

**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 her weekly payments at the rate applicable prior to 14 March 2015.**
- c. The payments are to be back-dated from 14 March 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 1 December 2014. The insurer advised the applicant that her weekly payments of compensation would cease from 14 March 2015. The applicant sought internal review and the Internal Review Decision was dated 14 January 2015 and confirmed the original decision.
2. The applicant then sought Merit Review from the Authority on 13 February 2015 and they delivered a decision dated 16 March 2015. The finding was that in accordance with Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) the applicant was not entitled to weekly payments of compensation.
3. The applicant then applied to this office for procedural review on 30 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 had previously sought procedural review of a work capacity decision dated 15 November 2013. The applicant was

successful and the work capacity decision was set aside by an earlier recommendation of this office¹.

5. The facts and circumstances concerning the background of the claim are set out in the aforementioned recommendation and need not be repeated.
6. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).
7. The relevant version of the Guidelines was dated 4 October 2013 and came into effect on 11 October 2013.

Submissions by the applicant

8. 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.
9. The applicant’s submissions include that she considers the decision unfair and that the insurer has not taken into consideration her limited education. These are not issues which are relevant to procedural review.
10. The applicant has also submitted that she has sent recent certificates of capacity to the insurer which downgrade her capacity. Pursuant to Section 44(1)(c) I am only able to review the work capacity decision dated 1 December 2014. If the applicant has submitted updated medical evidence to the insurer it is within the insurer’s discretion to perform another work capacity assessment. As Guideline 4 notes “*the insurer may conduct a work capacity assessment at any stage throughout the life of a claim.*”

¹ Reported and numbered as 18714

Submissions by the Insurer

11. The Insurer has not made submissions in response to this application dated 30 March 2015.

The Decision

12. In accordance with Guideline 5.3.2 the Insurer advised the applicant that work capacity assessments were completed on 20 September 2013 and 26 November 2014. The applicant was advised of the work capacity decision by letter dated 1 December 2014.
13. The same Guideline requires the Insurer to explain the relevant entitlement period. The Insurer informed the applicant that she had received 149 weeks' worth of payments of compensation at the time that the work capacity decision was made.
14. The Insurer advised the applicant that as she had received in excess of 130 weeks of payments and had a current work capacity her entitlement to weekly compensation was subject to the provisions of Section 38(3) of the 1987 Act. In order to be entitled to ongoing weekly payments of compensation the applicant was informed that she must comply with subsections (b) and (c).
15. The insurer noted at page 8 of the work capacity decision that the applicant had returned to suitable duties for 21 hours per week and satisfied the provisions of Section 38(3)(b) by working not less than 15 hours per week and earning in excess of \$173.00 per week. However the insurer had made a work capacity decision that the applicant had the capacity to work 35 hours per week and she had not satisfied the provisions of Section 38(3)(c) in that they were not satisfied that the applicant was indefinitely incapable of undertaking additional employment to increase her current weekly earnings.
16. The Insurer has complied with the Guideline 5.3.2 by explaining the relevant entitlement period and referencing the legislation when determining whether the applicant was entitled to weekly compensation payments under the 1987 Act.

17. 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 her weekly payments would cease from 14 March 2015 which is the required notice period. The Insurer has complied with the legislation and Guideline.

18. 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 referenced Section 59A(2) of the 1987 Act and advised the applicant that he is entitled to claim medical and related treatment costs for 12 months from the date his weekly payments of compensation ceased. The provisions of Section 59A(3) were also explained.

19. Given the present uncertainty that surrounds Section 59A of the 1987 Act² as evidenced by conflicting views from the Workers Compensation Commission it is unlikely the insurer could do any more in explaining Section 59A(2) and (3) in the present case.

20. The decision of the Insurer dated 1 December 2014 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

Finding

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

RECOMMENDATION

22. The application for procedural review is dismissed.

² 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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23. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 14 March 2015.
24. The payments are to be back-dated from 14 March 2015 in accordance with clause 30 Schedule 8 to the Workers Compensation Regulation 2010.
25. Such payments are to continue until the receipt of this recommendation.

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
8 May 2015