

**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 24 July 2014 is set aside.**
- b. **The applicant is to be reinstated to her weekly payments at the rate applicable as at 24 July 2014, or in the event that payments continued until 30 or 31 October 2014, the last date on which payments were made.**
- c. **The payments are to be back-dated to the date payments ceased in accordance with the work capacity decision (either 24 July 2014, or 30 October 2014, or 31 October 2014 – see 2 above.)**
- 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 24 July 2014. The decision advised the applicant that her weekly payments of compensation would cease.<sup>1</sup> The applicant sought internal review and the Internal Review Decision (IRD) was dated 10 September 2014. She then sought Merit Review on or about 25 September 2014 and the Authority issued the Merit Review recommendation on 16 October 2014. The applicant made application to this office on 27 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 23 March 1999 the applicant suffered injury to her back and arms in the course of her employment as a finance officer. She continued working however her employment was terminated in or about April 1999. Since that time the applicant has obtained various periods of casual employment as a telemarketer, receptionist and accounts receivable

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<sup>1</sup> As to *when* they would cease, see paragraph 10 *et seq, infra*.

clerk. The applicant was in receipt of an award from His Honour Judge Moran from the Compensation Court of New South Wales at the rate of \$200 per week from 11 August 1999.

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. *Section 54(2)(a)* of the 1987 Act requires 3 months’ notice be given when weekly payments are to be reduced or ceased. A better way to explain the 3 month period is to explain that the *Interpretation Act 1987 Section 76(1)(b)* states that service by mail is taken to be on the fourth working day after the letter is posted. A working day is a day other than “*a Saturday or Sunday, or a public holiday or a bank holiday in the place to which the letter was addressed*”: *Section 76(2)(a) and (b)* of the *Interpretation Act 1987*. Therefore, the proper notice period is 3 months and four working days.
9. In addition to the above *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.”*

10. In the decision the Insurer does not advise the applicant of the date that her weekly payments will cease as a result of the decision. At page 5 of the decision the Insurer advises the applicant that payment of medical and treatment expenses will continue for 12 months after weekly payments have ceased and that her entitlement to medical expenses will cease on 31 October 2015.
11. The Insurer also advises *“during the three months & seven days notice period I will continue to manage your claim and process your weekly payments as they are currently paid.”*
12. Inferentially, it can be deduced that the applicant’s payments of weekly compensation will cease on 31 October 2014. However, such inference should not have to be drawn by the applicant. The Insurer has failed to comply with both the 1987 Act and the *Guidelines* by failing to advise the applicant of the date that her weekly payments of compensation will cease as a result of the decision.
13. As breaches of the *Guidelines* and the legislation go, the failure to advise the worker of precisely when her payments would cease might be described as fundamental. It is an error by omission which would be sufficient on its own to invalidate the decision.
14. The explanation provided by the Insurer in respect of *Section 59A* of the 1987 Act is inadequate because the applicant was not advised that by virtue of *Section 59A(2)* her *entitlement* to medical expenses would actually cease 12 months after her entitlement to weekly payments ceases and that pursuant to *Section 59A(3)* her 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>2</sup>

## FINDING

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



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.

### **RECOMMENDATION**

16. The work capacity decision of the Insurer dated 24 July 2014 is set aside.
17. The applicant is to be reinstated to her weekly payments at the rate applicable as at 24 July 2014, or in the event that payments continued until 30 or 31 October 2014, the last date on which payments were made.
18. The payments are to be back-dated to the date payments ceased in accordance with the work capacity decision. (Either 24 July 2014, or 30 October 2014, or 31 October 2014 – see 2 above.)
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  
5 December 2014