



**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 his weekly payments at the rate applicable prior to 12 July 2015.**
- c. The payments are to be back-dated from 12 July 2015 in accordance with clause 30 Schedule 8 to 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 31 March 2015. The decision informed the applicant that his weekly payments of compensation would cease on 12 July 2015. The applicant sought internal review on 14 April 2015 and the Internal Review Decision was dated 8 May 2015. That decision confirmed the original work capacity decision.
2. The applicant applied to the Authority for Merit Review on 2 June 2015 and they delivered findings and recommendations dated 8 July 2015. The Authority made a finding that the applicant did meet the special requirements under Section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act) and therefore his ongoing entitlements were calculated pursuant to Section 38(7). The ongoing entitlement was nil.
3. The applicant then made application to this office dated 10 July 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. The applicant had previously sought procedural review of a work capacity decision dated 6 August 2014. The applicant was successful and the work capacity decision was set aside by an earlier recommendation of this office<sup>1</sup>.
5. The facts and circumstances concerning the background of this claim are set out in the aforementioned recommendation and need not be repeated.
6. 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**

7. 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.
8. The applicant’s submission refers to what constitutes suitable employment.
9. I am only able to review the insurer’s procedure with respect to making the work capacity decision. Any decision with respect to suitable employment is within the discretion of the insurer and not the subject of procedural review.

### **Submissions by the Insurer**

10. The Insurer has not provided any submissions in response to the application.

### **The Decision**

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

---

<sup>1</sup> Reported and numbered as 25514

12. 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 a work capacity assessment was completed on 31 March 2015. As a result of that assessment the applicant was informed of the work capacity decision by letter dated 31 March 2015. The insurer has complied with the Guideline.
13. 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 12 July 2015. This is in excess of the required notice period. The Insurer has complied with the legislation and the Guidelines.
14. Pursuant to Guideline 5.3.2 the insurer is 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. The insurer has specified the date 12 July 2016 as the date the entitlement to medical and related treatment expenses will cease. The insurer has also referenced and explained Section 59A(3) of the 1987 Act. The insurer has complied with the legislation and the Guidelines.
15. 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 393 weeks of compensation payments and his ongoing entitlements are subject to the special requirements contained in Section 38(3) of the 1987 Act. The special requirements of that section are explained by the insurer at page 4 of the decision.
16. The insurer correctly advised the applicant that Section 38(3)(b) requires him to return to work for not less than 15 hours and that he must earn at least \$173 per week (adjusted figure). The insurer also advised that Section 38(3)(c) requires that the applicant be assessed as likely to

continue to be indefinitely incapable of undertaking further additional employment that would increase his current weekly earnings.

17. In accordance with Section 32A of the 1987 Act the insurer had determined that the vocations of construction project manager, construction estimator and program administrator were all suitable employment. The insurer has maintained this position since an earning capacity assessment dated September 2013 and an updated vocational assessment dated June 2014. The insurer has complied with the legislation and the Guidelines. I am unable to review the discretion of the insurer in making the decision as to what constitutes suitable employment.
18. It was noted by the insurer that the applicant had returned to work as a self-employed delivery driver working up to 37 hours per week and earning up to \$400 per week based upon the pay slips provided by the applicant. The insurer maintains its position that a delivery driver is not an option that they consider to be suitable employment within the definition of Section 32A of the 1987 Act. Again I am unable to review the discretion exercised by the insurer.
19. The insurer has noted that the applicant has complied with Section 38(3)(b) in that he has returned to work for not less than 15 hours per week and he is earning in excess of \$173.00 per week. Furthermore the applicant has satisfied Section 38(3)(c) as the insurer concedes that the applicant is working up to his full capacity as a delivery driver. Therefore the weekly compensation to which the worker, who has current work capacity, is entitled is to be calculated pursuant to Section 38(7) of the 1987 Act.
20. The algorithm for Section 38(7) takes into account the average weekly earnings of the applicant which were calculated to be \$2030 per week. The calculation was at pages 7 and 8 of the decision. The insurer notes that the maximum weekly payment amount allowable for PIAWE as legislated by Section 34(1) of the 1987 Act is \$1974 per week.
21. The next amount to be taken into consideration is the applicant's earnings. In working out if any ongoing payments are payable to the applicant, the applicant's earnings are taken to be the amount that the

insurer has determined the applicant can earn in suitable employment (in this case being a construction project manager, construction estimator or program administrator) being \$2072.35 per week.

22. The insurer has used the correct amounts in the algorithm in Section 38(7) of the 1987 Act to determine that the applicant's ongoing entitlements are nil. The calculation is explained correctly at page 9 of the decision. The insurer has complied with the legislation and the Guidelines.

23. The decision of the insurer dated 31 March 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation.

## **Finding**

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

## **The Stay**

25. 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.

26. The work capacity decision was dated 31 March 2015. The applicant applied for internal review on 14 April 2015. The application was made within the 30 day requirement for the stay to operate immediately.

## **RECOMMENDATION**

27. The application for procedural review is dismissed.

28. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 12 July 2015.



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

29. The payments are to be back-dated from 12 July 2015 in accordance with clause 30 Schedule 8 to the Workers Compensation Regulation 2010.

30. Such payments are to continue until the receipt of this recommendation.

Tracey Emanuel  
Delegate of the WorkCover Independent Review Officer  
7 August 2015