



**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 his weekly payments at the rate applicable prior to 10 November 2014.**
- c. The payments are to be back-dated to 10 November 2014.**
- 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 31 July 2014. The decision advised the applicant that his weekly payments of compensation would cease from 10 November 2014. The applicant sought internal review of the decision and the Internal Review Decision was dated 26 September 2014. The applicant then sought Merit Review from the Authority on 28 October 2014. They delivered a decision dated 27 November 2014 confirming the original work capacity decision. The applicant then applied to this office on 23 December 2014 for a procedural review.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. The applicant previously sought procedural review of a work capacity decision dated 3 June 2013. The applicant was successful and the work capacity decision was set aside by an earlier decision of this office<sup>1</sup>.

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<sup>1</sup> Reported and numbered as 2614

4. The facts and the circumstances concerning the background of the claim are set out in the aforementioned recommendation and need not be repeated.

### **Submissions by the applicant**

5. Section 44(1)(c) of the *Workers Compensation Act 1987* (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’s submissions detail his difficulty in obtaining employment and not being advised to retain job seeking records by the Insurer. These submissions are not relevant to a procedural review.

### **Submissions by the Insurer**

6. The Insurer has not made submissions in response to this application.

### **The Decision**

7. The *WorkCover Work Capacity Guidelines* relevant to making this work capacity decision came into effect on 11 October 2013.
8. 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 provided the applicant with sufficient notice in advising that his payments would cease on 10 November 2015. The Insurer has complied with the legislation.
9. Guideline 2.3 states that the Insurer’s decision should be “*timely, informed and evidence based.*” 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 a work capacity assessment was conducted on 31 July 2014 and that a work capacity decision was made on the same day. He was advised of the work capacity decision by letter dated 31 July 2014. The Insurer has complied with the Guideline.
10. Guideline 5.3.2 requires the insurer to explain the relevant entitlement periods. The insurer has informed the applicant that he has been in receipt of weekly payments of compensation for 337 weeks and that his

ongoing entitlements would be assessed pursuant to Section 38 of the 1987 Act. The insurer has complied with the Guideline.

11. The same Guideline requires the Insurer to state the impact of the decision upon the applicant's entitlement to medical and related treatment expenses. The insurer has referenced Section 59A(2) and (3) of the 1987 Act and informed the applicant that his entitlement to treatment expenses will cease on 10 November 2015. The applicant has received at least 337 weeks of compensation payments. The applicant has exhausted the second entitlement period under Section 38 of the 1987 Act and in accordance with the Workers Compensation Commission decision in *Vella*<sup>2</sup> the applicant's entitlement to medical expenses will cease 12 months from the date weekly payments of compensation cease. The Insurer has complied with the Guideline.
12. The Insurer noted that the applicant has returned to work for 16 hours per week and is earning \$264.00 per week. The Insurer also took into consideration the WorkCover Certificate of Capacity from Dr L dated 23 June 2014, nominated treating doctor, who assessed the applicant to have capacity to work 8 hours per day for 5 days per week. The Insurer concluded that the applicant had the capacity to perform the duties in his current position on a full time basis. The Insurer has complied with Guideline 5.3.2 by clearly explaining the line of reasoning for the decision and referencing the relevant legislation.
13. The decision dated 31 July 2014 has displayed a careful consideration of the requirements of the Guidelines and legislation.

## **Finding**

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

## **Recommendation**

15. The application for procedural review is dismissed.
16. The applicant is to be reinstated his weekly payments at the rate applicable prior to 10 November 2014.
17. The payments are to be back-dated to 10 November 2014.

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<sup>2</sup> *Christopher Vella v Penrith City Council* [2014] NSWCC 363; see para 48-96



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

Tracey Emanuel  
Delegate of the WorkCover Independent Review Officer  
2 February 2015