

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 13 March 2015.**
- c. The payments are to be back-dated from 13 March 2015 in accordance with clause 30 Schedule 8 to the *Workers Compensation Regulation 2010*.**
- d. Such payments are to continue until the receipt by the applicant of this recommendation.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 2 December 2014.¹ The insurer advised the applicant that his weekly payments of compensation would cease from 13 March 2015. The applicant sought internal review on 22 December 2014 and the Internal Review Decision was dated 27 January 2015 and confirmed the original decision.
2. The applicant then sought Merit Review from the Authority which was received on 25 February 2015. A recommendation issued on 31 March 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 27 April 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

¹ There had been an earlier work capacity decision in March 2014, but this was overturned by the Merit Review Service of the WorkCover Authority in June 2014.

4. The applicant sustained a lower back injury on 5 July 1998. He has subsequently undergone several procedures under general anaesthetic and has had a disc replacement. Attempts to return to work were unsuccessful and the applicant has received more than 787 payments of weekly compensation.
5. The applicant was an “existing recipient” of weekly benefits immediately prior to 1 October 2012. Accordingly the claim requires transitioning to the new regime introduced in 2012. Such a transitioning requires a work capacity assessment to be made and a subsequent work capacity decision to also be made.
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 makes three broad submissions:
 - The insurer has “failed in their due diligence by not seeking medical assessments of effects of prescribed medications,” with this alleged failure leading to the authority being in no position to make an informed decision in the course of Merit review;
 - The applicant disputes the suitability of “suitable employment” nominated by the Insurer in light of the medical evidence in the case, alleging that the descriptions of the role identified (postal worker) are inaccurate; and

- The Insurer has “failed in their due diligence to advise the Authority of the current ABS Job Vacancies and Unemployment rate (Marchy 2015), which are relevant to obtaining employment.”

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, or the Authority. It appears that what the applicant seeks is a re-run of the merit review process.

Submissions by the Insurer

11. The Insurer made submissions as follows:

- “We submit that Section 44(1)(c) of the *Workers Compensation Act 1987* states a procedural 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 made submissions which are not relevant to procedural review and they go to the merit of the decision, which has been dealt with by the WorkCover Merit Review Service; and
- “[The Insurer] seeks have the decision procedurally upheld.”

The Decision

12. In accordance with Guideline 5.3.2 the Insurer advised the applicant that a work capacity assessment was completed on 5 November 2014. The applicant was advised of the work capacity decision by letter dated 2 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 the legislation. As a result the applicant was given 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. 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 Commission² 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 787 payments of weekly compensation at the time that the work capacity decision was made.
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 then set out the requirements of that section.
18. In accordance with Guideline 5.3.2 the insurer has outlined the evidence they considered in making the decision. Eleven different documents are referred to, including to first recommendation of the Merit Review Service. They have also considered a vocational report which identifies suitable employment options, and medical evidence from July and August 2014, which post-date the original Merit Review Service recommendation.
19. 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

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.

\$173 per week he did not meet the special requirements set out in Section 38(3)(b) of the 1987 Act. The insurer has thereby 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.

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

22. In light of the compliance with legislation shown by the Insurer, there is no procedural error ascertainable in this case. The submissions of the applicant seek to do no more than call into question the procedures of the Merit Review Service, which is beyond my power. But even if such a power reposed in this Office, I would find there was no error by the Authority. The applicant made no effort to himself provide the supportive evidence he says the Insurer “failed” to obtain or provide to the Authority. If such evidence exists or can be obtained, the applicant should obtain it himself and give it to the insurer, since it is he who bears the onus of proving his case. It might also be emphasised that employment rates and unemployment rates are irrelevant to the question of work capacity, since for the purposes of ascertaining “suitable employment” the “*availability of work*” is specifically excluded in section 32A(b)(i) and (ii) as a consideration.

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 2 December 2014. The applicant applied for internal review on 22 December 2014. 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 his weekly payments at the rate applicable prior to 13 March 2015.

28. The payments are to be back-dated from 13 March 2015 in accordance with clause 30 Schedule 8 to the *Workers Compensation Regulation* 2010.

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

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
5 June 2015