

**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 30 April 2014 is set aside.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable as at 30 April 2014.**
- c. **The payments are to be back-dated to 6 August 2014 in accordance with Clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 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 30 April 2014. The applicant was advised that his weekly payments of compensation would cease on 6 August 2014. The applicant sought internal review and the Internal Review Decision (IRD) was dated 23 June 2014. He then sought Merit Review on or about 21 July 2014 and the Authority issued the Merit Review recommendation on 14 August 2014. The applicant made application to this office on 11 September 2014.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. On 10 January 2012 the applicant sustained injury to his neck and lower back in the course of his employment. He has been in receipt of weekly payments since that time.
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)*.
6. The relevant version of the *Guidelines* came into effect on 27 September 2012. That publication stated that the *Guidelines* provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessments and decisions.
7. Once the Insurer has conducted a first assessment then the Insurer is required to make a work capacity decision. Where that decision involves a reduction in the weekly benefits payable to the injured worker then the Insurer is required to give proper notice to the worker (*Section 54(2)(a)* of the 1987 Act).

### **Submissions by the applicant**

8. *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 has made various submissions which are not relevant to procedural review.

### **Submissions by the Insurer**

9. The Insurer has not provided submissions in response to the application.

### **The Decision**

10. The relevant WorkCover Work Capacity Guidelines referable to making this work capacity decision came into effect on 11 October 2013.
11. The insurer advised the applicant in writing on 30 April 2014 of a work capacity decision. He was advised that his entitlement to ongoing weekly payments would be terminated as he no longer has any entitlement under *Section 38* of the 1987 Act.
12. The applicant was advised that he has received **120** weeks of weekly payments. He is then advised that ‘*this places you at the end of the second entitlement period*’. This is incorrect. The end of the second

entitlement period as referred to in Section 38 arises after the effluxion of 130 weeks, not 120.

13. Quite clearly, as at the date of the decision, the worker had not received 130 weeks of compensation. Being in receipt of 120 weeks of compensation does not place him *'at the end'* of the entitlement period. *Section 38* was not the correct section upon which to assess his entitlement at that time. This is a demonstrable error.
14. The decision advises the applicant that *Section 59A(2)* of the 1987 Act *'states that you are entitled to claim treatment and service costs for up to 12 months after weekly payments have ceased'*.
15. Upon review *Section 59A(2)* actually uses the phrase *'12 months after the worker ceased to be entitled to weekly payments of compensation'*. Therefore, the relevant point in time is not the cessation of the weekly payments but rather the cessation of the **entitlement** to the weekly payments.
16. In a recent decision of the *Workers Compensation Commission*<sup>1</sup> this phrase 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)*. This exception is not relevant to this case.
17. The explanation of the effect of *Section 59A* in this work capacity decision is erroneous in that it advises the applicant that payment of treatment expenses ceases 12 months after his weekly payments cease. Rather, the right to claim medical expenses ceases 12 months after the applicant's entitlement to weekly payments pursuant to *Section 38* ceases. In some circumstances, as in this one, the cessation date will be the same in both instances.
18. This is of course subject to the worker becoming entitled to further medical treatment pursuant to *Section 59A(3)* of the 1987 Act. This is referred to in the work capacity decision.
19. On 3 September 2014 the *Workers Compensation Amendment (Existing Claims) Regulation 2014* (the Amendment Regulation) was published. Clause 26 of the Amendment Regulation provides that Part 2 "takes effect on and from 1 October 2012."

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<sup>1</sup> Christopher Vella v Penrith City Council [2014] NSWCC 363; Arbitrator Josephine Snell

20. Clause 30 of the Amendment Regulation, which is in part 2 and therefore is deemed to have been in effect since 1 October 2012, is in the following terms:

### **30 Stay of work capacity decisions**

- (1) A review under section 44 (Review of work capacity decisions) of the 1987 Act of a work capacity decision made in respect of an existing claim 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.
- (2) This clause applies to an internal review under section 44 (1) (a) of the 1987 Act only if the application for internal review is made by the worker within 30 days after the worker receives notice from the insurer of the work capacity decision to be reviewed.
- (3) The stay under this clause operates from the time the application for review is made until the worker is notified of the findings of the review (or the application for review is withdrawn).
- (4) This clause applies despite section 44 (4) of the 1987 Act, which is deemed to be amended to the extent necessary to give effect to this clause.

21. It must follow that the applicant is entitled to the full benefit of the Amendment Regulation and therefore the Insurer should restore the applicant to the payments being received immediately prior to the payments ceasing as a result of the original decision.

### **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, 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 30 April 2014 is set aside.
24. The applicant is to be reinstated to his weekly payments at the rate applicable at 30 April 2014.
25. The payments are to be back-dated to 6 August 2014 in accordance with Clause 30 of the Workers Compensation Amendment (Existing Claims) Regulation 2014.
26. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.

Tracey Emanuel  
Delegate of the WorkCover Independent Review Officer  
15 October 2014