

**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.

Introduction and background

1. A work capacity decision dated 31 January 2014 was sent to the applicant advising her that her entitlements to weekly payments would cease from 30 April 2014. The applicant requested an internal review which was made on 31 March 2014 confirming the work capacity decision and the cessation of payments. The applicant did not request merit review or procedural review of that work capacity decision.
2. The insurer made another work capacity decision dated 18 June 2014. That applicant now seeks a procedural review of that decision. The applicant requested an internal review on 5 February 2015 and the internal review decision was dated 5 March 2015. The internal review decision found that the applicant was entitled to a maximum amount of \$346.26 per week pursuant to Section 37 of the *Workers Compensation Act 1987* (the 1987 Act).
3. The applicant applied for merit review by the Authority on 17 March 2015. They delivered a decision dated 17 April 2015 which found that the applicant was entitled to weekly payments at a maximum amount of \$376.13 in accordance with Section 37(2) of the 1987 Act.
4. The applicant then made application to this office dated 8 May 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
5. On 31 December 2011 the applicant slipped and fell during the course of her employment as a Registered Nurse. The applicant was diagnosed with a fractured coccyx and underwent surgery in November 2012. The applicant eventually returned to suitable duties but these were withdrawn and her employment terminated in May 2014. At the time of

the work capacity decision which is the subject of this review the applicant had found alternate employment performing administrative duties as well as working as a practice nurse. At the time of the work capacity decision the applicant was not in receipt of weekly payments of compensation from the insurer.

6. 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

7. 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.
8. The applicant has submitted that the work capacity decision dated 18 June 2014 was sent to the incorrect address and by the time she received a copy of the decision the time for internal review had lapsed and she was unaware that internal review could be applied for at any time. The subsequent internal review, dated 5 March 2015, made a decision that the applicant was entitled to \$364.26 per week. The insurer had declined to give the applicant the benefit of the stay under clause 30 Schedule 8 of the *Workers Compensation Regulation 2010* and advised her “*as you have not applied for internal review within 30 days of receiving the work capacity decision the initial decision of 18 June 2014 is not stayed.*”
9. The period for which the applicant appears not to have been paid weekly payments of compensation arising out of this work capacity decision is between 18 June 2014 and 5 March 2015.
10. I am only in a position to review the procedures undertaken by the insurer in making the work capacity decision. I cannot have any consideration for periods of non-payment or subsequent recommendations made on internal review or merit review. I can only assess the validity of the work capacity decision document as a whole.

Submissions by the Insurer

11. The Insurer has provided submissions dated 12 May 2015 in response to the application. The insurer submitted that at the time of the work capacity decision dated 18 June 2014 the applicant was not in receipt of weekly payments of compensation given the previous decision dated January 2014.

The Decision

12. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.

13. The work capacity decision dated 18 June 2014 advised the applicant that *“as of 30 April 2014 your entitlements to Section 37 payments were reduced to nil and will not be re-instated based on this further decision.”*

14. As the applicant was not in receipt of weekly payments at the time of the work capacity decision dated 18 June 2014 and as she had already been informed in the previous work capacity decision made in January 2014 that her weekly payments of compensation would cease on 30 April 2014 and her entitlement to medical and treatment expenses would cease one year later it was not incumbent upon the insurer to advise the applicant of these issues in this work capacity decision.

15. Guideline 5.3.2 requires the insurer to advise the date when the decision takes effect. The insurer did advise the applicant that *“as your entitlement to weekly benefits ceased on 30 April 2014 we are not required to provide you with a three month notice period as you are not currently in receipt of benefits.”* The Insurer has complied with the legislation and the Guidelines.

16. Guideline 5.3.2 also requires the insurer to advise the applicant of the relevant legislation. The insurer informed the applicant that her ongoing entitlements would be assessed under Section 37 of the 1987 Act. The insurer informed the applicant that it had made a decision in accordance with Section 43 of the 1987 Act that she could work 24 hours per week earning \$39.28 per hour (\$942.72 per week). The insurer explained the

way in which the applicant's entitlements were calculated at pages 2 and 3 of the work capacity decision.

17. The insurer also advised the applicant, at page 3 of the decision of the evidence upon which it relied. The insurer has complied with the Guidelines.
18. The decision of the insurer dated 18 June 2014 has displayed a careful consideration of the requirements of the Guidelines and legislation.

The Stay

19. Clause 30 Schedule 8 of the *Workers Compensation Regulation 2010* (the Regulations) 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.
20. The work capacity decision was dated 18 June 2014. The applicant applied for internal review on 5 February 2015. The application was made outside the 30 day requirement for the stay to operate immediately.
21. I note the applicant's submission that the insurer sent the work capacity decision to the incorrect address being a previous solicitor. However, as that address was the last contact address the insurer had for the applicant the insurer has complied with the legislation and the Guidelines in respect of properly notifying the applicant.
22. I note that all subsequent correspondence including the internal review decision was sent to the same solicitor's address.
23. For the period between 18 June 2014 and 5 March 2015 the insurer has declined to pay the applicant weekly payments of compensation as she failed to comply with the requirements of Clause 30 Schedule 8 of the Regulations. I refer to the Deputy President Roche's decision in Mr Rawson's case¹ where the Deputy President stated at paragraphs 81 & 82 of the judgement:

¹ *Rawson v Coastal Management Group Pty Ltd* [2015] NSWCCPD3

“...As its [the insurer] decision was that Mr Rawson had “no current work capacity” and as that expression is defined to mean “a present inability arising from an injury such that the worker is not able to return to work, either in the worker’s pre-injury employment or in suitable employment” (s 32A), it seems that the insurer has decided that the phrase “present inability” dictates that a work capacity decision can only apply from the date it is made. That is patently incorrect.”

The expression “present inability” relates to the time from which the weekly compensation is sought and requires a decision about a worker’s “current work capacity” that applies at and from that time, even though the work capacity decision may not be made until a later time. Any other interpretation leads to workers being denied compensation because of the insurer’s delay in making the work capacity decision.”

24. The same issue can be raised in this present situation where the insurer did not perform an internal review until 5 March 2015 yet the capacity of the applicant would be the same had it been performed in or about June 2014. I note in the applicant’s submissions that she refers to a letter from the insurer dated 30 July 2014 which stated *“I understand that you have requested that a further work capacity decision be made now that you are working 16 hours per week. I can confirm for you that we won’t be issuing a further work capacity decision on this basis as the 2nd work capacity decision issued on 18 June 2014 is still valid.”*

25. The insurer shielding themselves behind their delay in making a further work capacity decision as well as the Regulations in respect of operation of the stay as reasons for non-payment of the back pay period is *“patently incorrect”* to quote the Deputy President in Rawson’s case. However, I note that I am unable to make any recommendations in respect of this issue or the period of non-payment.

Finding

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



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RECOMMENDATION

27. The application for procedural review is dismissed.

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Delegate of the WorkCover Independent Review Officer
17 June 2015