



**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 2014 is set aside.**
- b. **The applicant is to be reinstated to his weekly payments at the rate applicable prior to 27 February 2015.**
- c. **The payments are to be back-dated to 27 February 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 21 November 2014. The decision informed the applicant that his weekly payments of compensation would cease on 27 February 2015. The applicant applied for internal review on 22 December 2014. An internal review decision was made by the insurer dated 5 January 2015.
2. The applicant applied for merit review by the Authority on 27 January 2015. The Authority issued a Merit Review recommendation dated 25 February 2015.
3. The applicant then made application to this office on 16 March 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. Section 44A of the *Workers Compensation Act 1987* (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**

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 has applied for a procedural review.
6. The applicant’s submissions were reviewed extensively however they were not relevant to procedural review.

### **Submissions by the insurer**

7. The insurer did not make submissions in response to this application.

### **The Decision**

8. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
9. The insurer informed the applicant that the position of “*call centre operator*” was a suitable employment option. This decision was based upon a commissioned earning capacity report. The certificate of capacity from the applicant’s treating practitioner certified that this was a suitable employment option and that the applicant had the capacity to work 6 hours per day, 4 days per week. These ‘decisions’ were made by the insurer in accordance with the provisions of Section 43 of the 1987 Act as noted on the first page of the work capacity decision.
10. The insurer then notes that the providers of the earning capacity report contacted “*multiple employers*” to ascertain details of “*average weekly earnings*” to assess the applicants earning capacity in the role of call centre operator. The insurer informed the applicant “*the average weekly earnings as obtained from these employers equates to \$580.96 per week. Therefore we consider you have the capacity to earn on average \$580.96 per week.*”
11. The insurer does not inform the applicant of how many employers were telephoned to obtain this “*average*” weekly earnings figure, the range of earning figures, nor the hourly rate upon which the weekly figure was calculated and whether or not it included any loadings or penalty rates. It is merely described as “*average*”.

12. According to Section 43 of the 1987 Act a work capacity decision is a decision about *“the amount an injured worker is able to earn in suitable employment.”* The amount referred to by the insurer in this decision is not an amount the applicant is able to earn. It is a mythical figure of several earnings combined. The applicant could earn more or less than the average figure. The amount relied upon by the insurer is not an actual amount which the applicant could earn if he were to obtain employment as a call centre operator with an employer.
13. The insurer has failed to make a work capacity decision in accordance with the legislation and Guideline 5.
14. It is noted that the Internal Review Decision refers to both a courier/delivery driver and call centre operator constituting suitable employment. However, when referring to the amount the applicant is able to earn the insurer relies upon the role of courier/delivery driver where the applicant can earn a starting wage of \$23.00 per hour totalling \$552.00 per week for the 26 hours. This is a decision on the amount the applicant is able to earn which satisfies Section 43 of the 1987 Act nevertheless, it is not sufficient to correct the deficiency in the work capacity decision.
15. This non-compliance with the legislation and Guidelines referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 21 November 2014.

## **FINDING**

16. 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 Guidelines which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

## **RECOMMENDATION**



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

17. The work capacity decision of the Insurer dated 21 November 2014 is set aside.
18. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 27 February 2015.
19. The payments are to be back-dated to 27 February 2015.
20. 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  
27 April 2015