



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 5 March 2015.**
- c. The payments are to be back-dated to 5 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 25 November 2014. The insurer advised the applicant that his weekly payments of compensation would cease on 5 March 2015. The applicant sought internal review of the decision on 15 December 2014 and the Internal Review Decision dated 14 January 2015 confirmed the original work capacity decision.
2. The applicant then sought Merit Review from the Authority on 10 February 2015 and they delivered a decision dated 10 March 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 28 April 2015. In the submissions annexed to the application the applicant advised that he did not receive the Merit Review findings until 16 April 2015. The insurer, in its submissions, also conceded that they did not receive the Merit Review findings until 16

April 2015. Therefore, I am satisfied that the applicant has made the application for procedural review in the proper form and within time being within 30 days of receipt of the Authority's decision.

4. The applicant suffered injury to his wrists as a result of the nature and conditions of his employment as a shearer. The accepted date of injury was 16 September 1987. The applicant's right wrist was surgically fused in 1992 and he has had surgery on his left wrist three times with the most recent taking place on 14 August 2013. Since that time the applicant has performed some farming work on a casual basis and has been in receipt of weekly payments of compensation from the insurer.¹
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 provided submissions with his application. The applicant raised the following issues:
 - He did not receive the Merit Review decision until 16 April 2015;
 - The insurer had not considered his recent surgery when they made a finding he was not working 15 hours per week;
 - That the insurer has not considered how he is supposed to be able to get a job with a totally fused wrist and the other wrist

¹ I am not informed as to the existence or outcome of any claim for WPI; but it seems likely that a person with bilateral wrist injuries requiring multiple surgeries (including a fusion) would at least *approach* the thresholds in section 32A of the 1987 Act and Clause 28 of Schedule 8 to the *Workers Compensation Regulation 2010* which are referred to somewhat echoically in sections 38(5) and 44A(4) of the 1987 Act. That, however, is a dormant issue in the current proceedings.

which will go the same way if he gets a job requiring repetitive movements.

9. Apart from the first submission, which was accepted at paragraph 3 above, the remaining submissions are not relevant to procedural review. I am only in a position to be able to review the procedures undertaken by the insurer and not the merits or decisions made by the insurer.

Submissions by the Insurer

10. The Insurer has made submissions in response to this application as follows:

- The Insurer did not receive the merit review findings until 16 April 2015;
- The issues raised by the applicant in his application are not of a procedural nature and fall outside of the procedural review;
- Vocational options were reviewed by Merit Review Service and were noted as per the Insurer as being appropriate and suitable.

The Decision

11. Pursuant to Guideline 5.3.2 the insurer has informed the applicant that a work capacity assessment was commenced on 19 March 2014 and completed on 24 November 2014. The applicant was advised of the work capacity decision arising out of that assessment by letter dated 25 November 2014.

12. 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. The insurer has informed the applicant that the notice period is 3 months and 1 week (to allow for delivery). The insurer advised the applicant that his payments will cease from 5 March 2015 which is in excess of the required notice period. Although the insurer has not referenced Section 76(1)(b) of the *Interpretation Act* 1987 it has made an allowance for the delivery period. The Insurer has complied with the legislation and the Guidelines.

13. 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 Act² as evidenced by conflicting views from the Workers Compensation Commission it is unlikely the insurer could do any more in the present case.
14. The Insurer has informed the applicant that he has received 1237 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 and referencing the relevant legislation.
15. The insurer has cited Section 38(3) of the 1987 Act at page 10 of the work capacity decision and noted that the amount in Section 38(3)(b) had 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. As the insurer found that the applicant has a capacity to work in suitable employment and is not currently working the insurer advised the applicant that he does not meet the special requirements in Section 38(3)(b) to be entitled to ongoing weekly payments.
16. In accordance with Section 43(1)(c) of the 1987 Act the insurer identified that the applicant had the capacity to earn \$928.08 per week performing the suitable duties of a delivery driver. The insurer based its decision upon various WorkCover Certificates of Capacity issued by Dr A and Dr D, nominated treating doctors, who certified the applicant with a capacity to work in suitable employment 8 hours per day, 5 days per week for the period 11 November 2013 to 12 February 2015.

² 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 informed the applicant that as he did not meet the requirements of Section 38(3)(b) his weekly payments would be discontinued from 5 March 2015. The insurer has referenced the appropriate legislation and Guidelines in its explanation of how the work capacity decision which was made.
18. 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 pages 3 and 4 of the decision.
19. The decision of the Insurer dated 25 November 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 25 November 2014. The applicant applied for internal review on 15 December 2014 therefore the application was made within the 30 day requirement for the stay to operate immediately.

RECOMMENDATION

23. The application for procedural review is dismissed.



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24. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 5 March 2015.
25. The payments are to be back-dated to 5 March 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
4 June 2015