



**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.**
- b. **Because this was an “existing claim” as at 1 October 2012, weekly payments to the applicant should be made from 22 December 2014 until the date of receipt of this recommendation by the applicant in accordance with clause 30 of Schedule 8 to the *Workers Compensation Regulation 2010*. They should cease thereafter.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 14 September 2014. The decision informed the applicant that his weekly payments of compensation would cease on 21 December 2014 and the decision would “take effect” on 22 December 2014. The applicant sought internal review and the Internal Review Decision was dated 11 November 2014, confirming the original work capacity decision.
2. The applicant then sought Merit Review from the Authority on or about 18 December 2014. The Authority made recommendations and findings dated 15 January 2015 that in accordance with Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) the applicant was not entitled to weekly payments of compensation.
3. The applicant made application to this office on 11 February 2015 for a procedural review. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. The applicant suffered injury to his lower back and right knee on 16 June 1999 during the course of his employment as a Machine Operator. Liability was accepted and the applicant was in receipt of weekly

payments of compensation for over 800 weeks by the time of the original work capacity decision. At the time of that decision the applicant was working as a taxi driver for an indeterminate number of hours and earning around \$150-200 per week. The work was described as casual. He was self-employed.

5. The applicant was in receipt of weekly payments immediately before 1 October 2012. Accordingly *Clause 8 of Part 19H of Schedule 6* to the *Workers Compensation Act 1987* (the 1987 Act) required the Insurer 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).

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 submissions seeking to impugn the recommendation of the Merit Review Service of the Authority and entering into a dispute about the relevance of medical evidence which post-dates any decision by the Insurer. Accordingly the submissions of the applicant are irrelevant to procedural review and do not assist his case.

Submissions by the Insurer

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

The Decision

9. The work capacity decision which is the subject of this review is dated 14 September 2014. The relevant *WorkCover Work Capacity Guidelines* are dated 4 October 2013 and came into effect on 11 October 2013.
10. *Guideline 5.3.2* requires the Insurer to reference the relevant legislation and explain the relevant entitlement periods.

11. The Insurer has informed the applicant that he has received 804.2 weeks of weekly compensation payments. He is also informed that since he has received in excess of 130 weeks of payments he is in a period with special requirements for further payments.
12. The Insurer then disclosed and explained those “*special*” conditions and requirements according to the legislation. The explanation given was comprehensive, clear and correct.
13. Guideline 5.3.2 also requires the Insurer to state the impact of the decision on the worker in terms of his entitlement to medical and related treatment expenses. The Insurer has referred to Section 59A(2) and (3) of the 1987 Act and has made a good attempt at explaining those provisions.
14. The Insurer has methodically set out the steps taken under section 43(1), which appears to have been accurately applied.
15. Considerable medical evidence is canvassed and explained. That evidence and other documents relied upon are set out in a clear table, and copies of all documents referred to were sent to the applicant.
16. The notice period required under section 54(2)(a) is properly observed and referenced.
17. The applicant was correctly told that if he sought internal review he ought to do so “as soon as practicable after receipt of the work capacity decision,” which is the correct advice.

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 are no faults in the procedures of the Insurer identifiable on the evidence before me. Accordingly I find that the work capacity decision of the Insurer dated 14 September 2014 was validly made.



WorkCover independent review office

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

RECOMMENDATION

19. The application for procedural review is dismissed.
20. Because this was an “existing claim” as at 1 October 2012, weekly payments to the applicant should be made from 22 December 2014 until the date of receipt of this recommendation by the applicant in accordance with clause 30 of Schedule 8 to the *Workers Compensation Regulation* 2010. They should cease thereafter.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
12 March 2015.