



**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 23 April 2015 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 29 July 2015.**
- c. The payments are to be back-dated to 29 July 2015.**
- 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 23 April 2015. The decision informed the applicant that his weekly payments of compensation would cease on 29 July 2015. The applicant sought internal review on 26 May 2015 and the Internal Review Decision was dated 25 June 2015. That decision maintained the original work capacity decision.
2. The applicant applied to the Authority for Merit Review on 3 July 2015 and they delivered findings and recommendations dated 30 July 2015. The Authority made a finding that in accordance with Section 37(3) of the *Workers Compensation Act 1987* ("the 1987 Act") the applicant's entitlement to weekly payments of compensation is nil.
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 12 February 2014 the applicant sustained injury to his lumbar spine when he lifted a heavy wheel in the course of his employment as a



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mechanic. The applicant was retrenched from his employment in June 2014. The applicant has attempted to return to work in alternate employment. As 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 has misstated the operation of the law with regards to Section 44(6) where they say “*each party is to bear their own legal costs in relation to the decision.*” In fact, no lawyer is able to charge legal costs for the work associated with review of the decision.
- They have not indexed the pre-injury average weekly earnings in accordance with Section 82D. The PIAWE should now be \$633; and
- The applicant requests a procedural review of the decision as there may be errors of which he is not aware.

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. This includes reviewing the insurer’s discretion in making decisions in respect of suitable employment and PIAWE.

### **Submissions by the Insurer**



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

### **The Decision**

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

11. The insurer has made a decision pursuant to Section 43(1)(a) of the 1987 Act that the applicant has a current work capacity of 40 hours per week. The insurer relied upon the certificate of capacity from the nominated treating doctor issued as at 13 February 2015.

12. The insurer has made a decision in accordance with Section 43(1)(b) and Section 32A as to what constitutes suitable employment for the applicant. The insurer has determined the vocations of trainer/teacher, salesperson/representative and light vehicle mechanic are all suitable employment options. The insurer relied upon the a facsimile from the nominated treating doctor dated 2 May 2014 which approved of the nominated vocations as well as a vocational assessment report dated 15 May 2014.

13. In relying upon the vocational assessment report the insurer noted the applicant would be able to earn the following in the nominated suitable employment options:

- Trainer/teacher \$1291.00 per week
- Salesperson/Rep \$950.00 per week
- Light Vehicle Motor Mechanic \$993.00 per week

14. Up until this stage the insurer had complied with the Regulations and the Guidelines.

15. Finally the insurer made a decision pursuant to Section 43(1)(c) of the 1987 Act finding that the applicant has the capacity to earn \$1078 per week. To arrive at this amount the insurer has taken the earnings of each suitable employment vocation added them together and divided to obtain the average. This is a procedural error and the insurer has failed to comply with the Guidelines and legislation.



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16. The insurer is to make a decision about the amount an injured worker **is able to earn** in suitable employment. To do this the insured is required to select one of the suitable employment vocations and its corresponding weekly earnings.
17. By adding the weekly amounts of each vocation together and deciding the applicant can earn the average the insurer has created an earning capacity that the applicant is not able to achieve as it does not exist. Therefore, the applicant is not able to earn that amount in suitable employment.
18. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 23 April 2015.

### **Finding**

19. 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**

20. The work capacity decision by the Insurer dated 23 April 2015 is set aside.
21. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 29 July 2015.
22. The payments are to be back-dated to 29 July 2015.



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23. Such payments are to continue until such time as a further work capacity decision comes into effect.

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