicant then applied to this office for procedural review on 8 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 previously sought procedural review of a work capacity decision dated 31 October 2013. The applicant was successful and the work capacity decision was set aside by an earlier decision of this office¹.

¹ Reported and numbered as 10014

4. The facts and the circumstances concerning the background of the claim are set out in the aforementioned recommendation and need not be repeated.

Submissions by the applicant

5. 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’s submissions are that he is in long term employment working 12 hours per week, he is not in a position to increase his weekly hours and he is earning in excess of the weekly amount required by Section 38(3)(b) and that his insurer has not yet provided approval for him to see a medical specialist in Dubbo. These submissions are not relevant to a procedural review.

Submissions by the Insurer

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

The Decision

7. The *WorkCover Work Capacity Guidelines* relevant to making this work capacity decision came into effect on 11 October 2013.
8. Guideline 2.3 states that the Insurer’s decision should be “*timely, informed and evidence based.*” Guideline 5.3.2 requires the insurer to advise the applicant of the date of the work capacity assessment. The insurer informed the applicant that his work capacity assessment commenced on 14 August 2014 and concluded on 16 September 2014. He was advised of the work capacity decision by letter dated that day. The Insurer has complied with the Guideline.
9. 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. In this decision the insurer has referenced both sections of each piece of legislation and informed the applicant that his weekly payments of compensation would cease on 23 December 2014. The Insurer has complied with the legislation.
10. The insurer has referenced Section 59A of the 1987 Act and informed the applicant that his entitlement to treatment expenses will cease 12

months after his entitlement to weekly payments of compensation ceases. The insurer has complied with the Guidelines.

11. Guideline 5.3.2 requires the insurer to explain the relevant entitlement periods. The insurer has informed the applicant that he has been in receipt of weekly payments of compensation for 457 weeks. Therefore his ongoing entitlements would be assessed pursuant to Section 38 of the 1987 Act. The insurer has complied with the Guideline.
12. The same guideline requires the insurer to reference the relevant legislation and to state the decision and give brief reasons for making the decision. The insurer has explained that Section 38 of the 1987 Act is the relevant section of the legislation used to assess the applicant's entitlements. Part of that section requires the applicant to be working not less than 15 hours per week **and** earning in excess of \$173.00 per week (the current indexed amount under Section 38(3)(b)).
13. The insurer advised the applicant that the legislation requires him to be working no less than 15 hours per week and as he was only working 12 hours per week he was not entitled to ongoing weekly payments of compensation under Section 38(3)(b).
14. The applicant made a submission that he is earning in excess of the required amount per week as prescribed by Section 38(3)(b) and he should be entitled to ongoing payments. However, Section 38(3)(b) uses the word "**and**" and not "**or**" when setting out the conditions of working not less than 15 hours per week **and** being in receipt of at least \$173.00 per week (indexed amount). The applicant's submission must fail as he has not fulfilled both obligations under the legislation.
15. The decision dated 16 September 2014 has displayed a careful consideration of the requirements of the Guidelines and legislation.

Finding

16. 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.



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Recommendation

17. The application for procedural review is dismissed.
18. The applicant is to be reinstated his weekly payments at the rate applicable prior to 23 December 2014.
19. The payments are to be back-dated to 23 December 2014 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.
20. Such payments are to continue until the receipt of this recommendation.

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
7 January 2015