



**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 5 November 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 12 February 2015.**
- c. The payments are to be back-dated to 12 February 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 5 November 2014. The decision informed the applicant that his weekly payments of compensation would cease on 12 February 2015. The applicant sought internal review and the Internal Review Decision was dated 22 December 2014. That decision confirmed the work capacity decision.
2. The applicant applied to the Authority for Merit Review on 16 January 2015. On 24 February 2015 the Authority made findings and a recommendation that in accordance with Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) the applicant's entitlement to weekly payments of compensation was nil.
3. The applicant then made application to this office on 12 March 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. The applicant previously sought procedural review of a work capacity decision dated 8 May 2013. The applicant was successful and the work capacity decision was set aside by an earlier decision 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.

### **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 submissions provided by the applicant including an inability to return to his previous employment and increase his earnings are not relevant to procedural review.

### **Submissions by the Insurer**

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

### **The Decision**

9. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
10. Guideline 5.3.2 provides that the insurer must state the impact of the decision on the worker in terms of their entitlement to weekly payments, entitlement to medical and related treatment expenses and return to work obligations.
11. With respect to providing notice as to when weekly payments will cease, at page 5 of the decision, the insurer has cited the relevant legislation being Section 54 of the 1987 Act as well as Section 76(1)(b) of the *Interpretation Act 1987*. The insurer has advised the applicant that the relevant notice period is three months and the insurer has extended this

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<sup>1</sup> Reported and numbered as 12614

by one week to allow for delivery by post. The legislatively correct notice period is three months and four business days but as the insurer has allowed in excess of that period it is not in issue.

12. Unfortunately, the insurer did not advise the applicant in that paragraph of the actual date that his weekly payments will cease. Approximately 6 paragraphs later under a heading "*medical expenses*" the applicant is informed that his weekly payment of \$265.00 per week will cease on *12 February 2015*. This is the correct notice period although it would have been of more assistance to the applicant had he been advised of the cessation date earlier in the decision.
13. The applicant is informed that pursuant to Section 59A(2) of the 1987 Act his medical and treatment expenses will be paid for a period of 12 months following the cessation of his weekly benefits. This is correct. The applicant is then informed that his entitlement to medical expenses will cease on *27 January 2016*.
14. The two dates provided by the insurer are contradictory, incorrect and confusing to the applicant. He is informed that his weekly payments of compensation will cease on *12 February 2015*. He is then advised that he is entitled to medical and treatment expenses for a further 12 months after weekly payments cease and that his entitlement to medical expenses will cease on *27 January 2016*. Clearly the later of these two dates is an error.
15. The insurer has also failed to advise the applicant that he may again become entitled to medical expenses at some time in the future by operation of Section 59A(3) of the 1987 Act. This is an error by omission.
16. The above constitute a series of demonstrable errors by the insurer and are sufficient to set aside the work capacity decision dated 5 November 2014.

## **FINDING**

17. 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 legislation and the Guidelines which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

### **RECOMMENDATION**

18. The work capacity decision of the Insurer dated 5 November 2014 is set aside.
19. The applicant is to be reinstated to his weekly payments at the rate applicable as at 12 February 2015.
20. The payments are to be back-dated to 12 February 2015.
21. 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  
16 April 2015