

**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 work capacity decision of the Insurer dated 6 January 2015 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 19 April 2015.**
- c. The payments are to be back-dated to 19 April 2015.**
- d. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 6 January 2015. The decision informed the applicant that his weekly payments of compensation would cease on 19 April 2015. The applicant sought internal review and the Internal Review Decision was dated 28 January 2015. That decision reinstated weekly payments to the applicant in the sum of \$185.82 effective from 28 January 2015.
2. The applicant applied to the Authority for Merit Review on 4 March 2015 and they delivered findings and recommendations dated 23 April 2015. The Authority made a finding that in accordance with Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) the applicant is not entitled to payments of compensation.
3. The applicant then made application to this office on 13 May 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. The applicant previously sought procedural review of a work capacity decision dated 7 June 2013. The applicant was successful and the work capacity decision was set aside by an earlier decision¹ of this office.
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 has submitted that the insurer has failed to properly evaluate all the evidence and failed to seek any additional information. He has also made submissions in respect of the merit review recommendations and findings.
8. As stated above I am only allowed to review the procedures undertaken by the insurer in making the work capacity decision. I am not able to make any recommendations in respect of the merit review recommendations and findings.

Submissions by the Insurer

9. The Insurer submitted on 25 May 2015 that the work capacity decision dated 6 January 2015 complied with all relevant guidelines.

The Decision

10. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
11. Section 43 of the 1987 Act states that the insurer’s decision about a worker’s current work capacity constitutes a work capacity decision.

¹ Reported and numbered 314

12. Guideline 5.3.2 requires the insurer to reference the relevant legislation and clearly explain the line of reasoning for the decision.
13. At page 10 of the work capacity decision the insurer has informed the applicant that *“you have a capacity to work up to 40 hours per week in your current role, as indicated most recently in the report of Dr C [name withheld].”*
14. At page 9 of the decision the insurer has referred to a report of Dr C dated 1 October 2014 in which the doctor expresses the opinion that the applicant is not *“restricted from engaging in full time work.”*
15. The insurer has purported that this is the work capacity decision and the evidence relied upon to make it. The insurer has made an error and not complied with the legislation or the Guidelines.
16. Firstly, the insurer’s decision that the worker has capacity to work up to 40 hours per week is not a definitive decision. It means that the applicant can work anywhere from 1 hour per week to 40 hours per week. This is an error.
17. Secondly the insurer has stated that it relied upon a report of Dr C to make that decision. Dr C’s report states that the applicant is not restricted from *“engaging in full time work”*. The doctor does not express what constitutes full time work in his opinion. It cannot be assumed by the insurer that this means *“up to 40 hours per week.”*
18. It is noted that the insurer has referred to a Certificate of Capacity from the nominated treating doctor valid for the period 2 December 2014 to 1 February 2015 certifying the applicant fit for suitable duties for 4-6 hours per day, 5 days per week and noting that this has been the situation since 20 June 2014. Therefore the certificate of capacity from the nominated treating doctor certifies the applicant’s capacity to be 20 to 30 hours per week. The insurer’s assertion Dr C’s report *“most recently”* certified capacity is incorrect.
19. The most recent evidence as to the applicant’s capacity is the certificate of capacity from the nominated treating doctor. The insurer should have

made a decision as to the applicant's capacity taking this document into consideration and making a definitive decision as to how many hours per week the applicant has the capacity to work.

20. It is noted that in the internal review decision dated 28 January 2015 a work capacity decision was made that the applicant could work 30 hours per week in his present duties as a bar attendant. That is a procedurally correct decision. However that decision is not sufficient to validate the work capacity decision.

21. The non-compliance with the Guidelines and legislation referred to in above is sufficient to set aside the work capacity decision dated 6 January 2015.

FINDING

22. Under the legislation the Insurer can make an assessment of the applicant's work capacity and then a decision about that work capacity, but they must comply with the legislation, the Regulation and the Guidelines in order to produce a procedurally correct result. In the current instance there have been breaches of the legislation and the Guidelines which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

RECOMMENDATION

23. The work capacity decision of the Insurer dated 6 January 2015 is set aside.

24. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 19 April 2015.

25. The payments are to be back-dated to 19 April 2015.

26. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.



WorkCover **independent** review office

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

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