



**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 April 2015.**
- c. The payments are to be back-dated from 8 April 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 29 December 2014. The insurer advised the applicant that his weekly payments of compensation would cease from 8 April 2015. The applicant sought internal review on 21 January 2015 and the Internal Review Decision was dated 16 February 2015 and confirmed the original decision.
2. The applicant then sought Merit Review from the Authority on 10 March 2015 and they delivered a decision dated 8 April 2015. The finding was that in accordance with 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 on 30 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 had previously sought procedural review of a work capacity decision dated 27 August 2013. The applicant was successful and the work capacity decision was set aside by an earlier recommendation of this office<sup>1</sup>.
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 submission is “*I am unsure how I can be expected to meet the minimum 15 hrs/week of employment when my medical certificate only allows me 14 hours/wk.*”
10. Pursuant to Section 44 of the 1987 Act 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**

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

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<sup>1</sup> Reported and numbered as 4414

## The Decision

12. In accordance with Guideline 5.3.2 the Insurer advised the applicant that a work capacity assessment was completed on 29 December 2014. The applicant was advised of the work capacity decision by letter dated 29 December 2014.
13. As a result of the work capacity decision 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(1)(b) 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 his weekly payments would cease from 8 April 2015 which is the required notice period. The Insurer has complied with the legislation and Guideline.
14. The same Guideline 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 referenced Section 59A(2) of the 1987 Act and advised the applicant that he is entitled to claim medical and related treatment expenses for 12 months from the date his weekly payments of compensation ceased ( at page 1 of the decision the insurer further explained "*this means that your entitlement to medical and related expenses will cease 8 April 2016*"). The provisions of Section 59A (3) were also explained.
15. Given the present uncertainty that surrounds Section 59A of the 1987 Act as evidenced by conflicting views from the Workers Compensation Commission<sup>2</sup> it is unlikely the insurer could do any more in explaining Section 59A(2) and (3) in the present case.
16. Guideline 5.3.2 also requires the Insurer to explain the relevant entitlement period. The Insurer informed the applicant that he had received 694 weeks' worth of payments of compensation at the time that the work capacity decision was made.

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<sup>2</sup> 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.

17. The applicant was then informed that his entitlement to ongoing weekly payments must be assessed under Section 38 of the 1987 Act and that he must comply with the special requirements of that section. The insurer has then set out the requirements of that section on page 2 of the work capacity decision.
18. In accordance with Guideline 5.3.2 the insurer has outlined the evidence they considered in making the decision. The insurer referred to the Certificates of Capacity from Dr H certifying the applicant fit for suitable duties for 14 hours per week. They have also considered a vocational report which identifies suitable employment options being medical receptionist, librarian, administration assistant and exam supervisor. It was noted that Dr H approved the vocational options of medical receptionist, librarian and administration assistant.
19. At page 5 of the work capacity decision the insurer informed the applicant that as he had not returned to work for the required 15 hours per week and was not in receipt of at least \$173 per week he did not meet the special requirements set out in Section 38(3)(b) of the 1987 Act. Furthermore, the applicant was advised that he did not meet the special requirement set out in Section 38(3)(c) in that the insurer considered that it was likely the applicant was capable of undertaking further employment or work that would increase his current weekly earnings. The insurer has complied with the Guidelines by referencing the relevant legislation.
20. In accordance with Guideline 5.3.2 the insurer has informed the applicant that it would continue to provide support, during the notice period, to assist the applicant to return to work. The insurer has also listed the information considered in making the decision on page 3, and informed the applicant that copies of documents previously provided are available upon request at page 5.
21. In responding to the applicant's submission of how he can be expected to work 15 hours per week when he is only certified fit for 14 hours per week I reiterate that this is only a procedural review and furthermore it is noted in any event that the applicant has not returned to work for the 14 hours per week for which fitness has been certified.

22. The decision of the Insurer dated 29 December 2014 has displayed a careful consideration of the requirements of the Guidelines and the legislation.

### **Finding**

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

### **The Stay**

24. 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.

25. The work capacity decision was dated 29 December 2014. The applicant applied for internal review on 21 January 2015. That is within the 30 day requirement for the stay to operate immediately.

### **RECOMMENDATION**

26. The application for procedural review is dismissed.

27. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 8 April 2015.

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

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

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