

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 19 December 2014. The decision informed the applicant that his weekly payments of compensation would cease on 26 March 2015. The applicant sought internal review on 20 February 2015 and the Internal Review Decision was dated 24 March 2015. That decision confirmed the earlier work capacity decision.
2. The applicant applied to the Authority for Merit Review on 1 April 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) and consequently confirmed the earlier decisions of the Insurer.
3. The applicant then made application to this office dated 11 June 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time. The original form was unsigned and after contact with this Office a further copy of the application was forwarded, this time with a hand-written "x" in the box designated for a signature.
4. On 18 October 2010 the applicant suffered injury to his lower back whilst performing his pre-injury duties of a Sawmill Labourer. The applicant returned to pre-injury duties but had regular episodes of intense and increased back pain. By May 2013 he went off work and has not returned. Having obtained work as a Stable Hand the applicant left that job around August 2014 due to "industrial issues" (as opposed to work

capacity issues). At the time of the work capacity decision the applicant was not working and was in receipt of weekly payments of compensation.

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’s only submission is that he believes “some information has been withheld [by the Insurer] in making the Decision.” No indication is given as to what that missing information might be.

Submissions by the Insurer

8. The Insurer took an interest in the unsigned status of the original application form and also doubted that the “x” provided later constituted a valid signature. Since this office had told the applicant that an “x” was acceptable prior to his sending the second version of the form, it is a not a point on which the Insurer can succeed.

The Decision

9. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
10. Guideline 5.3.2 requires the insurer to advise the applicant of the date of the work capacity assessment. The insurer informed the applicant that the work capacity assessment was performed between 11 November 2014 and 19 December 2014. As a result of that assessment a work capacity decision was made on 19 December 2014. The applicant was advised of the decision by letter dated the same day.

11. 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 26 March 2015. This is the required notice period. The Insurer has complied with the legislation and the Guidelines.
12. 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 155 weekly payments and his ongoing entitlements are subject to the requirements contained in Section 38 of the 1987 Act. The special requirements of that section are explained by the insurer at pages 6 and 7 of the decision with the relevant provisions extracted and highlighted.
13. It is noted in the work capacity decision that the applicant is *not* working nor earning the minimum (being \$173.00 per week) and as a result, pursuant to Section 38 of the 1987 Act, he is not entitled to weekly payments of compensation. The insurer has complied with the Guidelines by explaining the relevant entitlement periods and referencing the legislation.
14. The insurer identified suitable employment for the applicant as being a Maintenance Handyperson, Process Worker, and/or Team Member (Hardware) and Stable Hand. The insurer determined that the applicant had the capacity to perform these suitable duties for 40 hours per week. The insurer has complied with Guideline 5.3.2 by stating the decision and providing brief reasons for the decision including outlining the evidence in making the decision.
15. 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. Given the present uncertainty that surrounds this Section 59A of the 1987 Act¹ as evidenced by conflicting views from the Workers Compensation Commission it is unlikely the insurer could do any more in the present case.

Finding

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

The Stay

17. 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.
18. The work capacity decision was dated 19 December 2014. The applicant applied for internal review on 20 February 2015. The application was made outside the 30 day requirement for the stay to operate immediately. If the applicant had made the application for internal review within 30 days of the work capacity decision he would have been entitled to a stay and his payments would have been back dated to the date of cessation.
19. Given that the date for cessation of payments (26 March 2015) had passed prior to the application for merit review (1 April 2015), there is no basis on which payments can be reinstated.

¹ 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.



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RECOMMENDATION

20. The application for procedural review is dismissed.

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Delegate of the WorkCover Independent Review Officer
20 July 2015