

**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 31 December 2013 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 7 April 2014.**
- c. The payments are to be back-dated to 7 April 2014.**
- d. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 31 December 2013. The decision informed the applicant that his weekly payments of compensation were to be reduced to \$232.40 per week. The same decision informed the applicant that his weekly payments would cease on 7 April 2014.
2. The applicant sought internal review and the Internal Review Decision was dated 2 October 2014. That decision confirmed that the applicant's weekly payments of compensation would cease. He then sought Merit Review on or about 3 November 2014 and the Authority issued the Merit Review recommendation on 2 December 2014. The Merit Review recommendation found that the applicant was entitled to weekly payments of compensation calculated to be nil.
3. The applicant made application to this office on 5 January 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. The applicant suffered injury to his lower back in the course of his employment as a store person on 20 October 2009. After a period of

incapacity the applicant returned to employment performing modified duties. In February 2013 he underwent back surgery and returned to work in August of the same year. The applicant remains employed performing suitable duties working lesser hours.

5. 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.

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’s submissions include not being advised of the purpose of medical examinations, not receiving a copy of the work capacity decision prior to payments being reduced, repeated delays at receiving authorisation for treatment, lack of opportunity to improve his position within the company and the general handling of his claim file.

Submissions by the Insurer

7. The Insurer provided submissions in response to the application which were received on 12 January 2014. The Insurer submits that it explained to the worker the purpose of the independent medical examinations, that as they were unable to contact the applicant by telephone they completed the fair notice requirement by letter and that the work capacity decision was sent to the applicant’s correct postal address.

The Decision

8. The relevant version of the *WorkCover Work Capacity Guidelines* (Guidelines) came into effect on 11 October 2013.
9. At paragraph 1, of the decision which is the subject of this review, under the title “*1. Decision*” the Insurer informs the applicant that “*a decision has been made to reduce your weekly payments to \$232.40.*”

10. Then at paragraph 3 the Insurer informs the applicant that *“weekly payments of compensation will cease on 7 April 2014.”*
11. Both of these statements are contradictory and extremely confusing to the applicant. The first statement advises the applicant that his weekly payments of compensation are being reduced whereas the second statement advises him that his weekly payments will cease. This is a demonstrable error and sufficient in itself to set aside the decision.
12. At paragraph 2 under the title *“Reason(s) for the decision”* the Insurer stated *“you were receiving weekly payments as at 22 November 2009 and hence (in accordance with the Workers Compensation Act 1987, Schedule 6, Part 19H, clause 2) you are classified as an “existing recipient of weekly payments” with deemed pre-injury average weekly earnings (“PIAWE”) of \$948.50 gross.”*
13. The above statement is incorrect. According to Clause 8 of Part 19H of Schedule 6 of the 1987 Act the relevant date upon which an *“existing recipient”* is determined is 1 October 2012. The Insurer has failed to comply with Guideline 5.3.2 in that they have failed to properly reference the relevant legislation.
14. The same Guideline also requires the Insurer to advise the applicant the date of the work capacity assessment. In the first paragraph of the decision the applicant is informed by the Insurer *“that we conducted a review of your work capacity (ie a work capacity assessment) on 31/12/2013.”* Then at paragraph 5 the Insurer informs the applicant *“we have arrived at this decision after conducting a review of your work capacity (ie a work capacity assessment) on 18/12/2013. This work capacity assessment then formed the basis of a work capacity decision.”*
15. Whilst both of the aforementioned statements may be correct, that is that the Insurer performed two work capacity assessments, the above statements would be confusing to the applicant. Furthermore, the Insurer did not base their work capacity decision upon the most recent work capacity assessment. Section 43 of the 1987 Act refers to *“a decision about a worker’s current work capacity”* and it follows that it would be most appropriate for the work capacity decision to be based upon the most recent assessment.
16. *Guideline 5.3.2* requires the Insurer to state the impact the decision has on the worker in terms of his entitlements to weekly payments, entitlement to medical and related treatment expenses and return to work obligations. As stated in paragraphs 9 and 10 of this recommendation the Insurer has informed the applicant that his

payments have been both reduced and will cease. The Insurer has failed to comply with the Guideline in that it has failed to precisely and clearly inform the applicant the effect that the work capacity decision had on his weekly payments.

17. At paragraph 2 under heading “3. *Effect of this work capacity decision*” the Insurer has informed the applicant that his “*entitlement to benefits for medical or related expenses will continue in accordance with the provisions of the Act.*” This statement is correct if the applicant’s entitlements to weekly payments of compensation had only been reduced. This statement is incorrect if the applicant’s weekly payments ceased.
18. If the applicant’s payments have ceased the Insurer should have referred to Section 59A of the 1987 Act which states that “*if weekly payments of compensation have been paid or are payable to the worker, compensation is not payable for medical and treatment expenses given or provided more than 12 months after the worker ceased to be entitled to weekly payments of compensation.*”
19. 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 second entitlement period (130 weeks) unless the worker has a further entitlement under the exception in *Section 38(3)*. In this particular case the applicant has received “in excess of 130 weeks of weekly compensation.”
20. The insurer should have informed the applicant that his medical and treatment expenses would cease 12 months after the cessation of his weekly payments. It is noted that the Insurer attempted to rectify this omission in the Internal Review Decision dated 2 October 2014 however this is insufficient to validate the work capacity decision. The Insurer has failed to comply with the Guideline.

21. FINDING

22. Under the legislation the Insurer can make an assessment of the applicant’s work capacity and then a decision about that work capacity,

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



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 have been breaches of the Guidelines which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

RECOMMENDATION

23. The work capacity decision of the Insurer dated 31 December 2013 is set aside.
24. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 7 April 2014.
25. The payments are to be back-dated to 7 April 2014.
26. Such payments are to continue until such time as a further work capacity decision comes into effect.

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