



**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 14 January 2015.**
- c. The payments are to be back-dated from 14 January 2015 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 7 October 2014. The insurer advised the applicant that his weekly payments of compensation would cease from 14 January 2015. The applicant sought internal review and the Internal Review Decision was dated 24 November 2014 and upheld the original decision.
2. The applicant then sought Merit Review from the Authority on 24 December 2014 and they delivered a decision dated 23 January 2015. The finding was that in accordance with Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) the applicant was entitled to weekly payments of compensation and that compensation was calculated to be nil.
3. The applicant then applied to this office for procedural review on 18 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 had previously sought procedural review of a work capacity decision dated 31 May 2013. The applicant was successful

and the work capacity decision was set aside by an earlier recommendation of this office<sup>1</sup>.

5. The facts and circumstances concerning the background of the claim are set out in the aforementioned recommendation and need not be repeated.
6. 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.
7. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).
8. The relevant version of the Guidelines was dated 4 October 2013 and came into effect on 11 October 2013.

### **Submissions by the applicant**

9. 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 of “*all aspects of my work capacity decision and the subsequent reviews carried out by the Insurer and Workcover.*”
10. Pursuant to Section 44(1)(c) of the 1987 Act the only document which I am able to procedurally review is the work capacity decision dated 7 October 2014.

### **Submissions by the Insurer**

11. The Insurer made submissions in response to this application dated 26 February 2015. Those submissions included a useful chronology.

### **The Decision**

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<sup>1</sup> Reported and numbered as 2613

12. In accordance with Guideline 5.3.2 the Insurer advised the applicant that the work capacity assessment was completed on 23 September 2015. The applicant was advised of the work capacity decision by letter dated 7 October 2014.
13. The same Guideline requires the Insurer to explain the relevant entitlement period. The Insurer informed the applicant that he had received 800 weeks of weekly payments of compensation at the time that the work capacity decision was made. This was well and truly past the second entitlement period of 14 to 130 weeks.
14. The Insurer advised the applicant that as he had received in excess of 130 weeks' worth of payments and had a current work capacity his entitlement to weekly compensation 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 36 hours per week and as such the applicant had complied with part of subsection (b).
15. The remaining requirement of subsection (b) was that the applicant must be earning at least \$173.00 per week. The applicant is in receipt of \$1140.54 per week. Therefore the applicant had complied with the requirements of Section 38(3). The insurer explained the algorithm used to calculate the applicant's entitlement including an explanation of the transitional rate referred to in Schedule 6 Part 19H Division 1 Clause 2 of the 1987 Act. The algorithm resulted in the applicant's entitlement being nil.
16. The Insurer has complied with the Guideline 5.3.2 by explaining the relevant entitlement period and referencing the legislation when determining whether the applicant was entitled to weekly compensation payments under the 1987 Act.
17. 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 referenced and explained both sections of each

piece of legislation. As a result the applicant was advised that his weekly payments would cease from 14 January 2015 which is the required notice period. The Insurer has complied with the legislation and Guideline.

18. 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 from the date his weekly payments of compensation ceased. The provisions of Section 59A(3) were also explained. The Insurer has complied with the Guideline.

19. The decision of the Insurer dated 7 October 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 7 October 2014. The applicant applied for internal review on 30 October 2014. Therefore, 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.



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24. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 14 January 2015.
25. The payments are to be back-dated from 14 January 2015 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  
23 March 2015