



**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 by the Insurer dated 12 July 2013 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 18 October 2013.**
- c. The payments are to be back-dated to 18 October 2013.**
- d. Such payments are to continue until such time as a further work capacity decision comes into effect.**

**Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 12 July 2013. The decision informed the applicant that her weekly payments of compensation would cease on 18 October 2013. The applicant sought internal review on 18 May 2015 and the Internal Review Decision was dated 10 June 2015. That decision concluded that the applicant has no entitlement to compensation payments under Section 38(7) of the *Workers Compensation Act 1987* ("the 1987 Act"). There has been an extraordinary delay between the work capacity decision and the applicant's request for internal review.
2. The applicant applied to the Authority for Merit Review on 29 June 2015 and they delivered findings and recommendations dated 28 July 2015. The Authority made a finding that the applicant did not meet the special requirements under Section 38(3) of the 1987 Act to be entitled to ongoing weekly payments of compensation.



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

3. The applicant then made application to this office dated 10 August 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 20 October 2010 the applicant suffered injury to her cervical spine in the course of her employment as a personal development, health and physical education teacher. On 23 October 2012 the applicant underwent a C6/7 spinal fusion. The applicant was unable to return to her pre-injury employment. At the time of the work capacity decision the applicant was 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.*” The applicant has applied for a procedural review.
7. The applicant has made the following submissions:
  - The insurer failed to state when the assessment of her work capacity commenced and ended;
  - The insurer failed to correctly reference the legislation and Guidelines; and
  - The insurer incorrectly states “*Should you require further copies of documents previously provided to you please do not hesitate to contact [named insurer] on the number below and request.*”
8. I am only able to review the insurer’s procedure with respect to making the work capacity decision. I am not in a position to review the internal review decision by the insurer. Likewise, I am unable to review any findings or recommendations made by the Merit Review Service.



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### **Submissions by the Insurer**

9. The Insurer has not made any submissions in response to this application.

### **The Decision**

10. The relevant Guidelines came into effect on 27 September 2012. The work capacity decision which is the subject of this review is dated 12 July 2013. It is noted that the errors which were present in work capacity decisions drafted at this time have since largely been eradicated by Insurers.
11. Guideline 5.4.2 required the insurer to reference the relevant legislation and advise the applicant of the impact the decision has on her entitlement to medical and related treatment expenses. The Insurer has failed to reference Section 59A(2) and (3) of the 1987 Act. The insurer has failed to comply with the Guideline.
12. The insurer then informed the applicant *“any entitlement you may have to payment of pre-approved reasonable and necessary medical and other expenses, until 18/10/14, will not be affected.”*
13. The insurer has failed to inform the applicant that the effect of Section 59A(2) at that time was that her entitlement to medical and related treatment expenses would actually cease on 18 October 2014. Informing the applicant that her entitlement to medical expenses would not be “affected” until that date is not advising the applicant of the consequences of the work capacity decision and as such does not comply with the Guidelines.
14. It is noted that by the time the internal review had occurred (23 months after the work capacity decision) the applicant had been assessed as having 25% WPI and therefore her entitlement to medical and related treatment expenses would continue up until her retirement age in accordance with Schedule 8 Part 2 Clause 28 of the *Workers Compensation Regulation 2010*.



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15. However this change in circumstance is not sufficient to overcome the initial deficiency in the work capacity decision.
16. The Guidelines also require the insurer to advise the applicant of a work capacity assessment. The insurer has failed to inform the applicant of the date of the work capacity assessment and the date the work capacity decision was made. As a result the insurer has failed to comply with the Guidelines.
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 12 July 2013.

### **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 by the Insurer dated 12 July 2013 is set aside.
20. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 18 October 2013.
21. The payments are to be back-dated to 18 October 2013.
22. Such payments are to continue until such time as a further work capacity decision comes into effect.



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[www.wiro.nsw.gov.au](http://www.wiro.nsw.gov.au)

Tracey Emanuel  
Delegate of the Workers Compensation  
Independent Review Officer  
9 September 2015