

**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 his weekly payments at the rate applicable prior to 17 December 2014. Those payments must continue in accordance with section 54(2)(a) until 24 March 2015 due to the notice already given to the applicant by the Insurer.**
- c. **Thereafter payment must be made in accordance with Clause 30 of 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 17 December 2014. The decision advised the applicant that his weekly payments of compensation would cease from 24 March 2015. The applicant sought internal review of the decision and the Internal Review Decision (which did not alter the original decision) and then sought Merit Review from the Authority on 17 February 2015. A recommendation was made by the Authority on 19 March 2015. Again this did not alter the decision of the Insurer. The applicant then applied to this office for procedural review on 24 March 2015.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. The applicant previously sought procedural review of a work capacity decision dated 31 October 2013. The applicant was successful and the work capacity decision was set aside by an earlier decision of this

office¹. He subsequently sought procedural review of a later decision dated 16 September 2014, but this was unsuccessful.²

4. The facts and the circumstances concerning the background of the claim are set out in the aforementioned recommendations and need not be repeated.
5. Prior to the recommendation subsequently reported and numbered as 315 (see footnote 2), the Insurer purported to make what can at best be described as a prophylactic decision in anticipation that the decision of 16 September 2014 would be found invalid by this Office. This preemptive strike, dated 17 December 2014,³ purported to once again give notice of termination of weekly payments and extended the date for last receipt of weekly payments to 24 March 2015. This decision was still purportedly in force when, on 7 January 2015, recommendation 315 issued from this Office, upholding the validity of the previous work capacity decision dated 16 September 2014.
6. The WIRO recommendation dated 7 January 2015 said that payments should continue beyond 23 December 2014 based on the stay applicable as a result of clause 30 of schedule 8 to the *Workers Compensation Regulation 2010* but should cease upon receipt by the applicant of the recommendation.
7. This Office was unaware of the decision dated 17 December 2014, which clearly pre-dated the expiration of the original notice period by 6 days. The Insurer having effectively extended that notice period to 24 March 2015, it is bound to pay the worker for the full period by operation of section 54(2)(a) of the 1987 Act.

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*

¹ Reported and numbered as 10014.

² Reported and numbered as 315.

³ It might be noted here that the decision of 16 September 2014 gave notice of termination of weekly payments on and from 23 December 2014, so they had not ceased as at the date of the later decision on 17 December 2014. Since the earlier notice period had yet to expire, the notice was merely continued by the Insurer, which must pay for the full notice period given.

any judgment or discretion exercised by the insurer." The applicant's submissions are as follows:

With reference to [the Insurer's] two letters dated 16th September 2014 and 17th December 2014 referring to two different work capacities the letters are almost identical except where I question on Page 4 of the letter dated 17th December where it states - quote - "As I have determined you as having the "current work capacity" to work 16 hours per week in suitable employment, and you are only working 12 hours per week, you do not meet the requirements of section 38 (3) (c).

This differs from the first letter dated 16th September 2014 where it states - quote - "As I have determined you as having the current work capacity" and you are only working 12 hours per week in suitable employment, you do not meet the requirements of Section 38 (3) (b).

Why did I have two work capacity decisions going at the same time?

On the letter dated 16th September it states that my weekly benefits will cease on 23 December 2014 but on the 2nd letter dated 17th December it clearly states that my weekly benefits will cease on 24th March 2015. Therefore, I have not received any benefits.

On the letter from [the Insurer] dated 24th September 2014 it states that I was advised on my claim dated 16th September 2014 that as per Section 59A (2) of The Act, my entitlement to medical expenses would cease on 23rd December 2015. In the first or second work capacity this has not been mentioned.

[The Insurer] must have missed something on the first work capacity which was sent to you, in order to carry out a second work capacity, which must have been overlooked by you.

I had to ring [the Insurer] today 24th March 2015 to get ongoing correspondence from the insurer from my merit review which wasn't sent to me. I had to ask for it.

I have had no phone calls or correspondence from [the Insurer] in the last two months to assist me with my current work capacity.

I received an Injury Management Plan from [the Insurer] in the mail dated 16th September, 2014 with 31st December 2014 being the date to be reviewed. To date I have heard nothing from [the Insurer].

Submissions by the Insurer

9. The insurer made submissions in relation to this third application by the worker thus:

1) The insurer made a work capacity decision dated 16/9/2014. This decision has undergone an internal review by the insurer (29/10/2014), Merit Review by The Authority (8/12/2014) and a WIRO review (7/1/2015). The outcome of all reviews was that the original decision was deemed correct.

2) On 17/12/2014, the case manager made a new work capacity decision. This was completed in anticipation of the previous decision being set aside by WIRO on procedural grounds. This subsequent decision provided [the applicant] with notice that his weekly benefits would cease 24/3/2015.

3) WIRO upheld the initial work capacity decision on 7/1/2015. The instructions provided in this notice were to pay [the applicant] to the date of that decision – that is, 7 January 2015. I confirm that this was completed.

4) Since this time [the applicant] has sought payment of weekly benefits until 24/3/2015. He has raised this issue with the WIRO complaints team and has sought a new internal review and Merit Review by the Authority, both of which have been completed and are attached for your reference.

The Decision

10. The Insurer has no need to make yet a further work capacity decision, since the decision dated 16 September 2014 was correctly made, as was the decision dated 17 December 2014. That is to say, the procedures adopted in making the decision were correct, however the need for the second of the two decisions is questionable in the absence of procedural review being completed. It was a (failed) attempt to second-guess the procedural review process, which will have expensive consequences.
11. The notice period given in the course of the work capacity decision dated 16 September 2014 has effectively been extended by the Insurer from having an expiration date of 23 December 2014 to having a new expiration date of 24 March 2015. It follows that compensation must be paid for the whole period, since the applicant is entitled to rely on the representation of the Insurer made on 17 December 2014.
12. The need to pay the applicant as a result of the stay arising under clause 30 of schedule 8 to the *Regulation* cannot arise until the full period of notice has expired, which occurred yesterday. Accordingly the stay is applicable for the period from yesterday until, receipt by the worker of this recommendation.
13. The applicant's concerns about "two work capacities" are unfounded and go to the merits of his case. He is clearly working fewer than 15 hours per week, and thus cannot qualify for further weekly payments under section 38(3) until he increases his hours. The Insurer has no discretion concerning this. His other concerns are also irrelevant to procedural review.

Finding

14. There are no procedural errors identifiable in the decision. The insurer has complied with the Guidelines and relevant legislation. The application for procedural review must be dismissed.

Recommendation



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15. The application for procedural review is dismissed.
16. The applicant is to be reinstated his weekly payments at the rate applicable prior to 17 December 2014. Those payments must continue in accordance with section 54(2)(a) until 24 March 2015 due to the notice already given to the applicant by the Insurer.
17. Thereafter payment must be made in accordance with clause 30 of schedule 8 to the *Workers Compensation Regulation 2010*.
18. Such payments are to continue until the receipt of this recommendation.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
25 March 2015