

**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 29 January 2015 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 7 May 2015.**
- c. The payments are to be back-dated to 7 May 2015 or the date payments ceased (whichever is the later).**
- 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. A work capacity decision dated 29 January 2015 was sent to the applicant advising her that her entitlement to weekly payments would cease from 7 May 2015. The applicant requested an internal review on 26 February 2015. The insurer issued an internal review decision dated 18 March 2015. The internal review decision altered the work capacity decision but maintained the cessation of payments. However, the insurer extended the date upon which weekly payments ceased to 23 June 2015.
2. The applicant applied for merit review by the Authority on 24 April 2015. They delivered a decision dated 21 May 2015 which found that the applicant was not entitled to ongoing weekly payments of compensation as she did not satisfy the special requirements of Section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act).
3. The applicant then made application to this office dated 12 June 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. On 13 October 2000 the applicant suffered injury to her right arm when she was struck on the arm by a door which she was holding open for elderly patrons.
5. On 6 March 2004 the applicant sustained a further injury when she tripped and twisted her left ankle.
6. At the time of the work capacity decision the applicant was not working and was in receipt of separate weekly payments of compensation in respect of each injury.
7. 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**

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.*”
9. The applicant has requested a procedural review of the insurer’s work capacity decision. The applicant’s submission is primarily that the insurer has relied upon a settlement document in the decision and the applicant does not agree that she has received the payment suggested in that document. Any issue with respect to non-payment of an agreement entered between the applicant and the insurer is not the subject of procedural review.
10. I am only able to review the procedures used by the insurer in making the decision.

## **Submissions by the Insurer**

11. The Insurer did not provide any submissions in response to the application.

### **The Decision**

12. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.

13. The insurer has made a work capacity decision in respect of two separate injuries and two separate weekly compensation payments.

14. In respect of the claim arising from the 2000 incident where the applicant suffered injury to her arm the applicant has received 493 weeks of compensation payments.

15. In respect of the claim arising from the 2004 incident where the applicant suffered injury to her ankle the applicant has received 309 weeks of compensation payments.

16. The applicant has received in excess of 130 weeks of payments in respect of each injury and therefore any ongoing entitlement to payments of weekly compensation is subject to the provisions of Section 38(3) of the 1987 Act. In accordance with Guideline 5.3.2 the insurer has informed the applicant of this at page 2 of the work capacity decision. The insurer has complied with the Guideline.

17. The insurer has identified suitable duties for the applicant as being a tourist information officer or a gallery or museum guide. The insurer relied upon a vocational assessment report dated 28 November 2014 to support this decision. The insurer has complied with Guideline 5.3.2 as well as Section 32A and Section 43(1)(b) of the 1987 Act.

18. Section 43(1)(a) of the 1987 Act states that a decision about a worker's current work capacity constitutes a work capacity decision. The insurer has made a decision that the applicant has a capacity to work 30 hours per week in respect of the injuries arising from the 2000 injury and a capacity to work 40 hours per week in respect of the injuries arising out of the 2004 incident. The insurer has relied upon certificates of capacity

from both Dr Richmond and Dr Cosgriff respectively when making this decision.

19. The decision that the applicant has a capacity to work 30 hours per week and a capacity to work 40 hours per week is contradictory and confusing. It is open for the applicant to assume that she must work 70 hours per week. It is noted that the applicant has suffered two separate injuries however the applicant cannot have two separate capacities to work. In the internal review decision the insurer has made a decision that the applicant has the capacity to work 35 hours per week. Whilst this decision is a correct decision it is not sufficient to validate the work capacity decision.
20. The non-compliance with the Guidelines and legislation referred to in the preceding paragraph is sufficient to set aside the work capacity decision dated 29 January 2015.

## **Finding**

21. 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**

22. The work capacity decision of the Insurer dated 29 January 2015 is set aside.
23. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 7 May 2015.
24. The payments are to be back-dated to 7 May 2015 or the date payments ceased (whichever is the later).



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

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