

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 her weekly payments at the rate applicable as at 23 March 2015.**
- c. The payments are to be back-dated to 24 March 2015.**
- d. Such payments are to continue until receipt by the applicant of a copy of this recommendation and are to cease thereafter.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 16 December 2014. The decision informed the applicant that her weekly payments of compensation would cease on 24 March 2015. The applicant sought internal review on 4 January 2015 (application received by the Insurer on 8 January 2015) and the Internal Review Decision was dated 2 February 2015. That decision confirmed the work capacity decision.
2. The applicant applied to the Authority for Merit Review on 24 February 2015 and they delivered findings and recommendations dated 26 March 2015. The Authority made a finding that the worker did not meet the special requirements for the continuation of weekly payments after the second entitlement period contained in Section 38 of the *Workers Compensation Act 1987* (the 1987 Act).
3. The applicant then made application to this office on a form dated 16 April 2015, received on 20 April 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. On 17 June 2000 the applicant sustained a lower back injury while lifting a heavy tray in the course of her employment as a Sterilisation Technician. She later developed anxiety and depression. She has had varying subsequent periods of total and partial incapacity and was in receipt of weekly payments immediately prior to 1 October 2012, making her an “existing recipient” as that term is defined in the 1987 Act.
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).

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.*” The applicant has applied for a procedural review.
7. The applicant relies on her assertion that she is ‘unhappy’ with the two decisions of the Insurer and goes on to say that it is her apparent belief that her depression, anxiety and physical disabilities (which continue to deteriorate) all result from her work injury. While it may be difficult for her to work, she is “willing to give it a try.”
8. Such submissions clearly go to the merits of the case and do not raise issues relevant to procedural review.

Submissions by the Insurer

9. The Insurer has provided a response to the application. The insurer provided a useful chronology of the correspondence to date as follows:

- [The Insurer] contacted [the applicant] on 30 October 2014 and sent a fair notice letter to [her] on that same day.
- [The Insurer] completed a Work Capacity Decision and issued a notice dated 16 December 2014 to [the applicant] (more than 3 weeks since date of Fair Notice letter).¹ The effective date of that decision was 24 March 2015, which is three months and four business days, the required period for a decision to become effective plus postage allowance.
- [The Insurer] received [the applicant's] Application for Internal Review on 8 January 2015. [The Insurer] issued an Internal Review Decision dated 2 February 2015 to [the applicant] maintaining the original decision.
- The Merit Review Service Recommendations dated 26 March 2015 upheld our original decision that [the applicant] had no entitlement to weekly benefits.

The Decision

10. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
11. In accordance with Guideline 5.3.2 the insurer informed the applicant that as at December 2014 she had received weekly compensation payments for 552 weeks. The same Guideline requires the insurer to explain the relevant entitlement periods and explain the line of reasoning for the decision. The entitlement periods are clearly set out and explained.
12. The insurer informed the worker of the "*special requirements*" she must fulfil in order for her to be entitled to ongoing weekly payments of compensation. Section 38(3) requires the worker to have returned to work for not less than 15 hours per week and to be earning at least \$173.00 per week and must be assessed *by the Insurer* as likely to continue to indefinitely be incapable of undertaking further employment which would increase her current weekly earnings.
13. The Insurer has correctly advised the applicant of the date of the work capacity assessment.

¹ More than six weeks, in fact.

14. The relevant notice period has been given as required by section 54(2)(a) and the time for delivery by post has been correctly added to the period of notice in accordance with section 76(1)(b) of the *Interpretation Act 1987*.
15. Section 59A was correctly explained, with particular emphasis on sections 59A(2) and (3).
16. The medical and other relevant evidence relied upon by the Insurer was current, including an MRI scan report dated 16 November 2014. The medical evidence was thoroughly traversed and the reasoning process behind the decision was carefully explained.
17. The insurer methodically set out the various vocational options available to the applicant who, it is agreed, can only work for a maximum of 20 hours per week.
18. No errors of a procedural nature can be found in the course of the Insurer's decision-making process.

FINDING

19. Under the legislation the Insurer can make an assessment of the applicant's work capacity and then a decision about that work capacity, which must comply with the legislation, the Regulation and the Guidelines in order to produce a procedurally correct result. In the current instance there have been no breaches of the legislation and the Guidelines which are to be treated as delegated legislation. Accordingly the work capacity decision cannot be impugned on procedural grounds.
20. Having applied for internal review within 30 days of the original work capacity decision, the applicant is entitled to the benefit of the "stay" arising out of clause 30 of Schedule 8 to the *Workers Compensation Regulation 2010* for the duration of section 44 review. Since payments were not due to cease until 24 March 2015, they should have never ceased until the conclusion of this review. If they have ceased, the recommendations in paragraphs 22-23 below apply. If weekly payments have not ceased, paragraphs 22-23 are otiose.

RECOMMENDATION



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21. The application for procedural review is dismissed.
22. The applicant is to be reinstated to her weekly payments at the rate applicable as at 23 March 2015.
23. The payments are to be back-dated to 24 March 2015.
24. Such payments are to continue until receipt by the applicant of a copy of this recommendation and are to cease thereafter.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
2 June 2015