

**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 12 December 2014 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 18 March 2015.**
- c. The payments are to be back-dated to 18 March 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 12 December 2014. The Insurer informed the applicant that her weekly payments of compensation would cease on 18 March 2015. The applicant applied for internal review and internal review decision was made by the insurer dated 23 January 2015.
2. The applicant applied for merit review by the Authority on 17 February 2015. The Authority issued a Merit Review recommendation dated 12 March 2015 that recommended that in accordance with Section 37(3) of the *Workers Compensation Act 1987* (the 1987 Act) the applicant has an ongoing entitlement to weekly compensation at the rate of \$145.84 per week.
3. The applicant then made application to this office on 18 March 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. The applicant suffered psychological injury as a result of increased workload and conflict with colleagues. The deemed date of injury was 3 July 2013. The applicant did attempt to return to suitable duties which

were withdrawn in or about August 2014. At the time of the work capacity decision being made the applicant was not working.

5. 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

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. The applicant’s submissions were reviewed and substantially relate to work capacity and suitable duties. These issues are not relevant to procedural review.

Submissions by the insurer

8. The insurer made submissions dated 20 March 2015 in response to this application. The insurer addressed the applicant’s submissions.

The Decision

9. The relevant WorkCover Guidelines were 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 entitlement periods.
11. At page 1 of the work capacity decision dated 12 December 2014 the insurer made decisions about the applicant’s capacity including the following:
 - “*Whilst you do have a present inability to return to your pre-injury employment, you are able to work in suitable employment and therefore have a current work capacity as defined by Section 32A of the Workers Compensation Act 1987.*”

- *“You currently have capacity to work 35 hours per week.”*
- *“You have not returned to work.”*

12. The insurer has then informed the applicant that as at 1 December 2014 a total of 32 weeks of compensation payments had been paid. By the time the work capacity decision came into effect on 18 March 2015 she would have received 45 weeks' worth of payments. The insurer has correctly advised the applicant that her ongoing entitlements would be determined pursuant to Section 37 of the 1987 Act.

13. At page 3 of the decision the insurer has referred the applicant to Section 37(2) of the 1987 Act and has used the algorithm provided in that section to determine the applicant's ongoing entitlement. This is an error.

14. Section 37 (2) is applied to workers who have a current capacity and have returned to work for not less than 15 hours per week. At page 1 of the work capacity decision the insurer had already determined that the applicant had not returned to work.

15. The correct Section which should have been used by the insurer was Section 37(3) which is used in circumstances where a worker is found to have current work capacity and they have not returned to work or have returned to work for less than 15 hours per week.

16. Using the incorrect Section to calculate the applicant's ongoing entitlement is a demonstrable error. In sub-section (2) the base figure used in the algorithm to calculate ongoing entitlements is 95% of the average weekly earnings whereas in subsection (3) it is 80%. Therefore, application of the incorrect sub section actually affects the mathematical outcome.

17. This non-compliance with the legislation and Guidelines referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 12 December 2014.

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 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

19. The work capacity decision of the Insurer dated 12 December 2014 is set aside.
20. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 18 March 2015.
21. The payments are to be back-dated to 18 March 2015.
22. 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
8 May 2015