



**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 her weekly payments at the rate applicable prior to 11 March 2015.**
- c. The payments are to be back-dated to 12 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 4 December 2014. The insurer advised the applicant that her weekly payments of compensation would cease on 11 March 2015. The applicant sought internal review of the decision on 14 January 2014 and the Internal Review Decision dated 10 February 2015 confirmed the original work capacity decision.
2. The applicant then sought Merit Review from the Authority on 12 March 2015 and they delivered a decision dated 10 April 2015 finding that pursuant to 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 by way of application dated 8 May 2015. I am satisfied that the applicant has

made the application for procedural review in the proper form and within time.

4. On 29 August 2006 the applicant suffered injury to her right shoulder in the course of her employment as a part time pathology collector working 25 hours per week. The applicant underwent surgery to her right shoulder on 1 May 2005, 1 May 2007 and 20 August 2009. The applicant alleged consequential injury to the left shoulder. The applicant's capacity has fluctuated between no capacity and partial capacity.
5. The applicant underwent Pudendal Nerve Neuralgia Decompression surgery on 21 March 2014. This was a non-work related condition.
6. The applicant's employment was terminated on medical grounds by way of letter dated 9 April 2015 effective from 1 May 2015. At the time of the work capacity decision the applicant was in receipt of weekly payments of compensation from the insurer.
7. 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.
8. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).
9. The relevant version of the Guidelines came into effect on 11 October 2013.

### **Submissions by the applicant**

10. 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.
11. The applicant made submissions on the application for procedural review as well as providing two documents titled "*Summary of Events*"

and “*Further Information for WIRO.*” The applicant’s primary submission is that the decision regarding suitable vocations is incorrect having regard to her current capabilities.

12. The applicant has requested the procedural review look into how the conclusion could be made that the selected vocations were suitable “*without further physical improvements or without undergoing some form of modification to the role, after reviewing all the information supplied by my NTD, Physiotherapist, Functional Assessor, the Independent Medical Officer and Independent Medical Consultant.*”
13. The applicant has also provided an extensive chronology of events that occurred including treatment, her return to work duties and her co-operation and participation with rehabilitation providers.
14. 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. Any decisions made by the insurer in respect of suitable duties and capacity are not issues which can be considered at this procedural review stage. I am only in a position to review the procedures undertaken by the insurer in making the work capacity decision. The submissions by the applicant are not relevant to this procedural review.

### **Submissions by the Insurer**

15. The Insurer made submissions dated 14 May 2015 in response to this application. The insurer submits that the applicant’s submissions go to the merits of the decision which have already been reviewed by the Authority. The insurer further submits that the applicant’s submissions are not relevant to procedural review. The insurer has also provided a useful chronology of correspondence between the parties.

### **The Decision**

16. Pursuant to Guideline 5.3.2 the insurer has informed the applicant that a work capacity assessment was completed on 3 December 2014. The applicant was advised of the work capacity decision arising out of that assessment by letter dated 4 December 2014.

17. 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 her payments would cease from 11 March 2015. The Insurer has complied with the legislation and the Guidelines.
18. Guideline 5.3.2 also requires the insurer to advise the applicant of the impact the decision has on her entitlement to medical and related treatment expenses. The Insurer has referenced Section 59A(2) of the 1987 Act and advised the applicant that her entitlement to medical expenses will cease 12 months after her entitlement to weekly payments ceases. 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 Act<sup>1</sup> as evidenced by conflicting views from the Workers Compensation Commission it is unlikely the insurer could do any more in the present case.
19. In accordance with the Guideline the insurer has explained the relevant entitlement provisions and the Insurer has informed the applicant that she has received 184 weeks' worth of compensation payments which places her after the second entitlement period and therefore her ongoing entitlements would be assessed pursuant to Section 38(3) of the 1987 Act.
20. The insurer has cited Section 38(3) of the 1987 Act at pages 2 and 3 of the work capacity decision and noted that the amount in Section 38(3)(b) had been indexed to \$173.00 per week as at 1 July 2014. The insurer has explained that in order for the applicant to be entitled to ongoing weekly payments she 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 her weekly earnings.

---

<sup>1</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.

21. In accordance with Section 32A of the 1987 Act the insurer identified suitable employment for the applicant as being a medical receptionist, ward clerk and sales assistant. The insurer determined that the applicant had the capacity to perform these suitable duties for 15 hours per week and had an earning capacity of \$420.00 per week.
22. The insurer informed the applicant at page 9 of the work capacity decision that as she did not meet the requirements of Section 38(3) she was no longer entitled to weekly payments of compensation. The insurer has referenced the appropriate legislation and Guidelines in its explanation of how the work capacity decision was made.
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 9 of the decision.
24. The decision of the Insurer dated 4 December 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.

## **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 4 December 2014. The applicant applied for internal review on 14 January 2015. The application was made outside the 30 day requirement for the stay to operate



immediately. Therefore the stay operates from the date the applicant applied for merit review by the Authority being 12 March 2015. It is noted that the applicant's weekly payments of compensation were not due to cease until 11 March 2015.

### **RECOMMENDATION**

28. The application for procedural review is dismissed.
29. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 11 March 2015.
30. The payments are to be back-dated to 12 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  
11 June 2015