



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

**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 31 March 2015 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 8 July 2015.**
- c. The payments are to be back-dated to 8 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 31 March 2015. The decision informed the applicant that his weekly payments of compensation would cease on 8 July 2015. The applicant sought internal review on 22 April 2015 and the Internal Review Decision was dated 22 May 2015. That decision confirmed the work capacity decision.
2. The applicant applied to the Authority for Merit Review on 19 June 2015 and they delivered findings and recommendations dated 17 July 2015. The Authority made a finding that the applicant did not satisfy the special requirements under Section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act) to be entitled to ongoing weekly payments of compensation.
3. The applicant then made application to this office dated 17 August 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.



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4. On 7 June 2011 the applicant suffered injury to his right arm whilst in the course of his employment as a warehouse manager. The applicant eventually ceased working and underwent surgery in or about February 2012. The applicant returned to suitable duties with the pre-injury employer until October 2012 at which time he was made redundant as the company closed down. At the time of the work capacity decision the applicant was working up to 22 hours per week in alternate employment and in receipt of weekly payments of compensation.
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. In addition to the request for a procedural review the applicant has made the following specific submissions:
  - His work capacity is inconsistent and he has not fully recovered from his injury;
  - He is incapable of undertaking any further duties; and
  - He has applied for specific employment opportunities and he has been unsuccessful.
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. The applicant’s submissions above are not relevant to this procedural review.

#### **Submissions by the Insurer**



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9. The Insurer has made submissions dated 24 August 2015 in response to this application. The insurer submitted:

- The work capacity decision, internal review and merit review were satisfied that the applicant had the capacity to work 40 hours per week;
- The work capacity decision takes into consideration various vocational options which are considered to be suitable employment in accordance with Section 42(1) of the 1987 Act.

### **The Decision**

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

11. Guideline 5.3.2 requires the insurer to advise the date of the work capacity assessment. The insurer advised the applicant that the work capacity assessment was completed on 28 October 2014. The applicant was advised of the insurer's work capacity decision on 31 March 2015.

12. Section 43 of the 1987 Act refers to work capacity decisions by insurers and notes in part:

*(1) The following decisions of an insurer (referred to in this Division as work capacity decisions) are final and binding on the parties and not subject to appeal or review except review under section 44 or judicial review by the Supreme Court:*

*(a) a decision about a worker's current work capacity.*

13. The insurer has completed a work capacity assessment and then taken five months to advise the applicant of its work capacity decision. As the work capacity decision is in respect of "**current work capacity**" the insurer's delay between completing the assessment and advising the applicant of the decision has made the decision invalid.

14. Pursuant to Guideline 5.3.2 the insurer must outline the evidence considered in making the decision, noting the author, the date and any



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key information. The insurer has listed the documents it has considered at pages 7 and 8 of the work capacity decision.

15. The most recent medical certificates / certificates of capacity considered by the insurer according to that list were from the nominated treating doctor dated **November 2013**. We do note that throughout the body of the decision on page 7 at paragraph 2 there is reference to a certificate of capacity dated **5 September 2014**.
16. The work capacity decision which is purporting to be a decision on the applicant's "**current work capacity**" is dated 31 March 2015 and relying upon medical certificates assessing work capacity which are between 6 and 18 months out of date.
17. Furthermore, the most recent medical reports from the orthopaedic surgeon which were relied upon were dated July and September 2012. The only reports referred to by the insurer which were obtained in 2014 were vocational assessment reports and a labour analysis report. There is no evidence dated 2015 which is the year in which the work capacity decision was made.
18. The purpose of a work capacity decision according to Section 43 of the 1987 Act is to assess a worker's "**current work capacity**". In this instance the insurer has completed a work capacity assessment on 28 October 2014 and has not made a decision until 31 March 2015. By that time the evidence being relied upon in making the decision is no longer current.
19. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 31 March 2015.

### **Finding**

20. 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



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Guidelines which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

### **RECOMMENDATION**

21. The work capacity decision by the Insurer dated 31 March 2015 is set aside.
22. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 8 July 2015.
23. The payments are to be back-dated to 8 July 2015.
24. 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  
18 September 2015