



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 8 September 2014.**
- c. The payments are to be back-dated to 3 March 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 2 June 2014. The insurer advised the applicant that his weekly payments of compensation would cease from 8 September 2014. The applicant sought internal review on 13 January 2015 and the Internal Review Decision was dated 5 February 2015 confirming the cessation of the applicant's weekly compensation payments.
2. The applicant then sought Merit Review from the Authority on 3 March 2015 and they delivered a decision dated 31 March 2015. The Authority found that the applicant did not meet the special requirements under Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) and was therefore not entitled to ongoing weekly payments of compensation.
3. The applicant then applied to this office for procedural review on 28 April 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. The applicant sustained injury to his left shoulder whilst lifting heavy benches overhead during the course of his employment as a carpenter. The accepted date of injury was 21 June 2011. 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 was dated 4 October 2013 and 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. The applicant’s submissions are that the Insurer failed to comply with Clause 5.1 and:
 - There was a change in the applicant’s personal circumstance and that was not given any recognition;
 - The decision is unrealistic given the true earning capacity of the applicant in light of his age, training, education and experience;
 - The insurer has failed to give sufficient weight to the impact the injury has had upon the applicant;
 - The insurer has not considered the realistic availability of suitable employment for the applicant.
8. The submissions then go on to explain why each of the nominated suitable duties is not suitable to the applicant.
9. These submissions are not relevant to procedural review. I am only in a position 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 not made any submissions in response to the application.

The Decision

11. 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 on 13 May 2014. As a result of that assessment a work capacity decision was made. The applicant was informed of the work capacity decision by way of letter dated 2 June 2014. The Insurer has complied with the Guideline.

12. The same Guideline requires the Insurer to advise the date when the decision will take 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 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 weekly payments would cease from 8 September 2014 which is the required notice period. The Insurer has complied with the legislation and this Guideline at page 7 of the work capacity decision.

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. 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. The Insurer has complied with the Guideline and the legislation.

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.

14. The Insurer has informed the applicant that he has received 150 weeks' worth of compensation payments. Therefore his ongoing entitlements would be assessed pursuant to Section 38 of the 1987 Act. The Insurer has explained the '*special requirements*' of Section 38(3)(a),(b) and (c) at page 7 of the work capacity decision. The insurer informed the applicant of the requirements which must be fulfilled for him to be entitled to ongoing weekly payments.
15. The insurer also noted that the amount of \$155 per week referred to in Section 38(3)(b) of the 1987 Act had been indexed to \$168 per week at the time the work capacity decision was made.
16. The Insurer referred the applicant to Section 38(3)(b) and noted that as he had not returned to work for at least 15 hours per week and was not currently in receipt of more than \$168 per week he had not complied with the requirements of the section. The Insurer has referenced the relevant legislation and explained the line of reasoning for the decision in accordance with Guideline 5.3.2.
17. In accordance with Section 32A of the 1987 Act the insurer determined that a sales representative was suitable employment for the applicant. As required by the Guideline the Insurer outlined the evidence considered in making the decision, noting the author, the date and key information. The insurer has relied upon a Vocational Assessment report from P and a certificate from Dr A which certifies the applicant fit for suitable duties for 5 hours per day, 5 days per week. Based upon this information the insurer decided that the applicant had capacity to work for 25 hours per week as a sales representative as set out at page 1 of the decision.
18. The decision of the Insurer dated 2 June 2014 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.

The Stay

20. Clause 30 Schedule 8 to 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.

21. The work capacity decision was dated 2 June 2014. The applicant applied for internal review on 13 January 2015. That is outside the 30 day requirement for the stay to operate immediately. Therefore the stay only operates from the date that the applicant applied for Merit Review by the Authority being 3 March 2015.

RECOMMENDATION

22. The application for procedural review is dismissed.

23. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 8 September 2014.

24. The payments are to be back-dated to 3 March 2015 in accordance with clause 30 Schedule 8 to the *Workers Compensation Regulation 2010*.

25. 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