

**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 is dismissed.

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 2 December 2014. The insurer advised the applicant that her weekly payments of compensation would cease from 9 March 2015. The applicant sought internal review of the decision and the Internal Review Decision was dated 22 December 2014 confirming the original decision.
2. The applicant then sought Merit Review from the Authority on 3 January 2015 and they delivered a decision dated 9 February 2015 making a recommendation and finding that the applicant has an entitlement to weekly payments of compensation in accordance with Section 37(3) of the Workers Compensation Act 1987 (the 1987 Act) at nil per week.
3. The applicant then applied to this office for procedural review on 18 February 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 30 January 2014 during the course of her employment as a legal secretary/assistant she experienced reactive depression when she was yelled at by a partner. The applicant did not return to work and resigned on 24 April 2014. She was in receipt of weekly payments of compensation from the insurer until 9 March 2015.
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.*”
7. The applicant has requested a procedural review. The applicant’s submissions are that she has been unable to find suitable employment; if her workers compensation payments cease prior to her finding suitable employment her interests will be adversely affected. She concedes she has applied for 200 jobs but has been unsuccessful and she states she does not have transferrable skills to obtain any type of employment. These submissions are not relevant to procedural review.

Submissions by the Insurer

8. The Insurer has made submissions in response to this application including that: the issues raised by the applicant are not relevant to procedural review; the vocational options in the work capacity decision have been found to be suitable; and that the applicant states that she does have capacity and that she is “over qualified” for roles and the insurer contends the vocational options identified are suitable. The latter two of these submissions are not relevant to procedural review.

The Decision

9. Section 54(2)(a) of the 1987 Act requires at least three months and four working days’ notice be given if payments are being reduced or ceased having regard to Section 76 of the *Interpretation Act 1987*. In this decision the Insurer has referenced Section 54 of the 1987 Act and explained the effect of both sections of each piece of legislation being that at least a 3 month and 4 business day (to allow for delivery of the decision) notice period has been given. As a result the applicant was advised that her payments would cease on 9 March 2015 which is the required notice period. The Insurer has complied with the legislation.
10. Guideline 5.3.2 requires the Insurer to advise the date of the work capacity assessment. The insurer has advised the applicant that the work capacity assessment commenced on 4 June 2014 and the assessment concluded on 2 December 2014. As a result of that

assessment a work capacity decision was made and the applicant was advised of the work capacity decision by letter dated 2 December 2014. The Insurer has complied with the Guideline.

11. The same Guideline requires the Insurer to explain the relevant entitlement periods. The Insurer has informed the applicant that she has received 45 weeks' worth of compensation payments. Therefore her ongoing entitlements would be assessed pursuant to Section 37 of the 1987 Act.
12. The Insurer has explained that they have accepted the certificate of capacity of Dr T which assesses the applicant to have a capacity to work her pre-injury duties with a different employer since 31 March 2014. Dr T confirmed this opinion on 19 November 2014. The insurer noted that as the applicant has current work capacity and had not returned to work her entitlements would be assessed under Section 37(3) of the 1987 Act. The Insurer, at page 8 of the work capacity decision, sets out the working algorithm which results in the applicant's nil entitlement. The Insurer has referenced the relevant legislation and explained the line of reasoning for the decision in accordance with Guideline 5.3.2.
13. The Guideline also requires the insurer to advise the applicant of the impact the decision has on his entitlement to medical and related treatment expenses. The Insurer has referenced Sections 59A(1) and (2) of the 1987 Act and advised the applicant that her entitlement to medical expenses will cease 12 months after her weekly payments cease. The insurer has also made a reasonable attempt to explain the provisions of Section 59A(3). Given the present uncertainty that surrounds this Section 59A of the 1987 Act¹ as evidenced by conflicting views from the Workers Compensation Commission it is unlikely the insurer could do any more in the present case.
14. The decision of the Insurer dated 2 December 2014 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

¹ 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.



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

Finding

15. There are no procedural errors identifiable in the decision. The insurer has complied with the Guidelines and relevant legislation.

RECOMMENDATION

16. The application for procedural review is dismissed.

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
23 March 2015