



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 19 June 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 25 September 2014.**
- c. The payments are to be back-dated to 25 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 19 June 2014. The decision advised the applicant that his weekly payments of compensation would cease on 25 September 2014. The applicant sought internal review and the Internal Review Decision was dated 18 August 2014. He then sought Merit Review on or about 17 September 2014 and the Authority issued the Merit Review recommendation on 13 October 2014. The applicant made application to this office on 12 November 2014.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. On 12 September 2012 the applicant suffered injury to his right shoulder in the course of his employment as a labourer. He returned to duties however his employment was terminated in October 2012. The applicant then obtained casual employment with a demolition company in January 2013. That position was later terminated. The applicant has not worked since May 2013.
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 which are substantially not relevant to procedural review.

Submissions by the Insurer

7. The Insurer has not provided submissions in response to the application.

The Decision

8. *Guideline 5.3.2* requires the insurer state the impact of the decision on the applicant in terms of his entitlement to medical and related treatment expenses.
9. At page 6 of the decision the insurer has advised the applicant:

“Section 59A(2) of the 1987 Act states that you are entitled to claim treatment and service costs for up to 12 months after weekly payments have ceased. In order for [named insurer] to consider requests for reasonably necessary treatment and services during the period of 12 months after weekly payments have ceased, please continue to submit a current WorkCover certificates of capacity, which confirms your recommended treatment plan. Please note that should you become re-entitled to weekly payments of compensation after first having ceased to be entitled, under Section 59A(3) of the 1987 Act you should once again be entitled to reasonably necessary treatment and service costs during the period that weekly payments are payable.”

10. Section 59A of the 1987 Act states:

59A Limit on payment of compensation

(1) Compensation is not payable to an injured worker under this Division in respect of any treatment, service or assistance given or provided more than 12 months after a claim for compensation in respect of the injury was first made, unless weekly payments of compensation are or have been paid or payable to the worker.

(2) If weekly payments of compensation are or have been paid or payable to the worker, compensation is not payable under this Division in respect of any treatment, service or assistance given or provided more than 12 months after the worker ceased to be entitled to weekly payments of compensation.

(3) If a worker becomes entitled to weekly payments of compensation after ceasing to be entitled to compensation under this Division, the worker is once again entitled to compensation under this Division but only in respect of any treatment, service or assistance given or provided during a period in respect of which weekly payments are payable to the worker.

(4) This section does not apply to a seriously injured worker (as defined in Division 2).

11. In a recent decision of the *Workers Compensation Commission*¹ the phrase ‘12 months after the worker ceased to be entitled to weekly payments of compensation’ is interpreted in accordance with *Section 38(1)* in that the worker’s entitlement to weekly compensation ceases at the end of the second entitlement period (130 weeks) unless the worker has a further entitlement under the exception in *Section 38(3)*. This exception is not relevant to this case.

12. In this particular case the applicant has been in receipt of weekly payments of compensation for 65 weeks. Therefore, he has not exhausted his entitlement to weekly payments of compensation under *Section 38(1)*. Until the worker does exhaust his entitlement to weekly payment of compensation *Section 59A* does not apply.

13. The insurer’s explanation of *Section 59A* is incorrect. A more appropriate way for the insurer to have explained the impact the decision has upon the applicant’s medical and treatment expenses would have been to inform him that his medical and treatment expenses

¹ *Vella v Penrith City Council* [2014] NSWCC 363; see para 48-96

cease 12 months after the cessation of his “entitlement” to weekly payments, rather than “12 months after weekly payments have ceased.”

14. This incorrect explanation by the Insurer is sufficient for the decision to be set aside.

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 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

16. The work capacity decision of the Insurer dated 19 June 2014 is set aside.
17. The applicant is to be reinstated to his weekly payments at the rate applicable at 25 September 2014.
18. The payments are to be back-dated to 25 September 2014.
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
18 December 2014