



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 his weekly payments at the rate applicable prior to 21 December 2014.**
- c. The payments are to be back-dated to 21 December 2014 in accordance with clause 30 Schedule 8 to the *Workers Compensation Regulation 2010*.**
- 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 15 September 2014. The insurer advised the applicant that his weekly payments of compensation would cease from 21 December 2014. The applicant sought internal review and the Internal Review Decision was dated 21 November 2014. He then sought Merit Review from the Authority on 18 December 2015 and they delivered a decision dated 21 January 2015 confirming the work capacity decision.
2. The applicant then applied to this office for procedural review on 2 February 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. The applicant sustained injury to his right shoulder and right middle finger on 24 July 2008 during the course of his employment as a taxi driver. The applicant has not worked since the incident and has been in receipt of weekly payments of compensation.
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 was dated 4 October 2013 and 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;
 - Advise the applicant that his payment was to be terminated instead of notifying the applicant that his payments were to be reduced to \$0; if the payments are only to be reduced and not terminated then the applicant’s entitlements to medical expenses should not cease;
 - Provide the applicant with an outline of all entitlement periods; and
 - Provide the applicant with a copy of documents as requested by the applicant in his application for internal review.

Submissions by the Insurer

8. The Insurer has made submissions in response to this application dated 3 February 2015. The Insurer has responded to the applicant’s submissions as follows:
 - The correct legislation was reference in both the work capacity decision and the internal review decision and the effects were adequately explained;
 - The work capacity decision sets out the date of the assessment;
 - The work capacity decision advises the applicant that his weekly payments are discontinued;

- The applicant was advised that any documents or information not already provided could be provided upon request; and
- All relevant medical documents including clinical records were sent to the applicant as part of the fair notice letter and furthermore a request for all medical documents and clinical records was not made.

The Decision

9. Guideline 5.3.2 requires the Insurer to advise the date when the decision will take effect. 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 his weekly payments would cease from 21 December 2014 which is the required notice period. The Insurer has complied with the legislation.
10. The same guideline 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 12 September 2014. As a result of that assessment a work capacity decision was made. The applicant was informed of the work capacity decision by way of letter dated 15 September 2014. The Insurer has complied with the Guideline.
11. The applicant submitted that the Insurer failed to provide him with an outline of all entitlement periods. Guideline 5.3.2 requires the Insurer to "explain the relevant entitlement periods" not outline all of the entitlement periods.
12. The Insurer has informed the applicant that he has received 311 weeks' worth of compensation payments. Therefore his 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. It was noted that the amount of \$155 per week referred to in

Section 38(3)(b) of the 1987 Act had been indexed to \$173 per week at the time the work capacity decision was made.

13. The Insurer has referred to Section 38(3)(b) and has noted that as the applicant has received weekly payments for in excess of 130 weeks he must meet the requirements of that section which are that the applicant must be working not less than 15 hours per week and earning at least \$173 per week in order to qualify for ongoing payments of compensation. As the applicant was not working and had been assessed as having current capacity for work he did not comply with the section. The Insurer has referenced the relevant legislation and explained the line of reasoning for the decision in accordance with Guideline 5.3.2.
14. As required by the Guideline the Insurer outlined the evidence considered in making the decision, noting the author, the date and key information. All evidence was considered and referred to including the certificate of capacity from Dr S.
15. A further submission made by the applicant was 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 4 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.
16. The applicant submitted that as the Insurer advised that his payments were to be reduced to \$0 instead of advising that they were terminated then as a result the reduction should not impact his entitlement to medical and related expenses. The work capacity decision informs the applicant on page 8 at paragraph 3 that “*your weekly payments of compensation will be discontinued as of 21 December 2014.*” This notification has the same impact as advising that weekly payments have been terminated and the applicant’s submission in respect of his medical and treatment expenses fails.

17. The Guideline also requires the insurer to advise the applicant of the impact the decision has on his entitlement to medical and related treatment expenses. The Insurer has referenced Section 59A(2) of the 1987 Act and advised the applicant that his entitlement to medical expenses will cease 12 months after his entitlement to weekly payments. The provisions of Section 59A(3) were also explained. The Insurer has complied with the Guideline.
18. Finally, the applicant submitted that the Insurer failed to properly reference the relevant legislation. As discussed earlier in this decision the Insurer has complied with the Guidelines in that it has properly referenced the relevant legislation.
19. The decision of the Insurer dated 15 September 2014 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

Finding

20. There are no procedural errors identifiable in the decision. The insurer has complied with the Guidelines and relevant legislation.

The Stay

21. Clause 30 Schedule 8 to the Workers Compensation Regulation 2010 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.
22. The work capacity decision was dated 15 September 2014. The applicant applied for internal review within the 30 day requirement for the stay to operate immediately.

RECOMMENDATION

23. The application for procedural review is dismissed.
24. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 21 December 2014.



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25. The payments are to be back-dated to 21 December 2014 in accordance with clause 30 Schedule 8 to the *Workers Compensation Regulation* 2010.
26. Such payments are to continue until the date of the receipt of this recommendation.

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
2 March 2015