

**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.

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 18 November 2014. The decision advised the applicant that his entitlement to weekly payments would cease from 26 February 2015, with the decision becoming "effective" on 27 February 2015. The applicant sought internal review of the decision and the Internal Review Decision (IRD) was dated 18 December 2014. The decision remained the same. He then sought Merit Review from the Authority on 07 January 2015 and they delivered a recommendation dated 3 February 2014. The merit review recommendation overturned the original work capacity decision and found that the applicant was eligible for weekly payments to be assessed on a continuing basis under section 37 for such time as the applicant was subject to the second payment period.
2. The applicant then approached this office for procedural review on 16 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 suffered an aggravation to a pre-existing injury to his left knee in October 2013 in the course of his employment as a mechanic. He underwent further surgery in December of that year. It is likely he will ultimately require a full knee replacement. The Insurer accepted liability to make ongoing payments of weekly compensation.
4. The applicant was not in receipt of weekly payments immediately before 1 October 2012. It follows that he is not an "existing recipient" and his pre-injury average weekly earnings are not pegged to the transitional rate.

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 has made submissions which are more relevant to merit review and not relevant to procedural review. They are set out in full as follows:

The applicant would like the following reviewed:

- i. How his payments are calculated;
- ii. Vocational options – there is only one option post-merit review; and
- iii. Vocational rehabilitation – he requires more options to obtain work.

Submissions by the Insurer

6. The Insurer has made submissions in response. Relevantly, they are thus:
 - i. The Insurer contends that the applicant has raised issues which are not of a procedural nature and therefore fall outside the scope of procedural review; and
 - ii. Vocational options were reviewed by Merit Review service and were noted as appropriate and suitable.

The Decision

7. The decision of the Insurer dated 18 November 2014 complied with the requirements of the Guidelines and the legislation.
8. *Guideline 5.3.2* requires the Insurer to explain the relevant entitlement periods and legislation. The decision informs the applicant that his entitlements are to be assessed under *Section 37* of the 1987 Act. The decision then provides an adequate explanation of how that Section works. The insurer has complied with the Guideline.

9. The applicant was given the correct notice period in accordance with *Section 54(2)(a)* of the 1987 Act being at least three months and four working days having regard to *Section 76(2)(a)* and *(b)* of the *Interpretation Act 1987*. In this decision the applicant was advised that his payments would cease from 27 February 2015 which is precisely the notice period required. The insurer has complied with the legislative requirements in respect of the notice period.
10. Guideline 5.3.2 also requires the insurer to state the impact of the decision on the worker in terms of their entitlement to weekly payments, entitlement to medical and related treatment expenses and return to work obligations.
11. The Insurer has advised the applicant of the date of cessation of his weekly payments. The Insurer has also advised the applicant of the impact that the decision has on his entitlement to medical and related treatment expenses with reference to *Sections 59A(2)* and *59A(3)* of the 1987 Act. The insurer has thus complied with the Guideline.
12. True it is that the merit review service found an error in relation to the applicability of section 37 and the calculation of the weekly benefits payable to the applicant. However, this is an error remediable by the merit review process, as the present case shows.
13. This office has no power to review the recommendations of the merit review service of the Authority. It would only be with such a power that the scrutiny requested by the applicant could be exercised. It follows that this office has no power to undertake the type of review sought in this case.

Finding

14. There are no procedural errors identifiable in the decision. The insurer has complied with the Guidelines and relevant legislation. The decision, although incorrect as to the amount payable to the applicant, was validly made. The error was appropriately remedied in the course of merit review.

RECOMMENDATION



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15. The application for procedural review is dismissed.

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Delegate of the WorkCover Independent Review Officer
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