

**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 16 February 2015 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 25 May 2015.**
- c. The payments are to be back-dated to 25 May 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 16 February 2015. The decision informed the applicant that his weekly payments of compensation would cease on 25 May 2015. The applicant sought internal review on 26 February 2015 and the Internal Review Decision was dated 26 March 2015 confirming the original decision.
2. The applicant applied to the Authority for Merit Review on 14 April 2015 and they delivered findings and recommendations dated 22 May 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(3) of the *Workers Compensation Act 1987* (the 1987 Act).
3. The applicant then made application to this office on 10 June 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. On 30 April 1997 the applicant experienced lower back pain during the course of his duties as a truck driver. On 6 August 1997 the applicant experienced exacerbating pain in his left calf muscle whilst driving. The applicant underwent spinal surgery on 25 November 1997. The applicant ceased working with his employer. On 24 September 2009 Heads of Agreement were signed by the applicant and insurer outlining the applicant's weekly payment entitlement from May 1995 and noting continuing payments at the statutory rate for a single person with no dependants.
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 submissions include not being recently examined by a medical practitioner on behalf of the insurer and being informed during WCC proceedings that he would be on weekly payments until he turned 65 years of age.
8. This review is of the procedures of the insurer in making the work capacity decision. I am unable to review any judgment or discretion used by the insurer. The submissions from the applicant are not relevant to procedural review.
9. I do note that the insurer is not required to have a medical examination of the applicant in order to make a work capacity decision and that at the time the applicant negotiated his ongoing weekly payments the legislation was such that he was entitled to the payments, had he remained incapacitated until he reached his 66<sup>th</sup> birthday.

### **Submissions by the Insurer**

10. The Insurer has provided submissions dated 16 June 2015 in response to the application. It was submitted by the insurer that a main factor in the applicant not being recently examined was that he moved to the Philippines and did not return to Australia until February 2015.
11. The insurer also noted that at the time the Heads of Agreement were signed between the parties the legislation was that the applicant would have been entitled to payments until he attained the age of 65 years.

## **The Decision**

12. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
13. Guideline 5.3.2 requires the insurer to explain the relevant entitlement periods.
14. The insurer has informed the applicant that as at 13 February 2015 he had received 876 weeks of compensation payments. Therefore any ongoing entitlements to weekly payments of compensation are subject to the provisions of Section 38(3) of the 1987 Act.
15. The legislation and Guideline 5.3.2 require the insurer to state the decision and give brief reasons for making the decision as well as referencing the relevant legislation. The insurer advised the applicant that it made a decision that he had the capacity to work 35 hours per week. This decision was made in accordance with the Certificate of Capacity from the applicant's nominated treating doctor. The insurer has complied with the Guidelines.
16. The insurer made a decision in accordance with Section 32A of the 1987 Act that suitable duties for the applicant were that of a retail manager. This decision was based upon a workplace rehabilitation report, the certificate of capacity from the nominated treating doctor and the applicant's most recent work experience in the Philippines. The insurer has complied with the Guidelines.
17. At page 2 of the decision the insurer has inserted the following table:

<b>Suitable employment</b> Pursuant to Section 32A of the Workers Compensation Act 1987	<b>Current Weekly Earnings (\$)</b> pursuant to Section 35(1)(b) and Section 44I of the Workers Compensation Act 1987	<b>Amount you are able to earn in suitable employment (\$)</b> pursuant to Section 35(1)(a) of the Workers Compensation Act 1987
Retail Manager	\$65.00	\$867.65

18. Further at the same page of the work capacity decision the insurer has set out the requirements of Section 38(3) of the 1987 Act as follows:

*“(a) They must have applied to the insurer in writing (in the form approved by the Authority) no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payments after the second entitlement period, and*

*(b) They have returned to work (whether in self-employment or other employment) for a period of not less than 15 hours per week and is in receipt of current weekly earnings (or current weekly earnings together with a deductible amount) of at least \$155 per week, (Note this rate was indexed on 1 July 2014 to \$173 per week as required by section 82B of the Workers Compensation Act 1987); and*

*(c) They are assessed by the insurer as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker’s current weekly earnings.”*

19. The above is in accordance with the Guidelines and the insurer has complied with both the legislation and Guidelines.

20. At page 3 of the work capacity decision the insurer has advised the worker:

*“As you meet all the requirement of Section 38(3), you are currently entitled to compensation after the second entitlement period (that is, after 130 weeks) and as you have a current work capacity your entitlements are assessed under section 38(7) of the Workers Compensation Act 1987...”*

21. This statement by the insurer is a demonstrable error and sufficient to set aside the work capacity decision.
22. The table clearly indicates that the applicant is earning \$65 per week. Section 38(3)(b) requires the applicant to be earning at least \$173 per week (as indexed) in order for the applicant to satisfy this section in order to establish an ongoing entitlement to weekly payments of compensation.
23. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 16 February 2015.

## **FINDING**

24. 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 has been a breach 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**

25. The work capacity decision of the Insurer dated 16 February 2015 is set aside.
26. The applicant is to be reinstated to his weekly payments at the rate applicable as at 25 May 2015.
27. The payments are to be back-dated to 25 May 2015.
28. 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](mailto:contact@wiro.nsw.gov.au)  
[www.wiro.nsw.gov.au](http://www.wiro.nsw.gov.au)

Tracey Emanuel  
Delegate of the WorkCover Independent Review Officer  
13 July 2015