

**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 28 May 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 4 September 2014.**
- c. The payments are to be back-dated to 4 September 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 28 May 2014. The decision advised the applicant that his weekly payments of compensation would cease on 4 September 2014. The applicant sought internal review and the Internal Review Decision (IRD) was dated 12 August 2014. He then sought Merit Review on or about 1 September 2014 and the Authority issued the Merit Review recommendation on 24 September 2014. 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 May 2011 the applicant alleges that he sustained injury to his shoulders in the course of his employment as a machinist. At the time of the work capacity decision the applicant was not working and was in receipt of weekly payments of compensation.
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 *WorkCover Work Capacity Guidelines* relevant to making this work capacity decision came into effect on 11 October 2013.
9. *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.
10. The applicant has received in excess of 130 weeks of weekly payments and was accordingly advised ‘*you are entitled to claim treatment and service costs for up to 12 months after weekly payments of compensation has (sic) ceased.*’
11. The above was an inadequate explanation, because the applicant was not advised that by virtue of *Section 59A(2)* 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.<sup>1</sup>

### **FINDING**

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<sup>1</sup> See the decision of *Vella v Penrith City Council* [2014] NSWCC 363



12. 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 has been a breach of the *Guidelines* which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

### **RECOMMENDATION**

13. The work capacity decision of the Insurer dated 28 May 2014 is set aside.
14. The applicant is to be reinstated to his weekly payments at the rate applicable at 4 September 2014.
15. The payments are to be back-dated to 4 September 2014.
16. 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  
18 November 2014