

**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 8 December 2014 is set aside.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 23 March 2015.**
- c. The payments are to be back-dated to 23 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 8 December 2014. The decision informed the applicant that his weekly payments of compensation would cease on 23 March 2015. The applicant sought internal review and the Internal Review Decision was dated 12 January 2015. That decision informed the applicant that he had an entitlement to weekly compensation in the sum of \$57.06 per week which would take effect from 14 April 2015.
2. The applicant applied to the Authority for Merit Review on 11 February 2015 and they delivered findings and recommendations dated 16 March 2015. The Authority made a finding that in accordance with Section 38 of the Workers Compensation Act 1987 (the 1987 Act) the applicant was not entitled to weekly payments of compensation.
3. The applicant then made application to this office on 1 April 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 10 July 1999 the applicant suffered injury to his lower back during the course of his employment as a picker and packer. The applicant has

been in receipt of weekly payments of compensation. As at the time of the work capacity decision the applicant had obtained casual employment as a taxi driver.

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 from the applicant was that he has certified capacity to work 5 hours per day for three days per week.

### **Submissions by the Insurer**

8. The Insurer has provided submissions dated 8 April 2015 in response to the application. The insurer responded to the applicant’s submission 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. In accordance with Guideline 5.3.2 the insurer informed the applicant that he had received 785 weeks’ worth of compensation payments. Therefore any ongoing entitlement would be assessed pursuant to Section 38(3) of the 1987 Act.
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. The insurer informed the applicant that it had made a decision that he had a capacity to work for 15 hours per week. The employment options which the insurer had determined suitable in accordance with Section 32A of the 1987 Act were those of a taxi driver, product assembler and kitchen hand. It was noted by the insurer that at the time of making the work capacity decision the applicant was earning \$165.88 per week as a taxi driver.
13. The insurer determined that the applicant did not satisfy the requirements of Section 38(3) as he had not returned to work for a period of not less than 15 hours per week and was not earning in excess of \$173.00 per week. Furthermore, the insurer did not consider that the applicant was likely to continue to be indefinitely incapable of undertaking additional work in order to increase his current weekly earnings.
14. At page 6 of the decision the insurer refers to *'job seeking diaries'* the applicant had maintained between 6 October 2013 to 31 August 2014 which detailed that the applicant earned a total of \$5640 gross. On the same page it was also noted that the applicant participated in a medical case conference on 7 November 2014 with a work focus member and the nominated treating doctor. In that conference the applicant advised that he was working 12 hours per day for two days per week.
15. At page 7 of the decision the insurer has determined that the applicant has been deemed *not* to be working based upon his failure to produce a proof of income.
16. This procedural review is not a review of any judgment or discretion exercised by the insurer in making the decision. However it cannot be within the discretion of a party to rely upon evidence, or lack thereof, which is conducive of procedural error. In this case the insurer has failed to accept the evidence the worker gave at a case conference that he was working 24 hours per week. The basis for the non-acceptance of the applicant was that he failed to produce proof of income. In the circumstances the insurer could fail to determine the earnings of the applicant but it is not within the discretion of the insurer to "deem" that the applicant has not been working.

17. At page 2 of the decision the insurer has determined that the applicant's ability to earn in suitable employment was \$348.60. The insurer calculated this figure by adding together the amount they determined the applicant could earn for working 15 hours per week in each suitable employment option being taxi driver (\$450.80 per week), product assembler (\$270.00 per week) and kitchen hand (\$325.00 per week) and then dividing by three resulting in an average weekly income which takes into account all three types of suitable employment. This is an incorrect method as it produces an amount that the applicant is not able to earn performing one of the suitable duties which has been determined under Section 32A of the 1987 Act.

18. The applicant has the ability to earn either \$450.80 per week working for 15 hours per week as a taxi driver, \$270.00 per week working 15 hours per week as a product assembler or \$325.00 per week as a kitchen hand. None of these suitable employment options enable the applicant to earn \$348.60 as decided by the insurer.

19. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 8 December 2014.

## **FINDING**

20. 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**

21. The work capacity decision of the Insurer dated 8 December 2014 is set aside.

22. The applicant is to be reinstated to his weekly payments at the rate applicable as at 23 March 2015.



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

23. The payments are to be back-dated 23 March 2015.

24. 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  
12 May 2015