

**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.**

**Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 18 August 2014. The decision informed the applicant that his weekly payments of compensation would cease on 25 November 2014. The applicant sought internal review on 13 January 2015 and the Internal Review Decision was dated 27 January 2015. That decision recommenced the applicant's weekly payments in the sum of \$778.32 per week from 27 January 2015.
2. The applicant applied to the Authority for Merit Review on 18 February 2015 and they delivered findings and recommendations dated 2 April 2015. The Authority made a finding that the worker did not meet the special requirements for the continuation of weekly payments after the second entitlement period contained in Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) for the period 26 November 2014 to 15 December 2014. However the delegate did find that the applicant had no work capacity for the period 16 December 2014 to 27 January 2015.
3. The applicant then made application to this office dated 8 May 2015. Taking into consideration Section 76(1)(b) of the *Interpretation Act 1987* and the public holidays (not counted as business days) I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 15 November 2004 the applicant suffered injury to his neck and back whilst performing his pre-injury duties of a storeman. The applicant's

attempt to return to pre-injury duties was unsuccessful. At the time of the work capacity decision the applicant was not working and was in receipt of weekly payments of compensation.

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).

### **Submissions by the applicant**

6. 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 applied for a procedural review.
7. The applicant’s submission is that the insurer ceased payments on a technicality of the applicant’s nominated treating doctor failing to enter an hourly restriction and inadvertently certifying the applicant fit for usual hours. The period of payments that the applicant disputes is from 26 November 2014 to 27 January 2015.
8. It is noted that the Merit Review decision recommended payments be commenced for the period 16 December 2014 to 27 January 2015 (at which time the insurer had recommenced voluntary weekly payments of compensation).
9. The only period for which the applicant has not been paid weekly payments of compensation is 26 November 2014 to 15 December 2014.
10. I am only in a position to review the procedures undertaken by the insurer in making the work capacity decision. I cannot have any consideration for periods of non-payment or subsequent recommendations made on internal review or merit review. I can only assess the validity of the work capacity decision document as a whole.

### **Submissions by the Insurer**

11. The Insurer has provided submissions dated 11 May 2015 in response to the application. The insurer submitted that the work capacity decision was provided to the applicant on 18 August 2014 in Dr K's rooms (his nominated treating doctor), in the presence of his treating doctor and the rehabilitation provider. The case manager advises capacity was discussed with Dr K, and it was noted that the failing to place hourly or daily restrictions on the certificate indicated that the applicant was fit for full hours. Dr K did not raise objections nor did he change the applicant's certification at that time. The applicant's certification did not change until November 2014.
12. Although this decision was issued in August 2014, the applicant did not lodge his request for review until 13 January 2015.
13. The insurer does not accept that Dr K *'did not realise'* the impact of his certification or the impact of the work capacity decision. The insurer did not mislead the applicant or Dr K. The work capacity decision was the decision most likely to be correct based on the evidence at that time. The insurer's submissions, which are in response to the applicant's application, are of limited assistance as I can only undertake a procedural review.

## **The Decision**

14. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
15. Guideline 5.3.2 requires the insurer to advise the applicant of the date of the work capacity assessment. The insurer informed the applicant that the work capacity assessment was performed on 23 July 2014. As a result of that assessment a work capacity decision was made on 18 August 2014. The applicant was advised of the decision by letter dated the same day.
16. 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 his payments would cease from 25 November 2014. This is the required notice period. The Insurer has complied with the legislation and the Guidelines.

17. Guideline 5.3.2 also requires the insurer to inform the applicant of the relevant entitlement periods. The insurer advised the applicant that he has received 458 weeks' worth of compensation payments and his ongoing entitlements are subject to the requirements contained in Section 38 of the 1987 Act. The special requirements of that section are explained by the insurer at page 3 of the decision *"under section 38 you are required to be working a minimum of 15 hours per week in paid employment, and earning a minimum of \$173.00 per week."*
18. It is noted in the work capacity decision that the applicant is *not* working nor earning the minimum (being \$173.00 per week) and as a result, pursuant to Section 38 of the 1987 Act, he is not entitled to weekly payments of compensation. The insurer has complied with the Guidelines by explaining the relevant entitlement periods and referencing the legislation.
19. The insurer identified suitable employment for the applicant as being a motor vehicle parts interpreter, assembler, shop assistant, call centre operator and administrative assistant. The insurer determined that the applicant had the capacity to perform these suitable duties for 40 hours per week. The insurer relied upon a vocational assessment undertaken in March 2014 and the certificate of capacity from the nominated treating doctor. The insurer has complied with Guideline 5.3.2 by stating the decision and providing brief reasons for the decision including outlining the evidence in making the decision.
20. The same Guideline 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 ceases. 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.

21. The decision of the insurer dated 18 August 2014 has displayed a careful consideration of the requirements of the Guidelines and legislation.

### **Finding**

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

### **The Stay**

23. 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.
24. The work capacity decision was dated 18 August 2014. The applicant applied for internal review on 13 January 2015. The application was made outside the 30 day requirement for the stay to operate immediately. If the applicant had made the application for internal review within 30 days of the work capacity decision he would have been entitled to a stay and his payments would have been back dated to the date of cessation.

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<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.



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## **RECOMMENDATION**

25. The application for procedural review is dismissed.

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15 June 2015