

**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 24 February 2015.**
- c. The payments are to be back-dated from 24 February 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 11 November 2014. The insurer advised the applicant that her weekly payments of compensation would cease from 24 February 2015. The applicant sought internal review on 22 December 2014 and the Internal Review Decision was dated 12 January 2015 and confirmed the original decision.
2. The applicant then sought Merit Review from the Authority on 16 February 2015 and they delivered a decision dated 18 March 2015. The finding was that in accordance with Section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act) the applicant was entitled to weekly payments of compensation and pursuant to Section 38(7) the amount was calculated to be nil.
3. The applicant applied to this office for procedural review on 16 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 13 June 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 this 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 the insurer:
 - has not complied with the legislation in relation to the Work Capacity Decision or the Guidelines;
 - failed to communicate accurately or effectively how it was going to make the present work capacity decision;
 - failed to have a specialist medical investigation.
10. The remaining submissions refer to suitable employment and rehabilitation. These issues are not relevant to procedural review.

Submissions by the Insurer

¹ Reported and numbered as 4114

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

The Decision

12. In accordance with Guideline 5.3.2 the Insurer advised the applicant that work capacity assessments were completed on 23 April 2013 and 4 November 2014. The applicant was advised of the work capacity decision by letter dated 11 November 2014.

13. The same Guideline requires the Insurer to explain the relevant entitlement period. The Insurer informed the applicant that she had received 588 weeks' worth of payments of compensation at the time that the work capacity decision was made.

14. The applicant was then informed that her entitlement to ongoing weekly payments must be assessed under Section 38 of the 1987 Act and that she must comply with the special requirements of that section. The insurer has then set out the requirements of that section noting that the amount referred to in Section 38(b) has been indexed from \$155 per week to \$174 per week.

15. The insurer also explained to the worker that as she was considered to be an *'existing recipient'* her pre-injury earnings were deemed to be the *'transitional rate'* of \$972.90 per week by virtue of Schedule 6 Part 19H Clause 9(3) of the 1987 Act.

16. The most recent certificate of capacity dated 28 August 2014 referred to by the insurer certifies the applicant has capacity for some type of employment for 7 hours per day 5 days per week. Payslips from the applicant's present employer indicate that she was earning \$29.8683 per hour which had increased to \$31.0660 per hour. Therefore, the applicant's current weekly earnings and capacity to earn has been assessed at \$1087.31 gross per week. The insurer relied upon that applicant's demonstrated capacity to earn supported by payslips.

17. The insurer then proceeded to work out the applicant's entitlements to weekly payments of compensation using the algorithm set out in Section 38(7) which resulted in an ongoing entitlement in the sum of nil.

18. The insurer complied with Guideline 5.3.2 and the relevant legislation by explaining to the worker the entitlement periods, suitable employment, capacity to earn, current weekly earnings and her ongoing entitlements.
19. 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 ceasing 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 24 February 2015 which is in excess of the required notice period. The Insurer has complied with the legislation and Guideline.
20. The same Guideline 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 referenced Section 59A(2) of the 1987 Act and advised the applicant that she is entitled to claim medical and related treatment costs for 12 months from the date her weekly payments of compensation ceased. The provisions of Section 59A (3) were also explained.
21. Given the present uncertainty that surrounds Section 59A of the 1987 Act as evidenced by conflicting views from the Workers Compensation Commission² it is unlikely the insurer could do any more in explaining Section 59A(2) and (3) in the present case.
22. In addressing the applicant's submissions the preceding paragraphs establish that the insurer did comply with the relevant legislation and guidelines in respect of making the work capacity decision.
23. The applicant has submitted that the insurer has failed to communicate accurately or effectively how it was going to make the work capacity decision however it is noted in the correspondence that the insurer had discussions with the applicant on 7 October 2014 and attempted further contact on 10 November 2014 and 11 November 2014. This is sufficient contact under the fair notice provisions. The applicant has not

² 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.

specifically submitted the nature of the communication failure which allegedly resulted in a procedural anomaly in making the work capacity decision. I do not accept that the applicant's submission of failure to communicate is sufficient to establish a procedural error.

24. The applicant has also submitted that the insurer failed to have a specialist medical investigation. For the purposes of evidence as to work capacity I refer to Section 44B of the 1987 Act which notes that a certificate of capacity is evidence as to work capacity. Whilst this evidence is not necessarily the only evidence as to work capacity it is not only reasonable but a requirement for an insurer to rely upon a recent/current certificate of capacity when making a work capacity decision. In this decision the insurer relied upon a certificate of capacity which reflects that the applicant has current capacity for some type of employment for 7 hours per day, 5 days per week from 28 August 2014 to 28 November 2014. This is sufficient to comply with the Guidelines and legislation.

25. The decision of the Insurer dated 11 November 2014 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

Finding

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

RECOMMENDATION

27. The application for procedural review is dismissed.

28. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 24 February 2015.

29. The payments are to be back-dated from 24 February 2015 in accordance with clause 30 Schedule 8 to the Workers Compensation Regulation 2010.

30. Such payments are to continue until the receipt of this recommendation.



WorkCover **independent** review office

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
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