

**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 work capacity decision of the Insurer dated 5 February 2015 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 13 May 2015.**
- c. The payments are to be back-dated to 13 May 2015.**
- d. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.**

**Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 5 February 2015. The decision informed the applicant that his *"new payment rate would commence on"* 13 May 2015. The applicant sought internal review on 6 February 2015 and the Internal Review Decision was dated 17 March 2015. That decision confirmed the original decision.
2. The applicant applied to the Authority for Merit Review on 26 March 2015 and they delivered findings and recommendations dated 12 May 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 13 May 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. On 8 June 2011 the applicant suffered injury to his right knee whilst performing his pre-injury duties as a shop assistant. The applicant continued working and underwent an arthroscopy in February 2012. On 30 March 2012 the applicant resigned from his employment. The applicant has been in receipt of weekly payments of compensation from the insurer.
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. I have reviewed the applicant’s submissions which refer to his entitlement to medical expenses and capacity to work. The submissions are not relevant to procedural review.

### **Submissions by the Insurer**

8. The Insurer has provided submissions dated 20 May 2015 in response to the application. The insurer responded to the applicant’s submissions and provided a useful chronology of the correspondence to date.

### **The Decision**

9. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
10. The insurer informed the applicant that pursuant to Section 43(1) of the 1987 Act it had made a decision that he had the capacity to work 40 hours per week. A review of the documentation reveals that at the time of the decision the applicant was working 15 hours per week.

11. The insurer considered that suitable employment, in accordance with the definition provided in Section 32A of the 1987 Act, was administrator, security officer and customer service attendant. It was noted that the applicant was earning \$185 per week as an administrator.
12. The insurer has decided that based upon an earning capacity assessment report dated 23 December 2014 the applicant had the capacity to work 40 hours per week in the above professions earning the following:
  - Administrator - \$915.20 per week;
  - Security Officer - \$842.00 per week;
  - Customer Service Attendant - \$910.00 per week.

The insurer has then determined \$889.07 per week as “*being your [the applicant’s] ability to earn in the identified suitable employment listed above.*” This methodology is incorrect. The applicant does not have the capacity to earn \$889.07 per week. This is a mythical weekly figure comprised of the average of all three suitable employments. The applicant has the capacity to earn one of the above listed amounts whilst working in the corresponding suitable employment. It is noted that in the Internal Review Decision the insurer had decided that the applicant has the ability to earn \$915.20 per week as an administrator. This decision in the internal review is not sufficient to make the work capacity decision valid.

13. In accordance with Guideline 5.3.2 the insurer has informed the applicant that he has received 160 weeks’ worth of weekly compensation payments. The applicant was informed that his ongoing entitlements to weekly payments of compensation would be subject to him complying with the special requirements in Section 38(3) of the 1987 Act.
14. The same Guideline requires the insurer to reference the relevant legislation and state the decision and give brief reasons for making the decision. At page 3 of the decision the insurer has informed the applicant that he “must satisfy the following three provisions under Section 38(3)”:

*(a) the worker has applied to the insurer in writing (in the form approved by the Authority) no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payments after the second entitlement period, and*

*(b) the worker has returned to work (whether in self-employment or other employment) for a period of not less than 15 hours per week and is in receipt of current weekly earnings (or current weekly earnings together with a deductible amount) of at least \$155 per week [it was noted by the insurer that this figure had been indexed on 1 July 2014 to \$173 per week], and*

*(c) the worker is assessed by the insurer as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker's current weekly earnings.*

15. The insurer then advised the applicant that he did meet all the requirements for an entitlement to weekly payments of compensation pursuant to Section 38(3) of the 1987 Act in that:

- *You are working more than 15 hours per week.*
- *You are earning over than 173 (sic) per week.*
- *You are likely to continue to be incapable of further employment that would increase your earnings.*

16. The last of these statements is *non sequitur*. The insurer had made a work capacity decision at page 1 that the applicant has current capacity to work 40 hours per week. At the time of the decision the applicant was working 15 hours per week. It does not follow that the applicant is likely to continue to be incapable of further employment given that the insurer has decided he has the capacity to work 40 hours per week and he is presently only working 15 hours.

17. The applicant has not met all the requirements of Section 38(3) in particular subsection (c). Clearly, the insurer's own work capacity decision is that the applicant is not incapable of further employment which would increase his current earnings. The insurer's statement to

the contrary is a demonstrable error. The insurer has failed to comply with the Guidelines.

18. The legislation and Guideline 5.3.2 requires the insurer to advise the date the decision takes effect. 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(1)(b) of the Interpretation Act 1987. In this decision the Insurer has referenced and explained both sections of each piece of legislation.

19. In this particular case the insurer has informed the applicant that he has satisfied the requirements of Section 38(3) for an entitlement to weekly payments to continue. There is then an algorithm on page 3 which calculates \$0 without actually explaining to the applicant that was his entitlement. The insurer merely advises that *"your new payment rate will commence on 12 May 2015."* In order to avoid any misinterpretation the insurer should have advised the applicant that his weekly payments of compensation would cease on 12 May 2015.

20. Guideline 5.3.2 also requires the insurer to state the impact of the decision on the applicant's entitlements to medical and related treatment expenses. At page 4 of the decision the insurer has attempted to proffer an explanation as to the effect the decision has had on the applicant's entitlement to medical expenses as follows:

*"When you no longer have an entitlement to weekly payments of compensation, there will also be a 12 month limitation to your entitlement to medical and related expenses in accordance with Section 59A(2) of the Workers Compensation Act 1987."*

21. It is conceded that at the present time there is some uncertainty surrounding the application of Section 59A<sup>1</sup> of the 1987 Act however in this case the explanation of the insurer is inadequate. The insurer has not attempted to explain to the worker when his entitlement to weekly payment ceases and when the 12 month limitation to his medical and related treatment expenses either commences or ceases.

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<sup>1</sup> See *Vella v Penrith City Council* [2014] NSWCC 363; *Brassaud v Chubb Fire Safety Ltd* [2014] NSWCC 202; and latterly *Flying Solo Properties Pty Ltd t/as Artee Signs v Collet* [2015] NSWCCPD 14.

22. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 5 February 2015.

## **FINDING**

23. Under the legislation the Insurer can make an assessment of the applicant's work capacity and then a decision about that work capacity, but they 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 breaches of the legislation and the Guidelines which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

## **RECOMMENDATION**

24. The work capacity decision of the Insurer dated 5 February 2015 is set aside.

25. The applicant is to be reinstated to his weekly payments at the rate applicable as at 13 May 2015.

26. The payments are to be back-dated to 13 May 2015.

27. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.

Tracey Emanuel  
Delegate of the WorkCover Independent Review Officer  
18 June 2015