

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 9 February 2015.**
- c. The payments are to be back-dated to 9 February 2015 (being the date on which payments were due to cease under the notice period) 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 3 November 2014. The insurer advised the applicant that his weekly payments of compensation would cease from 9 February 2015. The applicant sought internal review on 14 November 2014 and the Internal Review Decision was dated 17 December 2014 and upheld the original decision.
2. The applicant then sought Merit Review from the Authority on 22 December 2014 and they delivered a decision dated 22 January 2015. The finding was that the applicant did not satisfy the special requirements for continuation of weekly payments in accordance with Section 38 of the Workers Compensation Act 1987 (the 1987 Act).
3. The applicant then applied to this office for procedural review on 5 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 injury his lower back on 30 September 1998 whilst removing asbestos in the course of his employment as a

maintenance supervisor. He underwent spinal fusions in 2000 and 2003. The applicant has been in receipt of weekly payments of compensation.

5. As the applicant was in receipt of weekly payments immediately before 1 October 2012 Clause 8 of Part 19H of Schedule 6 to 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 provided submissions which are not relevant to procedural review. The submissions address the issues of suitable duties, training and job seeking.

Submissions by the Insurer

9. The Insurer has made submissions in response to this application dated 12 February 2015. The Insurer submitted that the correct procedures have been followed.

The Decision

10. 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 was completed on 30 October 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 3 November 2014. The Insurer has complied with the Guideline.

11. The same Guideline requires the Insurer to explain the relevant entitlement periods. The Insurer has informed the applicant that he has received 479 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.
12. The Insurer referred to a Certificate of Capacity dated 1 October 2014 issued by the nominated treating doctor which assessed the worker to have partial capacity for some type of employment for 4 days per week 4 hours per day. Based upon this certificate the Insurer made a work capacity decision that the applicant has the capacity to work 16 hours per week. At the time the work capacity decision was made the applicant was not working. The Insurer has complied with Guideline 5.3.2 in that it has outlined the evidence considered in making the decision, noting the author, date and key information.
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 he 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. The applicant did not fulfil either requirement. The Insurer has referenced the relevant legislation and explained the line of reasoning for the decision in accordance with the Guidelines.
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 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 9 February 2014 which is the required notice period. The Insurer has complied with the legislation.

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 has referenced Section 59A(2) of the 1987 Act and advised the applicant that his entitlement to medical expenses would continue for 12 months after the date of cessation of his weekly payments. 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.
17. The decision of the Insurer dated 3 November 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 3 November 2014. The applicant applied for internal review 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 his weekly payments at the rate applicable prior to 9 February 2015.



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23. The payments are to be back-dated to 9 February 2015 (being the date on which payments were due to cease under the notice period) in accordance with clause 30 Schedule 8 to the *Workers Compensation Regulation* 2010.

24. Such payments are to continue until the date of the receipt of this recommendation.

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