

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 21 August 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 30 November 2014.**
- c. The payments are to be back-dated to 30 November 2014.**
- d. Such payments are to continue until such time as a further work capacity decision is made in accordance with the Merit Review Findings and Recommendations dated 4 December 2014.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 21 August 2014. The decision advised the applicant that his weekly payments of compensation would cease on 30 November 2014. The applicant sought internal review and the Internal Review Decision was dated 9 October 2014. He then sought Merit Review on or about 6 November 2014 and the Authority issued the Merit Review recommendation on 4 December 2014. The Merit Review recommendation was that the applicant was entitled to weekly payments of compensation in the sum of \$778.32.
2. The applicant made application to this office on 17 December 2014. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. The applicant suffered injury to his neck and right shoulder when he fell in the course of his employment on or about 22 December 1993. On 15 April 1994 the applicant suffered a recurrence of right shoulder pain and upper back pain as a result of lifting wheels. Since that time the applicant suffered various periods of incapacity. At the time of the work

capacity decision the applicant was not working and was in receipt of weekly payments of compensation.

4. The applicant was in receipt of weekly payments immediately before 1 October 2012. Accordingly *Clause 8 of Part 19H of Schedule 6 to the Workers Compensation Act 1987* (the 1987 Act) required the Insurer to conduct a work capacity assessment.
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.*” The applicant has made submissions which are not relevant to procedural review.

Submissions by the Insurer

7. The Insurer provided submissions in response to the application which were received on 23 December 2013. The primary submission is that as merit review recommended the applicant maintain his benefits at the current maximum applicable and as such there is no appropriate basis upon which a procedural review can be performed.
8. Section 44(1)(c) of the 1987 Act allows the Independent Review Officer to review a work capacity decision of an insurer after the dispute has been the subject of merit review by the Authority. The Independent Review Officer’s jurisdiction is dependent upon the review having been performed by the Authority, not the outcome of the review. I find that this office has to undertake a procedural review.

The Decision

9. Guideline 5.3.2 states that written work capacity decision must comply with any requirements of the 1987 Act and *Review Guidelines* and “state the impact of the decision on the worker in terms of their entitlement to weekly payments, entitlement to medical and related treatment expenses and return to work obligations.”

10. In the work capacity decision which is the subject of this review the insurer has advised the applicant:

“Reasonably necessary and approved medical or related expenses resulting from your injury will continue to be met. The payment of reasonably necessary medical or related expenses will cease 12 months from the date payments of weekly benefits have ceased (section 59A(2) of the Workers Compensation Act 1987).”

11. Section 59 A of the 1987 Act states:

59A Limit on payment of compensation

(1) Compensation is not payable to an injured worker under this Division in respect of any treatment, service or assistance given or provided more than 12 months after a claim for compensation in respect of the injury was first made, unless weekly payments of compensation are or have been paid or payable to the worker.

(2) If weekly payments of compensation are or have been paid or payable to the worker, compensation is not payable under this Division in respect of any treatment, service or assistance given or provided more than 12 months after the worker ceased to be entitled to weekly payments of compensation.

(3) If a worker becomes entitled to weekly payments of compensation after ceasing to be entitled to compensation under this Division, the worker is once again entitled to compensation under this Division but only in respect of any treatment, service or assistance given or provided during a period in respect of which weekly payments are payable to the worker.

12. In a decision of the *Workers Compensation Commission*¹ the phrase ‘12 months after the worker ceased to be entitled to weekly payments of compensation’ is interpreted in accordance with *Section 38(1)* in that the worker’s entitlement to weekly compensation ceases at the end of the

¹ *Christopher Vella v Penrith City Council* [2014] NSWCC 363; see para 48-96

second entitlement period (130 weeks) unless the worker has a further entitlement under the exception in *Section 38(3)*. This exception is not relevant to this case.

13. In this particular case the applicant has been in receipt of weekly payments of compensation for 69 weeks. Therefore, he has not exhausted his entitlement to weekly payments of compensation under *Section 38(1)*. Until the worker does exhaust his entitlement to weekly payment of compensation *Section 59A* does not apply.
14. The insurer's explanation of *Section 59A* is incorrect. A more appropriate way for the insurer to have explained the impact the decision has upon the applicant's medical and treatment expenses would have been to inform him that his medical and treatment expenses cease 12 months after the cessation of his "*entitlement*" to weekly payments, rather than "*12 months after weekly payments have ceased.*"
15. This incorrect explanation by the Insurer is sufficient for the decision to be set aside.

FINDING

16. 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 has been a breach of the Guidelines which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

RECOMMENDATION

17. The work capacity decision of the Insurer dated 21 August 2014 is set aside.
18. The applicant is to be reinstated to his weekly payments at the rate applicable as at 30 November 2014.
19. The payments are to be back-dated to 30 November 2014.
20. Such payments are to continue until such time as a further work capacity decision is made in accordance with the Merit Review Findings and Recommendations dated 4 December 2014.



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