

**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 29 September 2014 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 5 January 2015.**
- c. The payments are to be back-dated to 5 January 2015.**
- 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 29 September 2014. The decision informed the applicant that her weekly payments of compensation would cease. The applicant sought internal review and the Internal Review Decision was dated 18 November 2014. She then sought Merit Review on or about 3 December 2014 and the Authority issued the Merit Review recommendation on 24 December 2014 upholding the decision. The applicant made application to this office on 20 January 2015.
2. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
3. The applicant had previously sought procedural review of a work capacity decision dated 31 May 2013. The applicant was successful and the work capacity decision was set aside by an earlier recommendation of this office¹.
4. The applicant suffered injury to her right knee on 19 October 2007 and underwent an arthroscopy on 26 March 2008. The applicant has

¹ Reported and numbered as 1614

returned to work albeit not at her pre-injury level. At the time of the work capacity decision she was working 21 hours per week.

Submissions by the applicant

5. 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 made no specific submissions other than requesting a procedural review.

Submissions by the Insurer

6. The Insurer has provided submissions in response to the application which were received by this office on 27 January 2015. Those submissions included a note that the findings of the merit review by the Authority agreed that the applicant’s entitlement to weekly compensation was “nil” as well as a useful chronology setting out the dates of the fair notice letter, work capacity decision, internal review letters, merit review recommendations and post merit review correspondence.

The Decision

7. The work capacity decision which is the subject of this review is dated 29 September 2014. The relevant *WorkCover Work Capacity Guidelines* are dated 4 October 2013 and came into effect on 11 October 2013.
8. At page 2 of the decision the Insurer has informed the applicant that her pre-injury average weekly earnings are “*deemed to be the transitional amount which is currently set at \$778.32 per week in accordance with transitional rate application pursuant to Schedule 6 Part 19H, Division 1, Clauses 2 and 9(3) of the Workers Compensation Act 1987*” (the 1987 Act).
9. This statement is incorrect. The transitional rate at that time was \$972.90. Whilst it is correct that 80% of the transitional rate was \$778.32, it has not been explained to the applicant why that figure was being used.

10. At page 3 of the decision the Insurer advised the applicant that she met all the requirements of Section 38(3) and went on to add:

“you are currently entitled to compensation in the after (sic) second entitlement period and as your (sic) have a current work capacity. Your entitlements are assessed under Section 38(7) of the Workers Compensation Act 1987 as follows:

*\$972.90 x 80% \$778.32 – (E) \$831.39
=\$0.00 which means you are no longer entitled to weekly payments.”*

11. The two statements **highlighted** in the above paragraph are contradictory and would be confusing to the applicant. The applicant is initially advised that she is entitled to compensation after the second entitlement period and she is then informed that she is no longer entitled to weekly payments.
12. Furthermore, the use of the word “are” in the final sentence rather than the phrase “will be” creates an impression that the applicant’s weekly payments of compensation will immediately cease rather than cease after the notice period pursuant to Section 54(2)(a) of the 1987 Act.
13. The Insurer has failed to comply with Guideline 5.3.2 in that they have failed to properly reference the legislation and failed to clearly explain the reasoning for the decision.

FINDING

14. 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

15. The work capacity decision of the Insurer dated 29 September 2014 is set aside.
16. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 5 January 2015.



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17. The payments are to be back-dated to 5 January 2015.

18. 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
24 February 2015.