

**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 September 2013 is set aside.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable as at 13 December 2013.**
- c. **The payments are to be back-dated to 13 December 2013.**
- 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 September 2013. The decision advised the applicant that his weekly payments of compensation would cease on 13 December 2013. The applicant sought internal review and the Internal Review Decision (IRD) was dated 8 January 2014. He then sought Merit Review on or about 3 February 2014 and the Authority issued the Merit Review recommendation on 15 September 2014 some 223 days later.¹ The applicant made application to this office on 15 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 10 January 2001 the applicant suffered injury to his lower back due to an accident which occurred in the course of his employment as a fisherman. Having been initially totally incapacitated, several years after the accident the applicant returned to employment as the "skipper" of a fishing boat owned by the pre-injury employer, while adhering to various functional restrictions imposed by medical advice.

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 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 from 13 December 2013. This is three months and six 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 1987* (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. This must confound and confuse any reader seeking to make sense of the decision.

11. This has been a recurring error in decisions made by this insurer and in keeping with consistent recommendations this misrepresentation is sufficient to constitute “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 ‘*any entitlement you may have to payment of pre-approved reasonable and necessary medical and other expenses, until 13 December 2014, will not be affected*’. This was an inadequate explanation, because the applicant was not advised that by virtue of *Section 59A(2)* that his entitlement to medical expenses would actually cease 12 months after his entitlement to weekly payments ceases and pursuant to *Section 59A(3)* his rights to medical and related expenses might once again be revived 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 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*.

FINDING

15. 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.

² See the decision of *Vella v Penrith City Council* [2014] NSWCC 363 at 48 *et seq.*



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RECOMMENDATION

16. The work capacity decision of the Insurer dated 5 September 2013 is set aside.
17. The applicant is to be reinstated to his weekly payments at the rate applicable at 13 December 2013.
18. The payments are to be back-dated to 13 December 2013.
19. 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
14 November 2014