



**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 prior to 24 March 2015.**
- c. The payments are to be backdated from 24 March 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 17 December 2014. The insurer advised the applicant that his weekly payments of compensation would reduce to \$152.32 per week from 24 March 2015. The applicant sought internal review of the decision. The Internal Review Decision was dated 22 January 2015 and was called "*a new decision*" and advised the applicant that his weekly payments would cease from 1 May 2015.
2. The applicant then sought Merit Review from the Authority on 2 February 2015 and they delivered a decision dated 3 March 2015 making a recommendation and finding that the applicant is not entitled to weekly payments of compensation in accordance with Section 38(3) of the Workers Compensation Act 1987 (the 1987 Act).
3. The applicant then applied to this office for procedural review on 19 March 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. On 11 June 2003 the applicant suffered injury to his right elbow. Liability was accepted by the insurer and the applicant has been in receipt of weekly payments of compensation. At the time of the work capacity decision the applicant was working suitable hours as a bus driver.
5. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines). The relevant version of the Guidelines came into effect on 11 October 2013.

### **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.*”
7. The applicant has requested a procedural review. The applicant’s submissions are based upon the hours of work which he performs each week. This submission is not relevant to procedural review.

### **Submissions by the Insurer**

8. The Insurer has made submissions received 23 March 2015 in response to this application. The insurer has submitted that the applicant’s evidence in respect of hours worked each week is not an issue for procedural review.

### **The Decision**

9. Section 44 of the 1987 Act provides that the Independent Review Officer can review a Work Capacity Decision after it has been referred to or the subject of an internal review by the insurer. There is no reference to any review of the internal review decision. Therefore this review is limited to the work capacity decision dated 17 December 2014.
10. 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 has referenced Section 54(2)(a) of the 1987 Act and

have provided the correct notice period by informing the applicant that his weekly payments will be reduced from 24 March 2015.

11. Guideline 5.3.2 requires the Insurer to advise the date of the work capacity assessment. The insurer has advised the applicant that the work capacity assessment commenced on 25 November 2014 and the assessment concluded on 17 December 2014. As a result of that assessment a work capacity decision was made and the applicant was advised of the work capacity decision by letter dated 17 December 2014. The Insurer has complied with the Guideline.
12. The same Guideline requires the Insurer to explain the relevant entitlement periods. The Insurer has informed the applicant that he has received 593 weeks' worth of compensation payments. Therefore his ongoing entitlements would be assessed pursuant to Section 38 of the 1987 Act.
13. The Insurer has informed the applicant that he is an "existing recipient" in accordance with Schedule 6 Part 19H Clause 1 of the 1987 Act. It was also explained that the applicant is subject to the transitional amount when calculating his pre-injury earnings which was \$972.90 at the relevant time. The Insurer made a decision that the applicant was able to earn \$626.00 per week. The applicant's ongoing entitlement was calculated using the algorithm in Section 38(7) of the 1987 Act.
14. 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 on this occasion has not referenced Section 59A of the 1987 Act. As the applicant's entitlement to weekly payments has not ceased then the applicant's entitlement to medical expenses was not affected by the work capacity decision which is the subject of this review. Therefore, there was no requirement for the insurer to reference this issue at this time.
15. The decision of the Insurer dated 17 December 2014 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

## Finding



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

### **RECOMMENDATION**

17. The application for procedural review is dismissed.

18. The applicant is to be reinstated to his weekly payments at the rate prior to 24 March 2015.

19. The payments are to be backdated from 24 March 2015 in accordance with clause 30 Schedule 8 to the Workers Compensation Regulation 2010.

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

Tracey Emanuel  
Delegate of the WorkCover Independent Review Officer  
30 April 2015