



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 10 October 2014.**
- c. The payments are to be back-dated from 5 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 4 July 2014. The insurer advised the applicant that his weekly payments of compensation would cease from 10 October 2014. The applicant sought internal review and the Internal Review Decision was dated 6 November 2014 and upheld the original decision.
2. The applicant then sought Merit Review from the Authority on 5 December 2015 and they delivered a decision dated 8 January 2015. The finding was that in accordance with Section 38 of the Workers Compensation Act 1987 (the 1987 Act) the applicant is not entitled to weekly payments of compensation.
3. The applicant then applied to this office for procedural review on 4 February 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. The applicant sustained a crush injury to his left ankle on 5 March 2000 in the course of his employment as a picker/packer. The applicant was

unable to return to his pre-injury duties. Since in or about 2004 the applicant has been self-employed in his own take-away business working 15–20 hours per week. The applicant has also been in receipt of weekly payments of compensation.

5. 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.
6. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).
7. The relevant version of the Guidelines was dated 4 October 2013 and came into effect on 11 October 2013.

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 and indicated that he does not agree with the work capacity decision made.

Submissions by the Insurer

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

The Decision

10. In accordance with Guideline 5.3.2 the Insurer advised the applicant that the work capacity decision was made on 4 July 2014. The applicant was advised of the decision by letter dated the same date. The applicant had previously been informed of the Insurer’s intention to conduct a work capacity assessment by letter dated 16 June 2014.
11. The same Guideline requires the Insurer to explain the relevant entitlement period. The Insurer informed the applicant that he had

received 802.8 weeks of weekly payments of compensation at the time that the work capacity decision was made.

12. At paragraph 6.3 of the decision the Insurer advised the applicant that as he had received in excess of 130 weeks' worth of payments his entitlement was subject to the provisions of Section 38(3) of the 1987 Act. In order to be entitled to ongoing weekly payments of compensation the applicant was informed that he must comply with subsections (b) and (c). It was noted by the Insurer that the applicant had returned to work for between 15 to 20 hours per week and as such the applicant had complied with part of subsection (b).
13. The remaining requirement of subsection (b) was that the applicant must be earning at least \$168.00 per week. The Insurer, relying upon a statutory declaration from the applicant dated 8 May 2014, noted that the applicant was earning between \$146 and \$149 per week as the owner of his own take away shop/business. As a result the Insurer concluded that the applicant had not satisfied the special requirements of Section 38. The Insurer has complied with the Guideline 5.3.2 by explaining the relevant entitlement period and referencing the legislation.
14. As the Insurer intended to 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 at paragraph 6.4 the Insurer referenced and explained both sections of each piece of legislation. As a result the applicant was advised that his weekly payments would cease from 10 October 2014 which is the required notice period. The Insurer has complied with the legislation and Guideline.
15. 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 referenced Section 59A(2) of the 1987 Act and advised the applicant that he is entitled to claim medical and related treatment costs for 12 months after his weekly payments of compensation have ceased. The provisions of Section 59A(3) were also explained. The Insurer has complied with the Guideline.

16. In accordance with the Guideline the Insurer has informed the applicant that any documents or information that has not already been provided can be made available upon request to the Insurer. The Insurer has also advised the applicant that he would be provided with occupational rehabilitation services for the notice period should he choose to participate.
17. The decision of the Insurer dated 4 July 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 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.
20. The work capacity decision was dated 4 July 2014. The applicant applied for internal review on 25 August 2014. The Insurer did not complete its internal review until 6 November 2014. The applicant then applied for merit review on 5 December 2014.
21. The usual application for the stay to immediately apply is that the applicant must apply for internal review within 30 days otherwise the stay does not apply until an application for review to the Authority is made. In this case the applicant applied for internal review after 52 days had elapsed. As a result the stay does not automatically apply. The Insurer did not complete the internal review for a further 73 days (rather than the 30 days allowed).
22. However, Section 44(3)(b) of the 1987 Act states “*an application for review by the Authority may be made without an internal review by the insurer if the insurer has failed to conduct an internal review and notify*”

the worker of the decision on the internal review within 30 days after the application for internal review is made.”

23. Therefore the applicant would have been within his rights to apply for a review by the Authority 30 days after lodging the Internal Review application rather than waiting for the review to be completed. In this case the stay does not apply until 5 December 2014 (being the date the applicant applied for review by the Authority) to the date of receipt of this recommendation.

RECOMMENDATION

24. The application for procedural review is dismissed.

25. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 10 October 2014.

26. The payments are to be back-dated from 5 December 2014 in accordance with clause 30 Schedule 8 to the *Workers Compensation Regulation* 2010.

27. 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