

**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 5 December 2014 is set aside.**
- b. The applicant is to be reinstated to her weekly payments at the rate applicable as at 19 March 2015.**
- c. The payments are to be back-dated to 19 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 5 December 2014. The decision informed the applicant that her weekly payments of compensation would cease on 19 March 2015. The applicant sought internal review and the Internal Review Decision was dated 12 January 2015. That decision confirmed the work capacity decision.
2. The applicant applied to the Authority for Merit Review on 27 January 2015 and they delivered findings and recommendations dated 4 March 2015.
3. The applicant then made application to this office on 30 March 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 1 September 2004 the applicant sustained injury to her right knee in the course of her employment as a child care worker. The applicant's capacity has fluctuated between being totally unfit and fit for suitable duties. From 2006 to 2009 she was working 16 hours per week but left the position due to an aggravation of her condition. From 2009 to date

the applicant has been working as a theatre attendant performing duties for 24 hours per week.

5. 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**

6. Section 44(1)(c) of the Workers Compensation Act 1987 ( 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 submissions from the applicant relate to calculation of her pre-injury earnings and non-payment of compensation from the insurer. The latter of these submissions is not relevant to procedural review.

### **Submissions by the Insurer**

8. The Insurer has provided submissions dated 2 April 2015 in response to the application. The insurer responded to the applicant’s submissions and provided a useful chronology of events and correspondence.

### **The Decision**

9. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
10. 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.
11. The insurer informed the applicant that it had made a decision that she had a capacity to work for 24 hours per week. The employment options which the insurer had determined suitable in accordance with Section 32A was a movie ticket attendant and customer service operator. It was noted by the insurer that at the time of making the work capacity

decision the applicant was working 24 hours per week as a theatre attendant.

12. In accordance with the Guidelines the insurer informed the applicant that she had received 476 weeks' worth of compensation payments. Therefore any ongoing entitlement would be assessed pursuant to Section 38(3) of the 1987 Act.
13. As the applicant was working in excess of 15 hours per week and earning in excess of \$173 per week the insurer correctly informed her that she had fulfilled the requirements of that section. Therefore any entitlements the applicant had were determined by the algorithm in Section 38(7) of the 1987 Act.
14. The applicant's pre-injury average weekly earnings were determined to be \$682.91 using a determination from the Workers Compensation Commission.
15. In respect of the applicant's earnings we note that in the table at page 2 of the decision in the column titled "current weekly earnings" the amount of "\$0" is entered. This is incorrect as the applicant was working.
16. At page 5 of the decision the insurer states "*you are currently earning \$26.51 per hour or \$636.24 per week on a 24 hour per week. Your Nominated Treating Doctor has approved this vocational option on 20 October 2014.*" I note that the applicant is working as a theatre attendant which is also the vocational option listed as suitable duties by the insurer.
17. At page 6 of the decision the insurer makes a decision as to the applicant's earning capacity for the purposes of Section 38(7). In the algorithm in that section "E" is determined to be the amount the applicant is able to earn in suitable employment or the workers current weekly earnings.
18. The insurer's work capacity decision was that the applicant can work 24 hours per week in suitable employment. One suitable employment option was a movie ticket attendant/ticket seller. The insurer concedes

that the applicant is working 24 hours per week as a theatre ticket seller. The applicant is earning \$636.24 per week.

19. According to Section 35 of the 1987 Act the amount to be taken into account as the worker's earnings is the amount the worker is able to earn in suitable employment or the worker's current weekly earnings – whichever is the greater amount. In this particular case the applicant is working in suitable employment and her current weekly earnings are \$636.24 therefore this is the amount which should be used in the calculation for Section 38(7).
20. At page 6 of the work capacity decision the insurer calculated the applicant's capacity to earn by adding together the weekly earnings of a movie ticket attendant/ ticket seller with the other suitable employment option of a customer service officer and determining the average weekly earnings for a 24 hour week to be \$689.15 per week. This is incorrect.
21. The applicant has complied with the requirements of Section 38(3) and her current weekly earnings should be used in the method of calculation for Section 38(7). The earnings figure used by the insurer is a mythical figure which cannot be attained by the applicant as it combines the weekly earnings of two separate suitable employment options when the applicant is working in one of those suitable employment options.
22. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 5 December 2014.

## **FINDING**

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



## RECOMMENDATION

24. The work capacity decision of the Insurer dated 5 December 2014 is set aside.
25. The applicant is to be reinstated to her weekly payments at the rate applicable as at 19 March 2015.
26. The payments are to be back-dated 19 March 2015.
27. 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