



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 6 March 2015.**
- c. The payments are to be back-dated to 6 March 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 27 November 2014. The insurer advised the applicant that his weekly payments of compensation would cease on 6 March 2015. The applicant sought internal review of the decision on 30 December 2014 and the Internal Review Decision dated 2 February 2015 confirmed the original work capacity decision.
2. The applicant then sought Merit Review from the Authority on 27 February 2015 and they delivered a decision dated 1 April 2015 finding that pursuant to Section 38(3) 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 27 April 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. On 2 August 2011 the applicant suffered injury to his lower back, left hip and right leg whilst moving an operating table in the course of his employment as an operating theatre technician. The applicant returned to duties with his pre-injury employer but felt pressured as he was not provided with suitable duties and he felt bullied and harassed by his employers. The applicant developed a psychological disorder and in or about October 2012 he found he could no longer continue working with his managers.
5. A dispute arose between the applicant and the insurer and proceedings were commenced in the Workers Compensation Commission which resolved on 20 June 2014. The applicant was awarded various amounts of weekly payments of compensation from 13 March 2012 and continuing.
6. The work capacity decision states that the applicant was an existing recipient of weekly payments of compensation immediately before 1 October 2012 and this issue is not disputed.
7. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).
8. The relevant version of the Guidelines came into effect on 11 October 2013.

Submissions by the applicant

9. 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.
10. The applicant provided two and a half pages of written submissions attached to his application. The applicant raised the following issues:
 - That he has two separate claims, one for physical injuries and the second for a psychological injury;

- That his psychological injury is severe;
- That the Workers Compensation Commission made a continuing award of weekly payments of compensation in his favour;
- That he is unfit for work as a result of his psychological injury and the insurer has tried to stop his weekly payments of compensation;
- Merit review was misled by the insurer; and
- The merit review decision has not been properly made.

11. As stated above Section 44(1)(c) of the 1987 Act only allows me to review the procedure followed by the insurer in making the work capacity decision. The applicant's submissions above are not relevant to procedural review.

Submissions by the Insurer

12. The Insurer has made submissions dated 1 May 2015 in response to this application as follows:

- The applicant was provided with proper notice of the work capacity assessment via a telephone conversation with the use of a Mandarin interpreter;
- The proper notice for the cessation of payments has been provided;
- The internal review and merit review both found that the applicant has no entitlement to weekly payments of compensation.

The Decision

13. Pursuant to Guideline 5.3.2 the insurer has informed the applicant that a work capacity assessment was completed on 25 November 2014. The applicant was advised of the work capacity decision arising out of that assessment by letter dated 27 November 2014.

14. The same Guideline requires the insurer to advise the date when the decision takes effect. 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 his payments would cease from 6 March 2015. This is in excess of the required notice period. The Insurer has complied with the legislation and the Guidelines.

15. The Insurer has informed the applicant that he has received 186 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.
16. The applicant disputed whether he had received that many weeks' worth of compensation payments. The insurer stated in the Internal Review Decision, that at that time being 2 February 2015, that 195 weeks' worth of weekly payments had been paid. The Authority was satisfied in the merit review decision that in excess of 130 weeks' worth of payments had been made.
17. Therefore, from the papers provided it can be considered that the applicant received in excess of 130 weeks of payments and the insurer was correct in advising that Section 38(3) of the 1987 Act is the appropriate section by which the applicant's ongoing entitlements would be assessed.
18. The insurer has complied with Guideline 5.3.2 which requires the explanation of the relevant entitlement periods and referencing the relevant legislation.
19. The insurer has cited Section 38(3) of the 1987 Act at page 3 of the work capacity decision and noted that the amount in Section 38(3)(b) has been indexed to \$173.00. The insurer has explained that in order for the applicant to be entitled to ongoing weekly payments he must 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 applicant was likely to continue to be incapable of undertaking further additional employment or work that would increase his weekly earnings.
20. In accordance with Section 32A of the 1987 Act the insurer identified suitable employment for the applicant as being a pathology delivery driver. The insurer determined that the applicant had the capacity to

perform these suitable duties for 24 hours per week. It was noted that the applicant had not returned to work.

21. The insurer informed the applicant that as he did not meet the requirements of Section 38(3) his weekly payments would be discontinued from 6 March 2015. The insurer has referenced the appropriate legislation and Guidelines in its explanation of how the work capacity decision which was made.
22. 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.
23. 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 10 of the decision.
24. The decision of the Insurer dated 27 November 2014 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

Finding

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

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.



The Stay

26. 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.
27. The work capacity decision was dated 27 November 2014. The applicant applied for internal review on 30 December 2014. Having regard to Section 76(1)(b) of the *Interpretation Act 1987* and allowing for 4 business days for postage the application was made within the 30 day requirement for the stay to operate immediately.

RECOMMENDATION

28. The application for procedural review is dismissed.
29. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 6 March 2015.
30. The payments are to be back-dated to 6 March 2015 in accordance with clause 30 Schedule 8 of the *Workers Compensation Regulation 2010*.
31. Such payments are to continue until the date of the receipt of this recommendation.

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
2 June 2015