

**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 application for procedural review is dismissed.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 12 August 2015. The decision informed the applicant that his weekly payments would cease on 24 November 2015. The applicant sought internal review and that decision confirmed the original decision.
2. The applicant applied to the Authority for Merit Review and they delivered findings and recommendations dated 15 October 2015. The Authority made a finding that the worker is entitled to ongoing weekly payments of compensation to be calculated by the insurer in accordance with Section 37(3) of the *Workers Compensation Act 1987* (the 1987 Act), applying a figure of \$493.07 for PIAWE and a figure of \$799.90 per week as the applicant's ability to earn in suitable employment as a cleaner.
3. The applicant then made application to this office on 6 November 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. The decision dated 12 August 2015 was made following a procedural review by this office of an earlier decision which had been found to be invalidly made.¹ The factual background to the claim is set out therein and need not be repeated here.

¹ Reported as **10115** (i.e. recommendation 101 of 2015)

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’s submissions refer to:

- Reliance by the Insurer on “conflicting medical evidence;”
- No updated assessment (some medical reports exceed 18 months in age);
- No work trial approved by rehabilitation provider.

Submissions by the Insurer

8. The Insurer has provided submissions in reply as follows:

In response to [the applicant’s] submissions:

1. Conflicting medical evidence is used by Insurer’s decision. This is no updated assessment and contradicting insurers legislation

[The Insurer] took into consideration all current medical information on file when making the work capacity decision and the internal review decision.

The evidence relied upon with making the original decision and internal review decision is the same and such the same outcome was achieved.

2. [The applicant] reported he was informed that [the Insurer] *don’t use medical reports existing 18 months*

[The Insurer] relies upon current medical evidence, being reports dated in the last 18 months².

3. [The applicant] has not had a work trial applied by the rehabilitation provider and that [the Insurer] has not contacted nominated treating doctor, Dr M

² An ambitious definition of “current,” to say the least.

A work trial is not considered necessary for a work capacity decision to be made. It was found that the role of Cleaner was considered suitable employment for [the applicant] taking into consideration *section 32A of the Workers Compensation Act 1987*.

The Decision

9. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
10. Guideline 5.3.2 requires the insurer to state the decision and give reasons for making the decision.
11. The insurer has made a work capacity decision that the applicant can work 40 hours per week in suitable employment. This decision was based upon a *“WorkCover Medical Certificate”* from the nominated treating doctor, dated 21 July 2015, which certified the applicant for *“partial capacity for work 40 hours.”* The insurer has thus complied with the Guidelines and has demonstrably relied on medical evidence provided by the applicant’s own nominated treating doctor.
12. While the Insurer has listed and purported to rely upon some medical evidence which is, on any view of it, out of date for present purposes, the reliance on a very recent certificate of capacity produced in the applicant’s own interests ameliorates the situation, particularly in circumstances where the certificate is consistent with earlier certificates from the same doctor.
13. The insurer made a decision that suitable employment for the applicant, in accordance with Section 32A of the 1987 Act, and the amount he could earn working a 40 hour week was as follows:
 - Cleaner - \$855.00 per week
14. The earlier decision by the Insurer which had been subject to procedural review by this Office was found to be invalid because the Insurer had



engaged in a practice of averaging possible incomes from potential occupations and arriving at a fictitious earning capacity. This procedural error has not been repeated in the present iteration of the decision. To that extent no error persists.

15. The Insurer advised the applicant of the date of the assessment (31 July 2015), the proper notice period was given under section 54(2)(a), the weekly payment periods of entitlement were relevantly explained, and the effect of the decision on eligibility for pre-approved medical and related treatment expenses was carefully explained.
16. The compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to say that the decision dated 12 August 2015 was validly made.

FINDING

17. 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 no 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 procedurally correct.

RECOMMENDATION

18. The application for procedural review is dismissed.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
09 December 2015