



**RECOMMENDATION FOLLOWING AN APPLICATION FOR REVIEW OF THE INSURER'S WORK CAPACITY DECISION PURSUANT TO SECTION 44BB(1)(c) OF THE *WORKERS COMPENSATION ACT 1987*.**

**SUMMARY:**

- a. The Work Capacity Decision by the Insurer dated 27 October 2015 is set aside.**
- b. Such weekly payments as the applicant is receiving by virtue of the stay pursuant to Section 44BC of the *Workers Compensation Act 1987* are to continue until a new decision is made in accordance with Section 43(1) of the *Workers Compensation Act 1987*.**
- c. Pursuant to Section 44BB(1)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.**

**Introduction and background**

1. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 27 October 2015. The Decision informed the applicant that his weekly payments of compensation would be reduced from \$794.96 per week to \$127.96 per week effective from 9 February 2016. The applicant sought internal review by the Insurer on 26 November 2015 and the Internal Review Decision was dated 10 December 2015 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application dated 15 December 2015. The Authority delivered its Findings and Recommendations dated 28 January 2016. The Authority made a finding that the applicant was able to earn \$667 per week in suitable employment and made a recommendation that the Insurer is to determine the applicant's entitlement to weekly compensation in accordance with Section 38 of the *Workers Compensation Act 1987* (1987 Act).



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

3. The applicant then made an application to this office for procedural review by way of application dated 26 February 2016. I am satisfied that the application has been made within time and in the proper form.
4. On 21 August 1998 the applicant suffered injury to his right arm in the course of his employment as a slaughterman. The applicant commenced working as a self-employed taxi driver in or about 17 November 2006. At the time of the Work Capacity Decision the applicant remained in that employ and was 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 making the application for review the applicant, through his solicitor, has made the following submissions:
  - The Insurer has failed to observe the proper procedures in making the Work Capacity Decision on 27 October 2015 and the Internal Review Decision of 10 December 2015;
  - The Insurer has failed to determine whether the applicant is a worker with *“high needs”* as required under Section 38(3) & (3A) of the 1987 Act;
  - The Insurer has considered that the applicant has a permanent impairment of 10% or less, however they have failed to conduct any assessment of the applicant in accordance with division 4 of the 1987 Act and as such have no sufficient basis to have determined the permanent impairment;
  - The Insurer’s determination that the applicant can work in full time employment is incorrect and contrary to the evidence supplied in particular by the applicant and his wife; and



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- The Insurer has relied upon flawed wage material in calculating the applicant's actual ability to earn and not take sufficient steps to rectify it.

### **Submissions by the Insurer**

8. The Insurer has made the following submissions dated 3 March 2016 in response to this application:
  - Determining whether a worker is "*high needs*" is not a work capacity decision; and
  - The Insurer assesses the applicant to have a whole person impairment less than 10% as stated in the Internal Review Decision.

### **Decision**

9. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
10. Guideline 5.3.2 requires the Insurer to state the impact that the decision has on the worker in terms of their entitlement to weekly payments, entitlement to medical and related treatment expenses and return to work obligations.
11. At paragraph 5 on page 1 of the Work Capacity Decision the Insurer clearly states that the applicant's weekly payments of compensation will be reduced from a payment of \$794.96 to \$127.96 from 9 February 2016. The Insurer has advised the applicant of the impact the decision has had on his weekly payments of compensation.
12. At page 2 of the Work Capacity Decision the Insurer has informed the applicant that compensation is not payable to an injured worker in respect of any treatment or assistance provided after the expiry of the compensation period. The Insurer then continues that as the applicant's degree of permanent impairment is 10% or less or the degree of permanent impairment has not been assessed the compensation period is two years.



13. As the applicant has been in receipt of weekly payments of compensation the compensation period commences, pursuant to Section 59A(2)(a) of the 1987 Act, on the day on which weekly payments of compensation cease to be payable. The Insurer explains that this means that the applicant's entitlement to any treatment, service or assistance provided after 8 February 2018 will not be payable. The only exception being if the applicant again becomes entitled to weekly compensation after payments cease by virtue of Section 59A(3) of the 1987 Act.
14. Then by way of clarification the Insurer sets out at point 6 on page 2 of the Work Capacity Decision:  
  

*“The effect of Section 59A(1), Section 59A(2) and Section 59A(3) are that compensation will not be payable for any medical treatment, service or assistance given or provided to you after 8 February 2018.”*
15. The aforementioned paragraphs would be correct in circumstances where the Insurer has made a Work Capacity Decision which results in the termination of the applicant's weekly payments of compensation. This is not the case in this matter.
16. In this instance the applicant remains entitled to ongoing payments of weekly compensation albeit at a reduced rate. Therefore in this particular case the applicant's entitlement to ongoing medical and related treatment expenses is not affected by Section 59A of the 1987 Act.
17. The Insurer has made a procedural error by providing the incorrect explanation of the effect of Section 59A in the circumstances of this Work Capacity Decision.
18. In this instance the non-compliance of the Insurer with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 27 October 2015.

## **Finding**



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19. 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 legislation and the Guidelines which are to be treated as delegated legislation. Accordingly the Work Capacity Decision must be found to be invalid.

### **RECOMMENDATION**

20. The Work Capacity Decision by the Insurer dated 27 October 2015 is set aside.

21. Such weekly payments as the applicant is receiving by virtue of the stay pursuant to Section 44BC of the *Workers Compensation Act 1987* are to continue until a new decision is made in accordance with Section 43(1) of the *Workers Compensation Act 1987*.

22. Pursuant to Section 44BB(1)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.

A handwritten signature in black ink that reads "Tracey Emanuel".

Tracey Emanuel  
Delegate of the Workers Compensation  
Independent Review Officer  
11 April 2016