

**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 30 September 2014 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 7 January 2015.**
- c. The payments are to be back-dated to 7 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 30 September 2014. The Insurer informed the applicant that her weekly payments of compensation would cease on 7 January 2015. The applicant applied for internal review on 22 October 2014. An internal review decision was made by the insurer dated 24 November 2014.
2. The applicant applied for merit review by the Authority on 27 January 2015. The Authority issued a Merit Review recommendation dated 3 March 2015 that in accordance with Section 38 of the Workers Compensation Act 1987 (the 1987 Act) the applicant has no entitlement to weekly payments of compensation.
3. The applicant then made application to this office on 19 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 and are limited to her capacity to work. These submissions are not relevant for this procedural review.

Submissions by the insurer

7. The insurer did made submissions dated 26 March 2015 in response to this application. The insurer addressed the applicant’s submissions and included a useful chronology of correspondence between the parties.

The Decision

8. The relevant WorkCover Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
9. The insurer made a decision that the applicant has current capacity to work of 18 hours per week. The insurer informed the applicant of the positions which were considered to be suitable employment as well as the amount she was able to earn in such employment:
 - Cashier - \$447.90 per week
 - Sales Assistant - \$449.82 per week
 - Kitchenhand - \$387.90 per week
10. The applicant is then informed by the insurer that it has determined that the amount she is able to earn in suitable employment is \$428.54 being the “*average*” of the identified suitable employment options above.
11. Pursuant 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 three different earnings from three separate types of employment combined together. The amount relied upon is not an actual amount the applicant could earn if she were able to obtain employment in one of the described suitable employment options.

12. The insurer has failed to make a work capacity decision in accordance with the legislation and Guideline 5.
13. It is noted in the internal review that the insurer has nominated the applicant's ability to earn as \$493.74 which is in keeping with employment as a Cashier. This is a decision which would have satisfied both Section 43 of the 1987 Act and the Guidelines, nevertheless it is not sufficient to correct the deficiency in the work capacity decision.
14. Guideline 5.3.2 provides that the insurer must reference the relevant legislation, outline the evidence considered in making the decision and clearly explain the line of reasoning.
15. At page 3 of the work capacity decision the insurer has cited Section 38(3) of the 1987 Act which is comprised of subsections (a), (b) and (c). The insurer then informed the applicant that she must satisfy the "*three provisions under Section 38(3).*" This is an error.
16. As the applicant is an existing recipient (as described on page 2 of the work capacity decision) defined in Schedule 6 Part 19H Division 1 Clause 1 of the 1987 Act, Section 38(3)(a) does not apply. The applicant was not required to comply with all three provisions as stated in the work capacity decision. The only provisions relevant to this applicant were Section 38(3)(b) and (c).
17. The insurer has failed to properly explain the legislation and has failed to comply with the Guidelines.
18. This non-compliance with the legislation and Guidelines referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 30 September 2014.

FINDING



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 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 of the Insurer dated 30 September 2014 is set aside.
21. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 7 January 2015.
22. The payments are to be back-dated to 7 January 2015.
23. 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
1 May 2015