

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 30 August 2013 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable as at 8 December 2013.**
- c. The payments are to be back-dated to 8 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 30 August 2013. The decision advised the applicant that her weekly payments of compensation would cease from 8 December 2013. The applicant sought internal review and the Internal Review Decision (IRD) was dated 21 October 2013. She then sought Merit Review on or about 20 November 2013 and the Authority issued the Merit Review recommendation on 19 May 2014 some 169 days later.¹ The applicant made application to this office on 21 October 2014.
2. The application for procedural review has been made 154 days after the recommendation from Merit Review. *Section 44(3)(a) of the Workers Compensation Act 1987 (the 1987 Act) states that "an application for review must be made within 30 days after the worker receives notice in the form approved by the Authority of the insurer's decision on internal review of the decision (when the application is for review by the Authority) or the Authority's decision on a review (when the application is for review by the Independent Review Officer)."*

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."*

Submissions by the applicant

3. 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 in respect of her late application for procedural review. The remaining submission is not relevant to procedural review.

Submissions by the Insurer

4. The Insurer has provided submissions in response to the application which were received by our office on 23 & 27 October 2014. These submissions have been given due consideration.

The Decision

5. The insurer submitted that the Merit Review recommendation was emailed by the Authority to the applicant on 19 May 2014 and the insurer was copied in on the email. The insurer provided a copy of the email and I note that it was sent at 4.19pm on 19 May 2014. The insurer’s primary submission is that the applicant’s review application has not been made within the prescribed time limit.
6. The insurer does concede in its submissions that they are “*unable to comment*” as to any further email communication or correspondence (after 19 May 2014) between the applicant and Merit Review.
7. In her application for procedural review the applicant advised that she did not receive the Merit Review recommendations until 23 September 2014. At the time the recommendation was originally emailed the applicant was in hospital. She submitted that she received other emails during that time but not the email from the Authority. The applicant made application to this office on 21 October 2014.
8. There is no evidence to contradict the applicant’s submission that she did not **receive** the email containing the Merit Review recommendations on 19 May 2014. I accept the applicant’s submission that she received the recommendations on 23 September 2014. Therefore, I am satisfied

that the applicant has made the application for procedural review in the proper form and within time.

9. On 29 August 1991 the applicant suffered injury to her back when she fell off a high bar onto the floor while demonstrating gymnastics in her role as a physical education teacher. Her employment with the pre-injury employer was terminated. The applicant has since performed casual teaching work. However, at the time of the work capacity decision the applicant was not working.
10. 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.
11. *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 12 August 2013.
12. *Schedule 8 Clause 23 of the Workers Compensation Regulation 2010* (the Regulation) states that an Insurer must make a work capacity decision as soon as practicable after the work capacity assessment.
13. The decision which is the subject of this review informs the applicant that *'I am writing to you following a review of your ongoing entitlement to weekly payments'* then *'as a result of this decision, your weekly payments will cease from 8/12/2013'*.
14. Later in the decision the applicant is informed *'This work capacity decision has been made by'* (name omitted) *'Case Manager, on 27/08/2013'*.
15. Whilst the applicant has been advised that the work capacity decision was made on 27 August 2013 she was not told when the assessment was conducted.
16. The applicant is unaware of when the work capacity assessment/s occurred. The applicant needs to know the date in order to be able to make coherent submissions about compliance with both the legislation and *Guidelines*.

17. The Insurer has not complied with *Schedule 6 Part 19H Division 2 Clause 9* of the 1987 Act or *Schedule 8 Clause 22(1)* of the Regulation in the absence of this information being provided to the applicant.
18. *Guideline 5.3.2* requires the “insurer to state the impact of the decision on the worker in terms of their entitlement to weekly payments, entitlement to medical and related treatment expenses and return to work obligations.” The applicant is informed by the insurer that “under *Section 59 of the Act*, your entitlement to medical benefits is limited to a period of 12 months after weekly benefits cease.” *Section 59* of the 1987 Act is in fact the section which refers to definitions. The correct section referable to the applicant’s entitlement to medical and treatment expenses is *Section 59A* of the 1987 Act.
19. Further, the description given by the insurer of the applicant’s entitlement to medical expenses, apart from referring to the incorrect section, is also an inadequate explanation, because the applicant was not advised that by virtue of *Section 59A(2)* that her entitlement to medical expenses would actually cease 12 months after her 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

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 30 August 2013 is set aside.
22. The applicant is to be reinstated to her weekly payments at the rate applicable at 8 December 2013.

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



WorkCover **independent** review office

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

23. The payments are to be back-dated to 8 December 2013.
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
3 December 2014