

**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 14 June 2013 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 23 September 2013.**
- c. The payments are to be back-dated to 23 September 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 14 June 2013. The decision advised the applicant that his weekly payments of compensation would cease on 23 September 2013. The applicant sought internal review by request dated 28 July 2014 and received by the Insurer on 30 July 2014, approximately 58 weeks after the original work capacity decision was made. The Internal Review Decision was made on 1 September 2014. The Insurer upheld the original decision. The applicant sought Merit Review on or about 8 September 2014 and the Authority issued the Merit Review recommendation on 7 October 2014. This did not disturb the Insurer's decision(s). The applicant made application to this office on 10 October 2014.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. The applicant was in receipt of weekly payments immediately before 1 October 2012. Accordingly *Clause 8 of Part 19H of Schedule 6* to the 1987 Act required the Insurer to conduct a work capacity assessment.

4. *Section 44A* of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).

5. The relevant version of the *Guidelines* was published on 28 September 2012. At point 1.1 under the heading "Purpose" the following appears:

"These guidance materials and instructions apply to all claims made on or after 1 October 2012.

"From 1 January 2013, these guidance materials and instructions will apply to all claims."

Inferentially a claim by an existing recipient was immune from the *Guidelines* until 1 January 2013 following which date any such claim along with any other claim would be covered by the Guidelines, in which case it might be thought that the Guidelines came fully into effect on 1 January 2013.

6. 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 *Workers Compensation Act 1987*).

Submissions by the applicant

7. *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's submissions are three-fold:

- The insurer did not specifically reference *section 54(2)(a)* of the 1987 Act when giving notice of cessation of payments;
- There is no reference in the decision notice to *section 76(1)(a)* of the *Interpretation Act 1987*; and
- There is no reference to the entitlement period for medical expenses.

Submissions by the Insurer

8. The Insurer has provided submissions in response to the application which might conveniently be set out here.

- In response to the notice period, the Insurer notes that there is clearly a reference to section 54 on page 1 of the decision (although they stop short of saying there is any reference to section 54(2)(a));
- The insurer notes that they gave three months and one week as the notice period, which actually exceeds the time required in section 54(2)(a) and they did refer to receipt of the decision by post. The Insurer might have saved itself the trouble by simply noting that section 76(1)(a) of the *Interpretation Act 1987* is irrelevant to the argument. The section which might have been relevant is section 76(1)(b), which provides that service is deemed to be effected on the fourth working day after a document is posted. Since more notice was given than required and since the *Guidelines* only require the relevant legislation to be referenced, I can see no error committed by the Insurer on this point.
- The Insurer refers to a passage on page 3 of the decision notice which refers to section 59. Relevantly, it says:

“However, under section 59 of the Act, your entitlement to medical benefits is limited to a period of 12 months after weekly benefits cease. Your entitlement to medical treatment will therefore expire on 23/09/2014.”

This is clearly a misstatement of principle and does not properly reference the legislation, in breach of *Guideline 5.4.2*. The cessation of an *entitlement* to weekly benefits is the precondition for section 59A(2) to commence the 12 month period, after which entitlement to medical and related expenses ends. But even if that occurs, the applicant might once again become entitled to weekly benefits by virtue of section 38 if he returns to work for more than 15 hours per week, earns in excess of \$173 per week and the Insurer agrees that he can do no more work than that. If this happens, his entitlement to weekly payments is resurrected and he can have medical and

related expenses met during any such period of payments by virtue of section 59A(3).¹ None of this was explained to the applicant and accordingly *Guideline 5.4.2* was breached.

FINDING

9. 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

10. The work capacity decision of the Insurer dated 14 June 2013 is set aside.
11. The applicant is to be reinstated to his weekly payments at the rate applicable at 23 September 2013.
12. The payments are to be back-dated to 23 September 2013.
13. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
17 November 2014

¹ For a full discussion of this, see *Vella v Penrith City Council* [2014] NSWCC 363 at 48-93.