

**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.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 7 January 2015. The insurer advised the applicant that her weekly payments of compensation would cease on 15 April 2015. The applicant sought internal review of the decision on 22 January 2015 and the Internal Review Decision was dated 13 February 2015. That decision maintained that the applicant was not entitled to ongoing payments of weekly compensation however the cessation date was extended to 22 May 2015.
2. The applicant then sought Merit Review from the Authority on 25 February 2015 and they delivered a decision dated 27 March 2015 finding that pursuant to Section 37 of the Workers Compensation Act 1987 (the 1987 Act) the applicant was entitled to weekly payments of compensation in the amount of \$418.66 per week.
3. The applicant applied to this office for procedural review on 2 April 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. As a result of her employment as a teacher the applicant suffered injury to her vocal chords. The accepted date of injury is 28 August 2013. The applicant attempted to return to suitable duties however this was not successful and the applicant's employment ceased on 14 August 2014. She has not worked since that time.
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 submits that: she was required to attend an interview for which she was not qualified; liability has been declined for a secondary psychological claim; a request to defer the work capacity decision until she returned from holidays was ignored; and general issues with rehabilitation. None of these submissions are relevant to 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 7 January 2015 and a work capacity decision was made on the same day. The applicant was advised of the work capacity decision by letter dated 7 January 2015. 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 her payments would cease from 15 April 2015. This is in excess of the required notice period. The insurer further extended this notification period to 22 May 2015 in the Internal Review Decision dated 13

February 2015. The Insurer has complied with the legislation and relevant Guideline.

12. Guideline 5.3.2 requires the Insurer to explain the relevant entitlement periods. The Insurer has informed the applicant that she has received 31 weeks' worth of compensation payments. Therefore her ongoing entitlements would be assessed pursuant to Section 37 of the 1987 Act.
13. The insurer informed the applicant of the decision it had made with respect to suitable employment within the definition of Section 32A of the 1987 Act. The insurer had made a determination that suitable employment for the applicant was a correspondence teacher and that vocation was supported by the nominated treating doctor.
14. The applicant was advised that her ongoing entitlement would be calculated under Section 37(3) and the algorithm and explanation of the applicant's entitlements were noted at page 4 of the work capacity decision. The insurer has complied with the legislation and Guidelines.
15. Guideline 5.3.2 also requires the insurer to advise the applicant of the impact the decision has on her entitlement to medical and related treatment expenses. The Insurer has referenced Section 59A(2) of the 1987 Act and advised the applicant that her entitlement to medical expenses will cease 12 months after her 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 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 the present case.
16. At page 2 of the work capacity decision the insurer has listed the documents considered when making the decision. The insurer has also informed the applicant that copies of any documents can be provided upon request. This is in accordance with Guideline 5.3.2.

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.



17. The insurer has also informed the applicant that support would continue to be provided to assist the applicant to return to work for the duration of the notice period. This is in accordance with the Guidelines.

18. The decision of the Insurer dated 7 January 2015 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

Finding

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

RECOMMENDATION

20. The application for procedural review is dismissed.

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