

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 8 October 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 15 January 2015.**
- c. The payments are to be back-dated to 15 January 2015.**
- 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 8 October 2014. The decision informed the applicant that his weekly payments of compensation would cease on 15 January 2015. The applicant sought internal review and the Internal Review Decision was dated 25 November 2014. This review confirmed the work capacity decision.
2. The applicant then sought Merit Review from the Authority on or about 23 December 2014. The Authority issued the Merit Review recommendation on 28 January 2015 making recommendations and findings that in accordance with Section 37(3) of the *Workers Compensation Act 1987* (the 1987 Act) the applicant's entitlement to weekly payments was nil.
3. The applicant then made application to this office on 16 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 sustained injury to his left eye, nose and a laceration to the face in the course of his employment as a teacher on 1 November

2013. The applicant has been in receipt of weekly payments from the insurer in the sum of \$1010.41 per week. At the time of the work capacity decision the applicant was working as a tutor approximately 4 hours per week.

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)*.

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 applied for a procedural review.
7. The applicant’s submissions include that the insurer:
 - did not examine current work capacity;
 - referred to evidence other than the certificate of capacity;
 - did not use a fair or timely estimate of possible earnings; and
 - did not detail the available support during the notice period.
8. The applicant’s first and third submissions are not relevant to procedural review. The remaining submissions are referred to below.

Submissions by the Insurer

9. The Insurer has provided submissions in response to the application raising issues such as work capacity, the internal review and merit review decisions. These matters are not relevant to procedural review.

The Decision

10. The work capacity decision which is the subject of this review is dated 8 October 2014. The relevant WorkCover Capacity Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.

11. Guideline 5.3.2 required the insurer to advise the applicant of the date of the work capacity assessment. The insurer has failed to do so in this work capacity decision and has therefore not complied with this guideline.
12. The same Guideline required the insurer to explain the relevant entitlement periods. The insurer has failed to advise the applicant how many weeks of compensation payments he has received and which entitlement period he falls within. The insurer has only informed the applicant that his *“entitlement to weekly payment of compensation is determined by section 37 of the Act.”* The insurer has not explained the requirements of Section 37 nor why the applicant’s entitlements are assessed under that section. The insurer has not complied with the guideline.
13. The insurer is also required to detail any support, such as job seeking support, which will continue to be provided during the notice period. The insurer has not done so and therefore has failed to comply with this guideline.
14. Guideline 5.3.2 required the insurer to state the impact of the decision on the applicant in terms of his entitlement to medical and related treatment expenses. The insurer has informed the applicant of the following:

“Your entitlement to compensation in respect of medical or related expenses will continue in accordance with our previous liability notice for a further 12 months only as per Section 59A of the Act, given you will have no further entitlement to weekly benefits from 15/01/2015. For more information on your medical benefits please refer to Section 59 and 60 of the Act.”

15. The above paragraph is almost indecipherable. The applicant has been informed that his medical and treatment expenses will continue for twelve months. It is unclear from what date the twelve months commences. The applicant is then referred to Section 59 of the Act. This section does not have any relevance to medical and related treatment expenses. The insurer has failed to comply with the above guideline. In addition Guideline 5.3.1 requires the insurer to

communicate a clear message and the insurer has also failed to comply with this guideline.

16. On the second page of the work capacity decision the insurer has informed the applicant *“as you will no longer have an entitlement to weekly payments of compensation as of 15/01/2015, Section 59A of the Act states that:”* The insurer has then cited Section 59A of the 1987 Act.
17. The insurer has not attempted to explain the effect the work capacity decision and the legislation, in particular Section 59A, has on the applicant’s medical and treatment expenses. Whilst presently there is uncertainty surrounding Section 59A of the 1987 Act as evidenced by the conflicting views from the Workers Compensation Commission the insurer should at least attempt to explain the effect of the section in accordance with one of the recent decisions.¹
18. The non-compliance with the Guidelines and the legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 8 October 2014.

FINDING

19. 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

20. The work capacity decision of the Insurer dated 8 October 2014 is set aside.

¹ See *Vella v Penrith City Council* [2014] NSWWC 363; *Brassaud v Chubb Fire Safety Ltd* [2014] NSWWC 202; and latterly *Flying Solo Properties Pty Ltd t/as Artee Signs v Collet* [2015] NSWCCPD 14.



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21. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 15 January 2015.
22. The payments are to be back-dated to 15 January 2015
23. 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
24 March 2015