

**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.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 18 February 2015.**
- c. The payments are to be back-dated from 18 February 2015 in accordance with clause 30 Schedule 8 to the *Workers Compensation Regulation 2010*.**
- d. Such payments are to continue until the receipt of this recommendation.**

**Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 5 November 2014. The insurer advised the applicant that his weekly payments of compensation would cease from 18 February 2015. The applicant sought internal review and the Internal Review Decision was dated 18 December 2014 and upheld the original decision.
2. The applicant then sought Merit Review from the Authority on 16 January 2015 and they delivered a decision dated 10 February 2015. The finding was that in accordance with Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) the applicant was entitled to weekly payments of compensation and that compensation was calculated to be nil.
3. The applicant then applied to this office for procedural review on 26 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 had previously sought procedural review of a work capacity decision dated 24 June 2013. The applicant was successful and the work capacity decision was set aside by an earlier recommendation of this office<sup>1</sup>.
5. The facts and circumstances concerning the background of the claim are set out in the aforementioned recommendation and need not be repeated.
6. 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.
7. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).
8. The relevant version of the Guidelines was dated 4 October 2013 and came into effect on 11 October 2013.

### **Submissions by the applicant**

9. 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 requested a procedural review. The applicant has submitted that the work capacity decision should be revoked on the grounds contained in the earlier WIRO recommendation.

### **Submissions by the Insurer**

10. The Insurer has submitted that the work capacity decision was conducted in accordance with the Guidelines.

### **The Decision**

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<sup>1</sup> Reported and numbered as 6214

11. The insurer informed the applicant that a work capacity assessment was completed on 30 October 2014 and as a result a work capacity decision was made. The applicant was advised of the decision by letter dated 5 November 2014. The insurer has complied with Guideline 5.3.2.
12. In the work capacity decision the insurer has informed the applicant that he has received 1220 weeks of compensation payments and any ongoing entitlement is to be assessed pursuant to Section 38 of the 1987 Act. In doing so the insurer has again complied with the Guideline.
13. It is noted in the decision that information from the applicant's present employer has established that he works 38 hours per week and the insurer has assessed the applicant's base rate of weekly earnings at \$935.40 per week. Therefore the applicant has satisfied the requirements of Sections 38(3)(b) and (c). It was noted correctly in the decision that Section 38(3)(a) is not relevant in this particular instance. The insurer has complied with the Guideline requiring it to reference the legislation.
14. The insurer informed the applicant that his ongoing entitlement would be calculated in accordance with Section 38(7) and has explained the algorithm used to calculate the applicant's entitlement including an explanation of the transitional rate referred to in Schedule 6 Part 19H Division 1 Clause 2 of the 1987 Act. The algorithm resulted in the applicant's entitlement being nil.
15. As the Insurer intended to discontinue the applicant's weekly payments 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 referenced and explained both sections of each piece of legislation. As a result the applicant was advised that his weekly payments would cease from 18 February 2015 which is in excess of the required notice period. The Insurer has complied with the legislation and Guideline.
16. 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 his entitlement to medical expenses will cease 12 months after his 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 Act as evidenced by conflicting views from the Workers Compensation Commission<sup>2</sup> it is unlikely the insurer could do any more in the present case.

17. The applicant has submitted that the work capacity decision should be set aside on the grounds raised in the procedural review referred to in this decision at paragraph 4. The insurer has rectified the deficiencies in the earlier decision in the work capacity decision dated 5 November 2014. It is that decision which is the subject of this procedural review.

18. The decision of the Insurer dated 5 November 2014 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

## Finding

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

## The Stay

20. Clause 30 Schedule 8 to the Workers Compensation Regulation 2010 operates to stay the decision that is the subject of the review and prevents the taking of action by an insurer based on the decision while the decision is stayed.

21. The work capacity decision was dated 5 November 2014. The applicant applied for internal review on 27 November 2014. Therefore, the applicant applied for internal review within the 30 day requirement for the stay to operate immediately.

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<sup>2</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.



## RECOMMENDATION

22. The application for procedural review is dismissed.
23. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 18 February 2015.
24. The payments are to be back-dated from 18 February 2015 in accordance with clause 30 Schedule 8 to the *Workers Compensation Regulation 2010*.
25. Such payments are to continue until the date of the receipt of this recommendation.

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