

**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 1 October 2014.**
- c. The payments are to be back-dated to 12 February 2015 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.**
- 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 25 June 2014. The insurer advised the applicant that his weekly payments of compensation would cease on 1 October 2014. The applicant sought internal review of the decision on 19 January 2015 and the Internal Review Decision was dated 5 February 2015. That decision reduced the applicant's capacity to earn however, it confirmed that the applicant's weekly payments of compensation ceased on 1 October 2014 in accordance with the work capacity decision.
2. The applicant then sought Merit Review from the Authority on 12 February 2015 and they delivered a decision dated 17 March 2015 finding that pursuant to Section 38 of the 1987 Act the applicant was not entitled to weekly payments of compensation.
3. The applicant applied to this office for procedural review on 27 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 sustained injury to his neck, back and left knee in the course of his employment as a taxi driver. The accepted date of injury

was 27 June 2002. The applicant has not worked in any capacity since his injury and has been in receipt of weekly payments of compensation.

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).
6. The relevant version of the Guidelines came into effect on 11 October 2013.

### **Submissions by the applicant**

7. 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.
8. The applicant does not agree with the conclusion of the insurer or merit review and he submits that he has applied for countless light duty jobs but due to his age and physical condition he has not been successful. These submissions are not relevant to a procedural review.

### **Submissions by the Insurer**

9. The Insurer has not made submissions in response to this application.

### **The Decision**

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 was conducted on 26 May 2014. The applicant was advised of the work capacity decision by letter dated 25 June 2014. The Insurer has complied with the Guideline.
11. 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(1)(b) of the *Interpretation Act* 1987. In this decision the Insurer has referenced and explained both sections of each piece of legislation. As a result the applicant was advised that his

payments would cease from 1 October 2014. The Insurer has complied with the legislation.

12. Guideline 5.3.2 requires the Insurer to explain the relevant entitlement periods. The Insurer has informed the applicant that he has received 623 weeks' worth of compensation payments. Therefore his ongoing entitlements would be assessed pursuant to Section 38(3) of the 1987 Act.
13. The Insurer has informed the applicant that he has not satisfied the requirements of Section 38(3) as he has not returned to work and he was not in receipt of more than \$168.00 per week.
14. The Insurer has explained to the applicant that as the work capacity decision was that he could work 38 hours per week (we note that this was reduced to 16 hours per week in the IRD dated 5 February 2015) and that as he had not returned to work at all he failed to satisfy Section 38. The Insurer has referenced the relevant legislation and explained the line of reasoning for the decision in accordance with Guideline 5.3.2.
15. The same 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 Section 59A(2) of the 1987 Act and advised the applicant that his entitlement to medical expenses will cease 12 months after his entitlement to weekly payments. The provisions of Section 59A(3) were also explained. The Insurer has complied with the Guideline. 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 the present case.
16. In accordance with Guideline 5.3.2 the insurer must outline the evidence considered in making the decision, noting the author, the date and key information. The insurer has informed the applicant that they have relied upon a functional assessment report dated 27 February 2014 when coming to the decision in respect of his work capacity. The insurer has

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<sup>1</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.

explained its decision under the heading “*Background and Reasons*” at pages 2, 3 and 4 of the decision. The insurer has complied with the Guideline.

17. The decision of the Insurer dated 25 June 2014 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

### **Finding**

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

### **The Stay**

19. Clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014* 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.
20. The work capacity decision was dated 25 June 2014. The applicant applied for internal review on 19 January 2015. That is outside the 30 day requirement for the stay to operate immediately. In this particular case the stay operates from the time the application is made to the Authority for merit review until the worker is notified of the findings of this review.

### **RECOMMENDATION**

21. The application for procedural review is dismissed.
22. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 16 October 2014.
23. The payments are to be back-dated to 12 November 2014 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation 2014*.
24. Such payments are to continue until the date of the receipt of this recommendation.



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