



**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 27 April 2015 is set aside.**
- b. **Such weekly payments as the applicant is receiving by virtue of the stay arising out of clause 30 of Schedule 8 to the *Workers Compensation Regulation 2010* are to continue until a new decision is made in accordance with the requirements of section 43(1) of the *Workers Compensation Act 1987* and any period of notice given therein has expired.**

**Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 27 April 2015. The decision informed the applicant that his weekly payments of compensation would cease from 04 August 2015. The applicant sought internal review and the internal review decision dated 18 June 2015 confirmed the original work capacity decision.
2. The applicant applied to the Authority for Merit Review on 22 July 2015 and they delivered findings and recommendations dated 21 August 2015. The Authority made a finding which was consistent with the work capacity decision.
3. The applicant subsequently made application to this office. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 11 August 1999 the applicant suffered a spinal injury in the course of his employment as a welder. At the time of the work capacity decision the applicant had received well in excess of 800 weekly payments. He was an existing recipient of such payments immediately prior to 1 October 2012.



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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 *Workers Compensation Act 1987* (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. No submissions are specifically made, beyond the observation that he has aggravated his injuries twice and has not heard from the Insurer since the internal review decision was made.

### **Submissions by the Insurer**

7. The Insurer made no submissions in response to the application.

### **The Decision**

8. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
9. Guideline 5.3.2 requires the insurer to advise the applicant of the date of the work capacity assessment and the effect of the work capacity decision on his current entitlements. Both requirements were more than adequately dealt with and overall the Insurer has complied largely with the Guidelines and the Act.
10. In what might have been welcomed in other circumstances as a refreshing break from the relentlessly rebarbative statisticism commonly underlying the calculation of an injured worker’s ability to earn in suitable employment, this Insurer eschewed any such considerations by doing no more than stating that in their opinion he could find employment delivering leaflets and newspapers, without taking the added step of quoting an hourly or daily rate of remuneration for such labour. This appears to fail the test of identifying “suitable employment,” since it does not even state that the work would attract payment at all, let alone the



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rate of payment. As Roche, DP stated in *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWCCPD 55 (*Dewar*):

“The word ‘employment’ is not defined in the legislation. Its common meaning is ‘the state of being employed’. However, ‘worker’ is defined. It means, subject to specified exclusions, ‘a person who has entered into or works under a contract of service or a training contract with an employer’ (s 4 of the 1998 Act). In context, the phrase ‘employment in work’, in the definition of suitable employment, ‘in relation to a worker’, must refer to real work in the labour market. That is, it must refer to a real job in employment for which the worker is suited.” [at 59]

11. In the absence of an hourly or daily rate of remuneration, the “suitable employment” identified by the Insurer might be of no more use in assessing an injured worker’s “work capacity” than any volunteer or community activity he or she might be able to perform. Such activity would not be a “real job” as stipulated by Roche, DP in *Dewar*.
12. While the decision of the insurer dated 27 April 2015 has otherwise displayed an exhaustive consideration of the requirements of the Guidelines and legislation, the error described in the two preceding paragraphs is irretrievable.

### **Finding**

13. There is a fundamental procedural error in the failure of the Insurer to identify the rate of remuneration available for the performance of work thought to constitute “suitable employment.” The insurer has therefore not complied with the Guidelines and relevant legislation.

### **The Stay**

14. 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.

### **RECOMMENDATION**



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15. The work capacity decision by the Insurer dated 27 April 2015 is set aside.
  
16. Such weekly payments as the applicant is receiving by virtue of the stay arising out of clause 30 of Schedule 8 to the *Workers Compensation Regulation 2010* are to continue until a new decision is made in accordance with the requirements of section 43(1) of the *Workers Compensation Act 1987* and any period of notice given therein has expired.

Wayne Cooper  
Delegate of the Workers Compensation  
Independent Review Officer  
20 October 2015