

**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 5 December 2013 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 13 March 2014.**
- c. The payments are to be back-dated to 13 March 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 5 December 2013. The decision advised the applicant that his weekly payments of compensation would cease on 13 March 2014. The applicant sought internal review and the Internal Review Decision (IRD) was dated 31 January 2014. He then sought Merit Review on or about 28 February 2014 and the Authority issued the Merit Review recommendation on 19 September 2014 some 203 days later.¹ The applicant made application to this office on 5 October 2014.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. On 17 October 2000 the applicant suffered injury to his lower back in the course of his employment as a spray painter. The applicant was unable to return to his pre-injury duties. The applicant is presently working approximately 20 hours per week in his own garlic farming business.

¹ *Guideline 10.14 of the Guidelines for work capacity decision Internal Reviews by insurers and Merit Review by the WorkCover Authority (Review Guidelines), which came into effect on 11 October 2013 states that "The Authority will write to the worker and insurer as soon as practicable and preferably within 30-days of receiving the application advising of the outcome of the merit review."*

4. The applicant was in receipt of weekly payments immediately before 1 October 2012 and according to *Clause 8 of Part 19H of Schedule 6 of the Workers Compensation Act 1987* (the 1987 Act) the Insurer is required 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). The relevant version of the *Guidelines* came into effect on 11 October 2013.

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 made extensive submissions all of which have been duly considered. They total no less than six closely typed, single-spaced pages. Given the defects in the Insurer’s decision (see below) there is no need to recite the applicant’s submissions here.

Submissions by the Insurer

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

The Decision

8. The Insurer advised the applicant that his weekly payments of compensation would cease 13 March 2014. This is three months and five business days’ notice. This notice is given in accordance with the *Section 54(2)(a)* of the 1987 Act and *Section 76(1)(b)* of the Interpretation Act (which provides that the notice period should be three months and four business days).
9. On page 2 of the decision the insurer advised the applicant that his entitlement to weekly payments ‘*must cease within 3 months of this decision*’.
10. This description is a complete misrepresentation of the notice provision in *Section 54(2)(a)* of the 1987 Act. The true effect of the section is that payments *may not* cease until three months have elapsed following the provision of notice. The insurer has styled the section as a maximum payment provision rather than a minimum notice provision.

11. This has been a recurring error in decisions made by this insurer and in keeping with consistent recommendations this misrepresentation is sufficient to be a demonstrable error.
12. *Guideline 5.3.2* states the insurer is to advise of the impact the decision will have on the applicant in terms of his ongoing medical and treatment expenses.
13. The applicant has received in excess of 130 weeks of weekly payments and was accordingly advised that 12 months after receipt of his last payment (as a result of his entitlement ceasing) any entitlement to medical and related treatment, by virtue of the operation of *Section 59A* of the 1987 Act, would cease. This was an inadequate explanation, because the applicant was not advised that by virtue of *Section 59A(3)* his rights to medical and related expenses might once again be revised during the course of any period of further entitlement to weekly payments which might arise if the future.²
14. The same *Guideline* also requires the Insurer to advise that any documents or information that have not already been provided to the worker can be provided to the worker on request to the Insurer. In this decision the Insurer advises *'should you require further copies of documents previously provided to you please do not hesitate to contact'* the insurer. This is incorrect as it places a condition upon the request that is not present in the regulation.
15. These errors are sufficient to set aside the work capacity decision.
16. The Insurer conceded in the decision that for the purposes of *Section 38* of the 1987 Act the applicant was working in excess of 15 hours per week. The Insurer concluded that the applicant was not in receipt of at least \$168.00 per week.
17. It is noted that the applicant is self-employed in his own garlic farm. The Insurer notes at page two that according to the applicant's tax return for the financial year ending 2013 the applicant's income was -\$514 (loss). It would appear that this would have been the loss to the business rather than the wages which the applicant paid himself as an employee. It was this evidence that was used to conclude that the applicant was not earning sufficient wages to qualify for ongoing payments pursuant to *Section 38*.

² See the decision of *Vella v Penrith City Council* [2014] NSWCC 363

18. I am unable to comment further on this issue not having the benefit of reviewing the tax return. However, I would consider it to be unusual for an employee to earn wages in the negative even when he is the owner of the business.

19. In any event, there are sufficient reasons to set aside the work capacity decision other than the issue mentioned directly above.

FINDING

20. 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

21. The work capacity decision of the Insurer dated 5 December 2013 is set aside.

22. The applicant is to be reinstated to his weekly payments at the rate applicable at 13 March 2014.

23. The payments are to be back-dated to 13 March 2014.

24. 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
11 November 2014