

**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 October 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 7 February 2015.**
- c. The payments are to be back-dated to 7 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 30 October 2014. The decision informed the applicant that his weekly payments of compensation would reduce to \$9.32 per week from 7 February 2015. The applicant sought internal review and the Internal Review Decision was dated 29 December 2014. That decision terminated the applicant's weekly payments from 13 April 2015.
2. The applicant applied to the Authority for Merit Review on 4 February 2015 and they delivered findings and recommendations dated 5 March 2015. The Authority made a finding that the applicant did not satisfy Section 38 of the Workers Compensation Act 1987 (the 1987 Act) and therefore was not entitled to ongoing payments of weekly compensation.
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 2 June 2010 the applicant suffered injury to his right wrist in the course of his employment as a labourer. The applicant attempted to return to his pre-injury duties but this was not successful. At the time the

work capacity decision was made the applicant was in receipt of weekly payments of compensation from the insurer.

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 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 suitability of employment, fitness for employment and the insurer not considering the realistic availability of suitable employment. These submissions are not relevant to procedural review.

### **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. Guideline 5.3.2 requires the insurer to explain the relevant entitlement periods. In this decision the insurer has informed the applicant that he has received 213 weeks’ worth of compensation payments. Therefore his ongoing entitlements will be subject to provisions of Section 38 of the 1987 Act. This is correct.
11. Guideline 5.3.2 also provides that the insurer must reference the relevant legislation, outline the evidence considered in making the decision and clearly explain the line of reasoning.

12. At page 3 of the work capacity decision the insurer noted “*As you have advised that you are currently not working*”, then at page 4 of the decision the insurer notes “*your current weekly earnings are \$778.32 gross per week.*” A review of the work capacity decision, internal review decision and merit review reveals that at the time of the work capacity decision being made the applicant was not working.
13. The statements referred to in paragraph 11 above are contradictory, confusing to the applicant and amount to an error.
14. At the time of the work capacity decision being made the applicant was not working. At page 4 of the decision the insurer had determined that in suitable employment the applicant had the capacity to earn \$769.00 per week. The insurer has then informed the applicant that his ongoing entitlements are subject to Section 38(7) of the 1987 Act. This is incorrect.
15. For the applicant to be entitled to ongoing payments of weekly compensation he must first satisfy Section 38(3)(b) and (c) of the 1987 Act. This section has not been satisfied as the applicant has not returned to work for at least 15 hours per week and was not earning \$173.00 per week. Therefore as the applicant had not satisfied Section 38(3)(b) he was not entitled to any ongoing weekly payments of compensation. This is a demonstrable error. The insurer has not complied with the legislation or the Guidelines.
16. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 30 October 2014.

## **FINDING**

17. 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

18. The work capacity decision of the Insurer dated 30 October 2014 is set aside.
19. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 7 February 2015.
20. The payments are to be back-dated 7 February 2015.
21. 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  
11 May 2015