



**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 March 2015 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 23 June 2015.**
- c. The payments are to be back-dated to 23 June 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. A work capacity decision dated 16 March 2015 was sent to the applicant advising her that her entitlement to weekly payments would cease from 23 June 2015. The applicant requested an internal review on 5 May 2015. The insurer issued an internal review decision dated 1 June 2015. The internal review decision confirmed the original work capacity decision.
2. The applicant applied for merit review by the Authority on 11 June 2015. They delivered a decision dated 14 July 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 of the *Workers Compensation Act 1987* (the 1987 Act).
3. The applicant then made application to this office dated 16 July 2015. In accordance with Section 76(1)(b) of the *Interpretation Act 1987* a period of four business days is allowed for receipt by the applicant of the findings and recommendations from the Authority. Therefore, I am

satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. On 9 November 2010 the applicant was working as a cleaner. She was mopping under a bed when the mop became caught. As the applicant attempted to free the mop she fell onto her right knee suffering injury. On 11 April 2011 the applicant underwent a partial menisectomy and chondroplasty. The applicant has been in receipt of weekly payments of compensation from the insurer.
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.*”
7. The applicant has requested a procedural review of the insurer’s work capacity decision. The applicant has sought review on compassionate grounds in that her hearing impairment has caused her difficulty in obtaining alternate suitable employment.
8. I am only allowed to review the procedures undertaken by the insurer in making the work capacity decision. I cannot review the discretion used by the insurer in coming to the decision as to what constitutes suitable employment.
9. The applicant’s submissions are not relevant to procedural review.

### **Submissions by the Insurer**

10. The Insurer provided submissions dated 22 July 2015 in response to the application. The insurer submitted that the applicant’s submissions were more relevant to merit review than procedural review.

### **The Decision**

11. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
12. Section 43 of the 1987 Act requires the insurer to make a decision about the applicant's current work capacity, what constitutes suitable employment and the amount an injured worker is able to earn in suitable employment.
13. At page 1 of the work capacity decision the insurer has informed the applicant that it has made a decision that she has the capacity to work 40 hour per week. At page 4 of the decision the insurer explains that it relied upon the most recent certificate of capacity of the nominated treating doctor which certified the applicant to have capacity for full time employment with lifting restrictions and no squatting. The certificate was for the period 20 February 2015 until 24 March 2015. The insurer has complied with the Guidelines and legislation in making this decision.
14. Commencing on page 5 of the decision the insurer has determined that the vocations of customer service representative, accounts clerk and cashier are suitable employment options in accordance with the definition in Section 32A and Section 43(b) of the 1987 Act. The insurer has relied upon vocational assessment report dated 28 March 2013 and 5 August 2014. The nominated treating doctor approved of these options. The insurer has complied with the Guidelines and legislation in making this decision.
15. In determining the amount the applicant can earn in suitable employment in accordance with Section 43(1)(c) of the 1987 Act the insurer has relied upon a labour market analysis report. In assessing how much the applicant could earn as an accounts clerk the author of the report obtained the hourly rate paid by three separate employers, then added that hourly rate together and divided by three to ascertain the average hourly rate. The average hourly rate was then multiplied by 40 hours per week to establish the applicant's capacity to earn. The same procedure was followed for the vocations of cashier and receptionist.

16. In accepting the procedure undertaken in the preceding paragraph the insurer has failed to comply with the Guidelines and legislation. The insurer has determined the applicant's ability to earn based upon a fictitious amount which does not exist in actual employment. The applicant is unable to go out and obtain employment where the hourly rate payable is an average of the hourly rate paid by three different employers. The insurer should select one hourly rate from one employer and calculate the capacity to earn using that rate.
17. 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 March 2015.

## **Finding**

18. 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**

19. The work capacity decision of the Insurer dated 16 March 2015 is set aside.
20. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 23 June 2015.
21. The payments are to be back-dated to 23 June 2015.
22. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.



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12 August 2015