

**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 application for procedural review of the work capacity decision of the Insurer dated 30 September 2014 is dismissed.**

**Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 30 September 2014. The decision informed the applicant that her weekly payments of compensation would cease from 13 January 2015. The applicant sought internal review and the Internal Review Decision was dated 1 December 2014. This review confirmed the earlier work capacity decision.
2. The applicant then sought Merit Review from the Authority on or about 16 December 2014. The Authority issued the Merit Review recommendation on 21 January 2015 confirming the applicant to have no entitlement to weekly payments.
3. The applicant subsequently made application to this office on 04 February 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. The applicant suffered injury to her right shoulder in January 2011 in the course of her employment as a Retail Manager. The insurer accepted liability for weekly payments, which continued until the work capacity decision came into effect in January 2015. The applicant is currently employed in a different role with a different employer on reduced hours, being approximately 30 hours per week.
5. The applicant was in receipt of weekly payments immediately before 1 October 2012. Accordingly *Clause 8 of Part 19H of Schedule 6* to the *Workers Compensation Act 1987* (the 1987 Act) required the Insurer to conduct a work capacity assessment.

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

### **Submissions by the applicant**

7. 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, through her representative, made the following submissions:

#### *The Insurer failed to:*

- i. *Correctly reference the legislation.*
- ii. *Provide the applicant with a copy of documents as requested in the course of Internal Review.*
- iii. *Include the date her entitlements to medical expenses will cease.*
- iv. *Properly advise of the process available for requesting review of the decision and how to access the required form, Work Capacity – application for internal review by Insurer (catalogue no. WC03304); for example the Insurer did not provide information about the Merit Review and the Procedural Review and did not advise that the internal review form was available from the WorkCover web-site.*
- v. *In addition the Insurer provided the applicant with the case-manager’s email address to lodge the internal review application instead of providing the email address of the independent officer who was to make the decision.*

### **Submissions by the Insurer**

8. The Insurer has provided submissions in response to the application annexing relevant correspondence together with an explanation of the

outcome of the merit review. In answer to the submissions appearing above, the Insurer has given the following:

- i. The Insurer correctly referenced the legislation in the original work capacity decision dated 30 September 2014 and internal review decision dated 1 December 2014. The work capacity decision dated 30 September 2014 was conducted in accordance with section 38(4) of the *Workers Compensation Act 1987*<sup>1</sup> (1987 Act) and the decision made to reduce the applicant's weekly compensation payments was made in accordance with section 38(7)<sup>2</sup> of the 1987 Act. The internal review application dated 4 November 2014, and received in the Insurer's office on 5 November 2014 and completed on 1 December 2014.<sup>3</sup> The Insurer is within the 30 day timeframe to complete the internal review decision and incorporated the 4 day postage rule as required by section 76(1)(b) of the *Interpretation Act 1987*.<sup>4</sup> The decision was made as a result of the application of section 38(3) of the 1987 Act as it was deemed<sup>5</sup> the applicant was capable of undertaking further additional employment<sup>6</sup> or work that would increase her current weekly earnings.
- ii. The Insurer acknowledges that there is no record of their providing the applicant with copies of all medical reports and updated clinical notes in their possession when they were requested as part of internal review. However, the applicant did not contact the Insurer to advise that the documents were not received and she subsequently lodged an application for merit review with the Authority.

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<sup>1</sup> I suspect this is the Insurer's way of saying that an **assessment** was conducted in accordance with section 44A and a **decision** was subsequently made in accordance with section 43.

Whether the Insurer realises it or not, it did in fact comply with both section 44A and section 43.

<sup>2</sup> See note 1, *supra*.

<sup>3</sup> Presumably this means the internal review was completed on 1 December 2014, not the filling in of the form by the applicant.

<sup>4</sup> Correct.

<sup>5</sup> No it was not – it may have been thought or decided, but it was definitely not “deemed.” The latter is a term which insurers would do well to use sparingly.

<sup>6</sup> A statutory tautology currently appearing in section 38(3)(c).

As part of the Insurer's reply to the application for merit review they provided copies of all medical reports and updated clinical notes in their possession as well as all information considered in the making of the work capacity decision and internal review decision, posted via express post to the applicant (tracking number provided).

- iii. The work capacity decision and the internal review decision both stipulate that in accordance with section 59A(2) of the 1987 Act the applicant's "entitlements to medical and related treatment expenses will only continue for a further 12 months from the effect date listed above<sup>7</sup>." Furthermore in the course of what is described as "the work capacity decision phone call" on 30 September 2014 the applicant was told that her payments would cease on 6 January 2015 (later extended by a week to 13 January 2015 as it appears in the written notice) and that a "further 12 months of medical entitlements" would be available after the cessation of weekly payments. The Insurer incidentally observes that it has recorded a note of the worker advising that she "*only requires Nurofen, now and then,*" having ceased all other treatment.
- iv. With reference to *Guideline 5.3.2*, it states that a "work capacity decision notice must advise of the process available for requesting review of the decision and how to access the required form." The decision dated 30 September 2014 meets the requirements of 5.3.2 as the notice includes the process for review of the decision. (The submissions then set out over a page of directions which, upon perusal, also appear in the notice dated 30 September 2014.)
- v. In accordance with *Internal Review Guideline 7.2.6* the internal review must be undertaken "by a party

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<sup>7</sup> The long-hand way of saying "13 January 2015."

independent to the original work capacity decision.” Since the Insurer could not know who might undertake an internal review (if requested) at the time of the work capacity decision being made, it is an impossibility to particularise the identity and contact details of that unknown person. The best the insurer can do is provide the contact details of the person who made the work capacity decision. If review is requested, that person can forward the request to whoever is allocated the review task. The *Guidelines* do not stipulate a particular person to whom the application for review should be sent, other than the Insurer itself. The applicant was advised she could post or email her application for procedural review.

## The Decision

9. Despite the submissions of the Insurer, I find that the work capacity decision appears to comply with the legislative and other regulatory requirements, including the *Guidelines* issued by WorkCover.
10. The author of the Insurer’s submissions became entangled in various misinterpretations of the legislation which were thankfully absent from those who made the original work capacity decision and internal review decision. The second submission by the applicant (listed as “ii” above) might have been better met by simply saying that the requirement is for the insurer to (a) list and describe all documents and other evidence relied upon and (b) advise the worker that any documents not in the possession of the worker might be provided upon request. There is no requirement that all such documents be provided to the worker prior to a work capacity decision being made, absent a request from the worker. In this case the worker made no such request prior to the original decision being made.
11. The insurer has certainly provided sufficient notice under section 54(2)(a), has fully explained the entitlement periods and the operation of the transitional rate and has even made a reasonable attempt at explaining section 59A(2). Given the current uncertainties around that



section<sup>8</sup> as evidenced by conflicting views yet to be resolved by the NSW Court of Appeal, it is unlikely any insurer could do more than was done in the present case.

## **FINDING**

12. The work capacity decision dated 30 September 2014 was validly made.

## **RECOMMENDATION**

13. The application for procedural review of the work capacity decision of the Insurer dated 30 September 2014 is dismissed.

Wayne Cooper  
Delegate of the WorkCover Independent Review Officer  
09 March 2015.

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<sup>8</sup> See *Vella v Penrith City Council* [2014] NSWCC 363; *Brassaud v Chubb Fire Safety Ltd* [2014] NSWCC 202; and latterly *Flying Solo Properties Pty Ltd t/as Artee Signs v Collet* [2015] NSWCCPD 14. All seem to accept a bizarre distinction between “actual entitlements” and “theoretical, future entitlements,” rather than focussing on the entitlements as the fruits of the tree of statutory rights held by workers who may choose to exercise them either presently or in the future.