

**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 her weekly payments at the rate applicable prior to 29 December 2014.**
- c. The payments are to be back-dated from 29 December 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 28 July 2014. The decision advised the applicant that her weekly payments of compensation would cease from 4 November 2014. The applicant sought internal review of the decision and the Internal Review Decision was dated 19 September 2014. The Internal Review Decision confirmed the initial work capacity decision however it extended the notice period to 29 December 2014.
2. The applicant then sought Merit Review from the Authority on 19 October 2014 and they delivered a decision dated 14 November 2014 confirming the original work capacity decision. The applicant then applied to this office for procedural review on 9 December 2014.
3. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. The applicant previously sought procedural review of a work capacity decision dated 26 July 2013. The applicant was successful and the work capacity decision was set aside by an earlier decision of this office<sup>1</sup>.

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<sup>1</sup> Reported and numbered as 6914

5. 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**

6. 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 submission is that her claim has not been transitioned within the required legislative timeframe. The applicant states that she made this submission on 27 August 2014 to the insurer and it was not accepted. The applicant submits that the amending legislation which was published on 3 September 2014 was published one week after her submission was made and was therefore published too late to apply to her case.

### **Submissions by the Insurer**

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

### **The Decision**

8. The *WorkCover Work Capacity Guidelines* relevant to making this work capacity decision came into effect on 11 October 2013.
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 her weekly payments of compensation would cease from 4 November 2014. In the Internal Review Decision the insurer confirmed the work capacity decision however a fresh notice period was provided. The applicant was advised that her payments would now cease from 29 December 2014. The notice period in both decisions complied with the legislation.
10. 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 a work capacity assessment was

conducted on 28 July 2014 and that a work capacity decision was made on the same day. She was advised of the work capacity decision by letter dated 28 July 2014. The Insurer has complied with the Guideline.

11. The insurer has referenced Section 59A(2) and (3) of the 1987 Act and informed the applicant that her entitlement to treatment expenses will cease 12 months after her entitlement to weekly payments of compensation ceases. The insurer also explained how the applicant may become re-entitled to medical treatment expenses by virtue of Section 59A(3). The insurer has complied with the Guidelines.
12. Guideline 5.3.2 requires the insurer to explain the relevant entitlement periods. The insurer has informed the applicant that she has been in receipt of weekly payments of compensation for 473 weeks and that her ongoing entitlements would be assessed pursuant to Section 38 of the 1987 Act. The insurer has complied with the Guideline.
13. Section 38(3)(b) requires the applicant to return to work for a period not less than 15 hours per week and be in receipt of not less than \$173.00 per week (indexed amount). The applicant has returned to work 7 hours per day for 3 days per week and is in receipt of \$1047.27 per week. Therefore the applicant had complied with the conditions of the section. The applicant's ongoing entitlements would then be worked out with reference to Section 38(7) as explained by the insurer. This resulted in the applicant having no further entitlement. This has been explained correctly by the insurer with the mathematical equation on page 4 of the work capacity decision. The insured has complied with the Guideline and the legislation.
14. The applicant has submitted that the insurer did not transition her within the legislative timeframes. The work capacity decision dated 28 July 2014 was out of time. The applicant submitted that the amending legislation which extended the time frames for transitioning workers was not published until 3 September 2014 which was a week after she made her submission. She submits that the amending legislation was published "to late" (sic) and that "natural justice and legislative analysis principles apply."
15. The applicant is correct in stating that the *Workers Compensation Amendment (Existing Claims) Regulation 2014* was published on 3 September 2014. The relevant amendment within that piece of

legislation was Schedule 1 [1] and [2] which had the effect of amending Schedule 8 Clause 17 of the *Workers Compensation Regulation 2010* to read “A period of 35 months (expiring at the end of August 2015) is prescribed for the purposes of Clause 8(2) of Part 19H of Schedule 6 to the 1987 Act” which refers to the timeframe within which an insurer must transition a worker.

16. Clause 31 of the Amendment Regulation noted the above amendment was to take effect from **31 March 2014** (emphasis added).

17. Therefore, the applicant’s submission must fail as the amending instrument states that the amendment extending the timeframe is retrospective and effective from 31 March 2014.

18. The decision dated 28 July 2014 has displayed a careful consideration of the requirements of the Guidelines and legislation.

## **Finding**

19. 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.

## **Recommendation**

20. The application for procedural review is dismissed.

21. The applicant is to be reinstated her weekly payments at the rate applicable prior to 29 December 2014.

22. The payments are to be back-dated from 29 December 2014.

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



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