



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 30 December 2014.**
- c. The payments are to be back-dated to 5 February 2015 in accordance with clause 30 Schedule 8 of 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 17 September 2014. The insurer advised the applicant that his weekly payments of compensation would cease on 30 December 2014. The applicant sought internal review of the decision on 15 December 2014 and the Internal Review Decision dated 5 January 2015 confirmed the original work capacity decision.
2. The applicant then sought Merit Review from the Authority on 5 February 2015 and they delivered a decision dated 10 March 2015 finding that pursuant to Section 38 of the Workers Compensation Act 1987 (the 1987 Act) the applicant was not entitled to weekly payments of compensation.
3. The applicant applied to this office for procedural review by way of application dated 7 April 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 14 March 2010 that applicant suffered injury to his head, neck, back, hips and knees as a result of being involved in a motor vehicle accident

in the course of his employment as a taxi driver. The applicant has been in receipt of weekly payments of compensation 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’s submissions are that the insurer failed to:
 - Correctly reference the legislation;
 - Outline the evidence considered in making the decision, noting the author, the date and any key information;
 - Refer to all evidence considered, regardless of whether or not it supports the decision;
 - Provide a clear explanation as to how decision was reach (*sic*);
 - Clearly identify who made the work capacity decision.

Submissions by the Insurer

9. The Insurer has made submissions dated 13 April 2015 in response to this application as follows:
 - We are of the view that the correct legislation was referenced in both the work capacity decision and internal review and the sections and their effects were adequately explained to the applicant;
 - We note that the work capacity decision and the internal review decision outlined the evidence considered in making the decision;

- The work capacity decision and the internal review decision have relied on all the relevant information. The insurer notes the requirement to provide Merit Review Services with any documentation requested by them, regardless of whether or not it was relied upon in the work capacity and internal review decisions;
- We are of the view that a clear explanation as to how the decision was reached was provided in the work capacity decision and the internal review decision;
- We submit that the work capacity decision states “*This decision was made by the Technical Specialist at Allianz*” and the internal review decision states that this decision was made by a Legal Specialist. Therefore, the person or a person who made the decision was identifiable sufficient that the applicant could see that the internal review was undertaken by someone who was not involved in the making of the original work capacity decision.

The Decision

10. Pursuant to Guideline 5.3.2 the insurer has informed the applicant that a work capacity assessment was completed on 16 September 2014. The applicant was advised of the work capacity decision arising out of that assessment by letter dated 17 September 2014.
11. The same Guideline requires the insurer to advise the date when the decision takes effect. Section 54(2)(a) of the 1987 Act also 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 30 December 2014. The Insurer has complied with the legislation and the Guidelines.
12. The Insurer has informed the applicant that he has received 238 weeks’ worth of compensation payments which places him after the second entitlement period and therefore his ongoing entitlements would be assessed pursuant to Section 38(3) of the 1987 Act. The insurer has

complied with Guideline 5.3.2 which requires the explanation of the relevant entitlement periods.

13. The insurer has cited Section 38(3) of the 1987 Act and noted that the amount in Section 38(3)(b) has been indexed to \$173.00. In order for the applicant to be entitled to ongoing weekly payments he was required to be working for not less than 15 hours per week and earning at least \$173.00 per week. In addition the insurer must be satisfied that the worker was likely to continue to be incapable of undertaking further additional employment or work that would increase his weekly earnings.
14. In accordance with Section 32A of the 1987 Act the insurer identified suitable employment for the applicant as being a customer service officer and sales assistant. The insurer noted that the applicant has a certificate of capacity certifying he has capacity to work 4 hours per day 3 days per week. It was noted that the applicant has not returned to work.
15. The insurer informed the applicant, at page 9 of the work capacity decision, that he did not meet the requirements of Section 38(3) and as a result his weekly payments would be discontinued from 30 December 2014. The insurer has referenced the appropriate legislation and Guidelines in its explanation of how the work capacity decision which was made.
16. Guideline 5.3.2 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 Act¹ as evidenced by conflicting views from the Workers Compensation Commission it is unlikely the insurer could do any more in the present case.

¹ 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.

17. The insurer has cited the various reports upon which it relies throughout the work capacity decision. The insurer cites the author of the report and provides the date. In keeping with the requirements of Guideline 5.3.2 the insurer has also listed the documents which it has reviewed and considered when making the work capacity decision at page 4 of the decision.

18. I am satisfied that on the face of the work capacity decision it is apparent that the work capacity decision was reviewed by a person other than the person who made the original decision.

19. I have reviewed and considered the applicant's submissions and have addressed the submissions in the preceding paragraphs. The decision of the Insurer dated 17 September 2014 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

Finding

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

The Stay

21. Clause 30 Schedule 8 of the Workers Compensation Regulation 2010 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.

22. The work capacity decision was dated 17 September 2014. The applicant applied for internal review on 5 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



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23. The application for procedural review is dismissed.
24. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 30 December 2014.
25. The payments are to be back-dated to 5 February 2015 in accordance with clause 30 Schedule 8 of the *Workers Compensation Regulation* 2010.
26. Such payments are to continue until the date of the receipt of this recommendation.

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