

**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 of the Insurer dated 28 July 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 4 November 2014.**
- c. The payments are to be back-dated to 4 November 2014.**
- d. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 28 July 2014. The decision advised the applicant that his weekly payments of compensation would cease on 4 November 2014. The applicant sought internal review. According to an email received by this office from the Insurer, dated 3 November 2014, the internal review was not completed within the allocated timeframe and an application for Merit Review was received prior to a response being issued by the Insurer.
2. The applicant sought Merit Review on or about 19 September 2014 and the Authority issued the Merit Review recommendation on 14 October 2014. The applicant made application to this office on 31 October 2014.
3. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 28 September 2011 the applicant suffered fracture injuries to both his hands and left knee when he fell from a 1.5 metre ladder in the course of his employment as an electrician. The applicant underwent surgery on 2 October 2011. Liability for the injury was accepted. The applicant is currently unemployed.

5. The applicant was in receipt of weekly payments immediately before 1 October 2012 and according to *Clause 8 of Part 19H of Schedule 6 of the Workers Compensation Act 1987* (the 1987 Act) the Insurer is required to conduct a work capacity assessment.
6. *Section 44A* of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines (Guidelines)*. The relevant version of the *Guidelines* came into effect on 11 October 2013.

Submissions by the applicant

7. *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 made a submission that the Insurer has failed to reference the legislation.

Submissions by the Insurer

8. The Insurer has not provided submissions in response to the application.

The Decision

9. *Guideline 5.3.2* requires the insurer to reference the relevant legislation and explain the relevant entitlement periods in the work capacity decision. The insurer advised the applicant that his payments of weekly compensation would cease on 4 November 2014. In doing so, the insurer has failed to reference *Section 54(2)(a)* of the 1987 Act. The insurer has failed to explain the notice period is three months and four working days (taking into account *Section 76(1)(b)* of the Interpretation Act). Whilst the insurer has provided the correct notice period it has failed to explain the basis upon which that period was calculated as well as reference the relevant legislation. The insurer has failed to comply with this Guideline.
10. The applicant was informed that he had received in excess of 130 weeks’ of weekly payments. The precise calculation was not specified. The applicant was advised that his eligibility for ongoing weekly payments of compensation was subject to *Section 38(3)* of the 1987 Act.

The insurer failed to explain to the applicant any of his obligations under *Section 38(3)*.

11. The applicant was advised that *Section 38(3)(a)* had been satisfied. The insurer failed to clarify the obligations of that sub-section and how the applicant had satisfied them.
12. The insurer advised the applicant that he did not satisfy *Section 38(3)(b)* as he had not returned to work and was not in receipt of weekly earnings. Whilst this statement is correct in the circumstances of this applicant the insurer has failed to advise the applicant that the requirements of *Section 38(3)(b)* are that he is required to return to work for a period of not less than 15 hours per week and be in receipt of at least \$173 per week.
13. There is no reference to *Section 38(3)(c)* in the decision.
14. The applicant is informed that as he does not satisfy *all* of the requirements under *Section 38(3)* his payments of weekly compensation will cease. The insurer has failed to comply with the Guidelines in that it has not fully referenced or explained the relevant legislation being *Section 38* of the 1987 Act.
15. The insurer informed the applicant that a work capacity decision had been made and it was decided he was able to undertake suitable employment as a product assembler (\$840 per week), cashier (\$800 per week) and customer services operator (\$800 per week). The insurer assessed the applicant's capacity to earn as the average of the above employment options being \$813.33 per week.
16. The applicant is advised on page 2 of the decision that his "*current weekly rate*" is \$768.40 gross per week. This statement would be perplexing to the applicant as he is presently not employed and not earning any weekly wages. The insurer has failed to advise that this amount is actually 80% of the transitional rate referred to in *Schedule 6 Part 19H Division 1 Section 2(1)* of the 1987 Act. The transitional rate is used as the deemed amount of the pre injury average weekly earnings of an injured worker for the purpose of determining the weekly payments of compensation payable to existing recipients as they become subject to the weekly payments amendments.
17. The insurer has failed to properly explain the relevant legislation in respect of the notice period, *Section 38* of the 1987 Act and the use of the transitional rate when calculating pre injury average weekly



earnings. Each of these breaches in itself is sufficient to make the work capacity decision invalid.

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 *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 of the Insurer dated 28 July 2014 is set aside.
20. The applicant is to be reinstated to his weekly payments at the rate applicable at 4 November 2014.
21. The payments are to be back-dated to 4 November 2014.
22. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
16 December 2014