

**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 25 October 2013 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 2 February 2014.**
- c. The payments are to be back-dated to 2 February 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 25 October 2013. The decision advised the applicant that his weekly payments of compensation would cease on 2 February 2014. The applicant sought internal review and the Internal Review Decision (IRD) was dated 11 March 2014. He then sought Merit Review on or about 4 April 2014 and the Authority issued the Merit Review recommendation on 11 September 2014 some 160 days later.¹ The applicant made application to this office on 13 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 5 May 2003 the applicant suffered injury to his lower back whilst packing a pallet in the course of his employment as a crew trainer. After three months off work the applicant returned to suitable duties with the same employer however his employment was terminated on 19 December 2004. The applicant obtained part time employment as a

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."*

computer program salesman from July 2006 and then as shop assistant from October 2007 to date.

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 submissions however they are not relevant to procedural review.

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 2 February 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 on 2 February 2015. 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 in the future.² The internal review decision attempted to rectify this error but it was not sufficient to validate this decision.
14. The Internal Review Decision complicates the issue further by advising the applicant that his entitlement to medical or related treatment expenses would cease on or after 23 February 2015. The relevance of this particular date for the cessation of entitlements to medical expenses is not explained nor is it correct.
15. The same *Guideline* 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 *Guideline*.
16. At page three of the decision the Insurer has provided a mathematical formula for working out the applicant's entitlement to weekly payments as follows:

<i>'Your average weekly earnings (AWE) are \$948.50.</i>	
<i>Average weekly earnings (\$948.50) x %</i>	<i>\$948.50</i>
<i>Less the amount you are able to earn in suitable employment</i>	<i>\$758.80</i>
<i>Your new entitlement to weekly payments</i>	<i>\$875</i>

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

...your entitlement to weekly payments under the new benefits system has been calculated to be nil.'

17. The above formula is incorrect and contradicts the statement which follows. These are demonstrable errors.

FINDING

18. 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

19. The work capacity decision of the Insurer dated 25 October 2013 is set aside.
20. The applicant is to be reinstated to his weekly payments at the rate applicable at 2 February 2014.
21. The payments are to be back-dated to 2 February 2014.
22. 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
13 November 2014