



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 December 2013 is set aside.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable prior to 13 March 2014.**
- c. **The payments are to be back-dated to 13 March 2014.**
- d. **Such payments are to continue until the date when the further work capacity decision was made and came into effect, being 29 January 2015.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 5 December 2013. The Insurer informed the applicant that his weekly payments of compensation would be reduced to nil effective from 13 March 2014. The applicant applied for internal review on 19 January 2015. An internal review decision was made by the insurer dated 29 January 2015 reinstating the applicant's weekly payments at the rate of \$778.32 from 29 January 2015.
2. The applicant applied for merit review by the Authority on 12 February 2015. The Authority made recommendations and findings dated 26 March 2015 noting that the applicant does not satisfy the special requirements under Section 38 of the *Workers Compensation Act 1987* (the 1987 Act).
3. The applicant then made application for procedural review to this office on 31 March 2015. I am satisfied that the applicant has made the application in the proper form and within time.

4. 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

5. 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.
6. The applicant’s submissions address the non-payment of weekly payments of compensation after the work capacity decision up until the time of the internal review dated 29 January 2015. These submissions are not relevant to procedural review.

Submissions by the insurer

7. The insurer made submissions dated 31 March 2015 in response to this application. The insurer’s submissions addressed the issue that the internal review decision maker does not have jurisdiction to reinstate back pay for the period between the original work capacity decision and the internal review decision.

The Decision

8. The relevant WorkCover Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
9. 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.
10. Guideline 5.3.2 requires the insurer to state the impact of the decision on the worker in terms of his entitlement to weekly payments, entitlement to medical and related treatment expenses and return to work obligations.

11. In this decision the insurer has referred to Section 59A of the 1987 Act and informed the applicant that *“any entitlement you may have to payment of pre-approved reasonable and necessary medical and other treatment expenses will be limited for up to 12 months after your entitlement to weekly payments cease. Please refer to: Section 59A of the Workers Compensation Act 1987.”*
12. In the next paragraph the insurer confirms that the applicant's entitlement to medical and related treatment expenses ceases on 13 March 2015.
13. Given the present uncertainty that surrounds this Section 59A of the 1987 Act¹ 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.
14. However, the insurer has not referred to Section 59A(3) and did not attempt to explain to the applicant that he may again become entitled to payment of medical and treatment expenses should he again become entitled to weekly payments.² The insurer has therefore failed to properly explain the legislation and has consequently failed to comply with the Guidelines.
15. This non-compliance with the legislation and Guidelines referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 5 December 2013.

FINDING

16. 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

¹ 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.

² Given that this is precisely what occurred as a result of a subsequent work capacity decision, the relevance of this otherwise theoretical error is apparent.



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

RECOMMENDATION

17. The work capacity decision of the Insurer dated 5 December 2013 is set aside.
18. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 13 March 2014.
19. The payments are to be back-dated to 13 March 2014.
20. Such payments are to continue until the date when the further work capacity decision was made and came into effect, being 29 January 2015.

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