

**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 15 December 2014 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 22 March 2015.**
- c. The payments are to be back-dated to 22 March 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 15 December 2014. The Insurer informed the applicant that her weekly payments of compensation would be reduced to nil effective from 22 March 2015. The applicant applied for internal review on 15 December 2014. An internal review decision was made by the insurer dated 27 January 2015 confirming the work capacity decision.
2. The applicant applied for merit review by the Authority on 6 March 2015. The Authority found that as the insurer had failed to conduct the internal review and notify the applicant of the decision within 30 days of the application they were satisfied that there was jurisdiction under Section 44(3)(b) of the *Workers Compensation Act 1987* (the 1987 Act) to proceed with the merit review.
3. The Authority issued a Merit Review recommendation dated 25 March 2015 that in accordance with Section 38 of the 1987 Act the applicant has no entitlement to weekly payments of compensation.

4. The applicant then made application for procedural review to this office on 26 March 2015. I am satisfied that the applicant has made the application in the proper form and within time.
5. Section 44A of the *Workers Compensation Act 1987* (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 were reviewed and are limited to the way in which the insurer has managed the claim and her inability to obtain employment. These submissions are not relevant to procedural review.

### **Submissions by the insurer**

8. The insurer did not make submissions in response to this application.

### **The Decision**

9. The relevant WorkCover Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
10. Guideline 5.3.2 provides that the insurer must reference the relevant legislation, outline the evidence considered in making the decision and clearly explain the line of reasoning.
11. The insurer has made a work capacity decision that the applicant is able to work 20 hours per week. This is in accordance with the certificates of capacity issued by the nominated treating doctor.
12. The insurer then informs the applicant that in accordance with an Earning Capacity Assessment report dated 27 June 2014 it has made a decision that the duties of community support worker (aged care), retail

sales assistant and receptionist are all suitable employment options in accordance with Section 32 of the 1987 Act.

13. The insurer then deemed the applicant capable of earning \$459.20 for 20 hours work per week. The insurer has failed to explain to the worker how that figure was calculated. The applicant is entitled to know the hourly rate upon which the figure is calculated and which of the employment options has been used to base the decision upon. The insurer has failed to comply with the Guideline.
14. Guideline 5.3.2 requires the insurer to state the impact of the decision on the worker in terms of her entitlement to weekly payments, entitlement to medical and related treatment expenses and return to work obligations.
15. In this decision the insurer has reproduced Section 59A of the 1987 Act. The insurer has informed the applicant that *“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 to 22/03/16 as per Section 59A of the Act, given that you have no further entitlement to weekly benefits from 22/03/15. For more information please refer to Section 59 and 60 of the Act.”* Interestingly, and perhaps ironically a hyperlink is then imbedded in the written document.
16. Given the present uncertainty that surrounds this Section 59A of the 1987 Act<sup>1</sup> as evidenced by conflicting views from the Workers Compensation Commission it is unlikely the insurer could do any more in explaining Section 59A(2) the present case.
17. However, the insurer has merely reproduced Section 59A(3) without making an attempt to explain to the applicant that she may again become entitled to payment of medical and treatment expenses should she again become entitled to weekly payments. The insurer has failed to properly explain the legislation and has failed to comply with the Guidelines.

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<sup>1</sup> 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.



18. This non-compliance with the legislation and Guidelines referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 15 December 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 legislation and 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 15 December 2014 is set aside.

21. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 22 March 2015.

22. The payments are to be back-dated to 22 March 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  
8 May 2015