

**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.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 22 April 2015.**
- c. The payments are to be back-dated to 22 April 2015 in accordance with clause 30 Schedule 8 of the *Workers Compensation Regulation 2010*.**
- d. Such payments are to continue until the receipt of this recommendation.**

**Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 15 January 2015. The insurer advised the applicant that his weekly payments would cease on 22 April 2015. The applicant sought internal review of the decision on 5 February 2015 and the Internal Review Decision was dated 4 March 2015. That decision confirmed the original work capacity decision.
2. The applicant then sought Merit Review from the Authority on 31 March 2015 and they delivered a decision dated 14 May 2015 finding that the applicant did not satisfy the special requirements in Section 38 of the *Workers Compensation Act 1987* (the 1987 Act).
3. The applicant applied to this office for procedural review by way of application dated 12 June 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. On 24 June 2003 the applicant sustained injury to his right elbow and left ankle when he stepped over a vacuum and lost his balance whilst performing his duties as a cleaner. He ultimately underwent a left ankle reconstruction. At the time of the work capacity decision the applicant was 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).
6. The relevant version of the Guidelines came into effect on 11 October 2013.

### **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 requested a procedural review.
8. The applicant’s submission is that subsequent to the work capacity decision his nominated treating doctor has certified him with no current work capacity.
9. As stated above Section 44(1)(c) of the 1987 Act only allows me to review the procedure followed by the insurer in making the work capacity decision. Any decisions made by the insurer in respect of capacity are not issues which can be considered at this procedural review stage.

### **Submissions by the Insurer**

10. The Insurer made submissions dated 19 June 2015 in response to this application. The Insurer has responded to the applicant’s submissions.
11. It is noted in the insurer’s submissions that since the work capacity decision was made the applicant has provided a certificate of capacity downgrading him to having “*no capacity.*” The insurer has indicated that they are presently investigating that issue. However, as stated above this issue is not relevant to this procedural review.

## The Decision

12. Pursuant to Guideline 5.3.2 the insurer has informed the applicant that a work capacity assessment was commenced on 5 November 2014 and completed on 15 January 2015. The applicant was advised of the work capacity decision arising out of that assessment by letter dated 15 January 2015. The Insurer has complied with the Guideline.
13. 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 Section 54(2)(a) of the 1987 Act. As a result the applicant was advised that his payments would cease on 22 April 2015. This is the correct notice period. The Insurer has complied with the legislation and the Guidelines.
14. Guideline 5.3.2 also 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 Sections 59A(2) and (3) of the 1987 Act. The insurer advised the applicant that he would lose the "*right to payment or reimbursement for the cost of any treatment, service or assistance given or provided more than 12 months after cessation date.*" The insurer has made a reasonable attempt at explaining the section given the present uncertainty that surrounds Section 59A as evidenced by conflicting views from the Workers Compensation Commission<sup>1</sup>. It is unlikely the insurer could do any more in the present case.
15. In compliance with the same Guideline the insurer has explained the relevant entitlement provisions and has informed the applicant that he has received 217 weeks of compensation payments which places him after the second entitlement period. Therefore his ongoing entitlement to

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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.

weekly compensation payments is to be assessed pursuant to Section 38(3) of the 1987 Act.

16. In accordance with Section 32A of the 1987 Act the insurer identified suitable employment for the applicant as being a data entry operator, general clerk and sales assistant. These options were identified in a rehabilitation report dated 17 January 2014. The insurer had also made a decision in accordance with Section 43 of the 1987 Act that the applicant had the capacity to work 5 hours per day for 4 days per week. This was in accordance with the work capacity certificate of the nominated treating doctor. The insurer had complied with the Guidelines and the legislation in making these decisions.
17. At page 4 of the actual work capacity decision the insurer has informed the applicant of the special requirements of Section 38(3) of the 1987 Act. The insurer has correctly noted that as the applicant was an existing recipient Section 38(3)(a) did not apply to him.
18. In accordance with Section 38(3)(b) the insurer explained that the applicant was required to be working not less than 15 hours per week and earning at least \$173 per week. It was noted that the applicant was not working and his earnings therefore were nil. With reference to Section 38(3)(c) the insurer informed the worker that as it had assessed that he could undertake further additional employment that would increase his current earnings he did not fulfil the requirement of that subsection.
19. The insurer determined that the applicant did not satisfy all the relevant requirements of Section 38(3) in order for his weekly payments to continue beyond the second entitlement period.
20. The insurer has cited the various reports upon which it relies throughout the work capacity decision. The insurer cites the author of the report and provides the date. In keeping with the requirements of Guideline 5.3.2 the insurer has also listed the documents which it has reviewed and considered when making the work capacity decision in *Attachment B* to the decision.

21. The decision of the Insurer dated 15 January 2015 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

### **Finding**

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

### **The Stay**

23. 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.

24. The work capacity decision was dated 15 January 2015. The applicant applied for internal review on 5 February 2015. The application was made within the 30 day requirement for the stay to operate immediately.

### **RECOMMENDATION**

25. The application for procedural review is dismissed.

26. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 22 April 2015.

27. The payments are to be back-dated to 22 April 2015 in accordance with clause 30 Schedule 8 of the *Workers Compensation Regulation 2010*.

28. Such payments are to continue until the date of the receipt of this recommendation.

Tracey Emanuel  
Delegate of the WorkCover Independent Review Officer  
22 July 2015