

**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. The applicant seeks procedural review of a work capacity decision made by the Insurer on 13 June 2014. The decision informed the applicant that his weekly payments of compensation would cease on 18 September 2015. The applicant sought internal review on or about 19 January 2015 and the Internal Review Decision was dated 11 February 2015. That decision confirmed the original work capacity decision. It may have been received by the applicant as late as 19 February 2015.
2. The applicant applied to the Authority for Merit Review on a date in April which may have been 24 April 2015 and they delivered findings and recommendations dated 1 May 2015. The Authority made the observation that since the worker had not received the outcome of internal review until 19 February 2015 then the Insurer had failed to notify the worker of the outcome of internal review within 30 days in accordance with the Act and so it was permissible to seek merit review.<sup>1</sup>
3. The merit review recommendation upheld the original decision by the Insurer.

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<sup>1</sup> Interesting as this observation no doubt is, it fails to explain how the applicant was permitted to approach merit review outside the statutory time limit of 30 days of his receipt of the internal review decision.

4. The applicant then made application to this office dated 28 May 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
5. The applicant suffered injury in the 1990s as a result of his former employment as a plasterer. He left that employment and has subsequently worked in retail on a full-time basis since 1999. The applicant was an existing recipient of weekly payments immediately before 1 October 2012.
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’s submissions in total are thus:
  - Disagreement with the decision to cancel weekly compensation payments.

The applicant has made a submission which clearly goes to the merits of the case and raises no issue of a procedural nature.

### **Submissions by the Insurer**

9. The Insurer made no submissions in reply..

### **The Decision**

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

11. Guideline 5.3.2 requires the insurer to advise the applicant of the date of the work capacity assessment. The insurer advised that the assessment had taken place on 13 June 2014. The same Guideline requires the insurer to advise the date when 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. As a result the applicant was advised that his payments would cease from 18 September 2014. This is in excess of the required notice period. The Insurer has complied with the legislation and the Guidelines.
12. The same Guideline requires the insurer to advise the applicant of the impact the decision has on his entitlement to medical and related treatment expenses. The Insurer has referenced Section 59A(2) of the 1987 Act and advised the applicant that his entitlement to medical expenses will cease 12 months after his entitlement to weekly payments ceases. Section 59A(3) was also referenced and explained. The insurer has complied with the legislation and the Guidelines.
13. Guideline 5.3.2 also requires the insurer to inform the applicant of the relevant entitlement periods. The insurer advised the applicant that he has received in excess of 130 compensation payments and his ongoing entitlements are subject to the requirements contained in Section 38(3) of the 1987 Act. The special requirements of that section are explained by the insurer at page 3 of the decision.
14. The insurer concluded that the applicant had complied with the special requirements of Section 38(3)(b) and (c) of the 1987 Act in that he had returned to work for not less than 15 hours per week, is earning in excess of \$168.00 per week (as the amount then was). The applicant's ongoing entitlements were then calculated in accordance with Section 38(7) of the 1987 Act.
15. The insurer correctly explained to the applicant that he was an existing recipient and in accordance with Schedule 6 Part 19H clause 9(3) of the 1987 Act that he is subject to the transitional rate for his pre-injury average weekly earnings.

16. The insurer has provided an explanation of the calculation pursuant to Section 38(7) at page 3 of the work capacity decision. This calculation results in an entitlement of nil. The insurer has complied with the legislation and relevant Guidelines.
17. In responding to the applicant's submissions it need only be said that nothing arises from them, since they go solely to the merits of the case, which cannot influence a recommendation of this office.
18. The decision of the insurer dated 13 June 2014 has displayed a careful consideration of the requirements of the Guidelines and 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 of 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.
21. The stay can only operate if a worker applies for internal review within 30 days of receipt of the work capacity decision, or applies for merit review within 30 days of receipt of the internal review decision. Since more than 30 days elapsed in this case prior to either application, the stay cannot operate.

### **RECOMMENDATION**

22. The application for procedural review is dismissed.



WorkCover **independent** review office

Level 4, 1 Oxford Street, Darlinghurst NSW 2010  
T: 13 9476  
[contact@wiro.nsw.gov.au](mailto:contact@wiro.nsw.gov.au)  
[www.wiro.nsw.gov.au](http://www.wiro.nsw.gov.au)

Wayne Cooper  
Delegate of the WorkCover Independent Review Officer  
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