

**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 21 November 2013 is set aside.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable prior to 5 March 2014.**
- c. **The payments are to be back-dated to 5 March 2014.**
- d. **Such payments are to continue until such time as the Merit Review Recommendations came into effect.**

**Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 21 November 2013. The decision informed the applicant that his weekly payments of compensation would cease on 5 March 2014. The applicant sought internal review and the Internal Review Decision was dated 6 January 2014. The Internal Review Decision confirmed the work capacity decision.
2. The applicant applied to the Authority for merit review on 2 February 2015, over 12 months after the Internal Review Decision. The Authority interpreted Section 44(3)(b) of the *Workers Compensation Act 1987* (the 1987 Act) to mean that if the insurer does not both (a) conduct the review **and** (b) notify the applicant (including actual receipt) of the Internal Review Decision within 30 days of the application being made, there is no limitation period placed upon the applicant to apply for merit review. According to the Authority the 30 day restriction contained in Section 44(3)(a) of the 1987 Act does not apply in these circumstances.
3. The Authority's finding and recommendation dated 4 March 2015 was that the applicant had no current work capacity and he was entitled to weekly payments of compensation in the sum of \$778.32 per week.

4. The applicant made application to this office on 6 March 2015 for procedural review. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
5. Section 44(1)(c) of the 1987 Act states that this procedural review is *“only of the insurer’s procedures in making the work capacity decision and not any judgment or discretion exercised by the insurer.”* Likewise, I am unable to review any aspect of the decision or recommendations made by the Authority at Merit Review.
6. On 30 November 2007 the applicant suffered injury to his right foot whilst in the course of his employment as a glass process worker. The applicant returned to work performing modified duties until September 2011 when he was made redundant. The applicant then obtained employment on a casual basis as a general hand in March 2012 and then obtained full time employment as a machine operator in July 2012. As at the time of the work capacity decision, dated 21 November 2013, the applicant was performing those duties. The applicant ceased this employment on or about 9 February 2015, being proximate to the time he made application to the Authority for merit review.

#### **Submissions by the applicant**

7. The applicant has applied for a procedural review. His submissions include reviewing the work capacity decision *“in regard to the merit review.”* As previously stated I am only able to review the work capacity decision in respect of the procedures undertaken by the insurer.

#### **Submissions by the Insurer**

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

#### **The Decision**

9. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
10. In keeping with recommendations previously made on this point the description of Section 54(2)(a) of the 1987 Act at page 3 of the decision is a complete misinterpretation of the notice provision and incorrectly states *“weekly payments at your current rate must cease within 3 months of this decision.”* Whereas the true effect of the section is to say that payments may not cease until three months have elapsed following the provision of notice. The Insurer has styled the section as a maximum payment provision, rather than a minimum notice provision. This constitutes a demonstrable error.
11. This error is sufficient to set aside the work capacity decision dated 21 November 2013.

## **FINDING**

12. 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 has been a breach of the Guidelines which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

## **RECOMMENDATION**

13. The work capacity decision of the Insurer dated 21 November 2013 is set aside.
14. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 5 March 2014.
15. The payments are to be back-dated to 5 March 2014.
16. Such payments are to continue until such time as the Merit Review Recommendations came into effect.



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

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

Tracey Emanuel  
Delegate of the WorkCover Independent Review Officer  
10 April 2015