



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 8 January 2015.**
- c. The payments are to be back-dated from 8 January 2015 in accordance with clause 30 of Schedule 8 to the *Workers Compensation Regulation 2010*.**
- d. Such payments are to continue until the date of the receipt of this recommendation by the applicant and to cease immediately thereafter.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 30 September 2014. The insurer advised the applicant that his weekly payments of compensation would cease from 8 January 2015. The applicant sought internal review and the Internal Review Decision was dated 17 November 2014 and upheld the original decision.
2. The applicant then sought Merit Review from the Authority and they delivered a decision dated 13 January 2015. The finding was that in accordance with Section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act) the applicant was not entitled to ongoing weekly compensation payments.
3. The applicant then applied to this office for procedural review on 26 February 2015, received in this office on 3 March 2015. It is questionable whether the applicant has made the application for procedural review within the time allowed in section 44, being 30 days. Despite the Merit Review recommendation being dated 13 January

2015, the applicant claims to have received a copy no earlier than 17 February 2015. If this is true, then the applicant has applied for procedural review within 30 days of receipt by him of the Merit Review recommendation. There is no obvious reason why it would have taken five weeks for the recommendation to reach the applicant who lives in NSW, and the recommendation was certainly received by the Insurer on 13 January 2015. In addition, the insurer wrote to the applicant advising the outcome of merit review in his own language and spoke to him with the assistance of an interpreter on 16 January 2015 advising of the outcome.

4. Despite what appear above, when I specifically sought submissions from the insurer on this point, none were forthcoming. Accordingly I can only conclude that this is not a point with which the Insurer takes issue and they must accept that the applicant only received the Merit Review recommendation on 17 February 2015. It follows that I must treat the application to this office as though it was made within time.
5. The applicant sustained injury to the lower back in 2004 while unloading luggage in the course of his employment as a baggage handler. He later worked on reduced hours as a porter/concierge, but was terminated by the employer in 2007. Having worked intermittently since, he was in receipt of weekly payments immediately prior to 1 October 2012 and was therefore an “existing recipient” as that term is understood in the 1987 Act. As at the date of the work capacity decision in September 2014 he had received weekly payments for 619 weeks.
6. Clause 8 of Part 19H of Schedule 6 to 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 on the following stated grounds:

- I do not believe that [the Insurer] or WorkCover have followed the correct procedures.

10. Whether or not WorkCover have followed the correct procedures cannot be a consideration in the course of procedural review and that part of the application must be disregarded.

Submissions by the Insurer

11. The Insurer made submissions in response to this application dated 9 March 2015. Those submissions included a useful chronology. They set out step-by-step the history of the claim and appear to be wholly consistent with the terms of the work capacity decision and the internal review decision.

The Decision

12. In accordance with Guideline 5.3.2 the Insurer advised the applicant that the work capacity assessment was completed on 29 September 2014. The applicant was advised of the work capacity decision by letter dated 30 September 2014.

13. The same Guideline requires the Insurer to explain the relevant entitlement period. The Insurer informed the applicant that he had received 619 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 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 not returned to work and as such the applicant had not complied with subsection (b).

15. 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.
16. 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 8 January 2015 which is the required notice period. The Insurer has complied with the legislation and Guideline.
17. 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.
18. The decision of the Insurer dated 30 September 2014 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

Finding

19. There are no procedural errors identifiable in the decision. The insurer has complied with the Guidelines and relevant legislation.

The Stay

20. 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. This means that payments should continue until the review process in section 44 of the 1987 Act is completed.

21. The work capacity decision was dated 30 September 2014. The applicant applied for internal review on 21 October 2014. Therefore, the applicant applied for internal review within the 30 day requirement for the stay to operate immediately from the date of cessation of payments.

RECOMMENDATION

22. The application for procedural review is dismissed.

23. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 8 January 2015.

24. The payments are to be back-dated from 8 January 2015 in accordance with clause 30 of Schedule 8 to the *Workers Compensation Regulation* 2010.

25. Such payments are to continue until the date of the receipt of this recommendation by the applicant and to cease immediately thereafter.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
7 April 2015