

**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 his weekly payments at the rate applicable as at 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 5 December 2014. The decision informed the applicant that his weekly payments of compensation would cease on 18 March 2015. The applicant sought internal review on 24 December 2014 and the Internal Review Decision was dated 19 January 2015. That decision confirmed the work capacity decision.
2. The applicant applied to the Authority for Merit Review on 11 February 2015 and they delivered findings and recommendations dated 24 March 2015. The Authority made a finding that the worker did not meet the special requirements for the continuation of weekly payments after the second entitlement period contained in Section 38 of the *Workers Compensation Act 1987* (the 1987 Act).
3. The applicant then made application to this office on 14 April 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 30 October 2002 the applicant experienced neck and shoulder pain as a result of the nature and conditions of his employment. The

worker's capacity for work has alternated between no capacity and partial capacity. The worker received an award of weekly compensation from the Workers Compensation Commission on 18 April 2005 in the sum of \$226.70 per week continuing. As at the time of the work capacity decision the applicant was working between 1.5 hours and 17.5 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 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. I have reviewed the applicant's submissions and they are not relevant to procedural review.

Submissions by the Insurer

8. The Insurer has provided submissions dated 21 April 2015 in response to the application. The insurer responded to the applicant's submissions and provided a useful chronology of the correspondence to date.

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 has informed the applicant that he has received 598 weeks' worth of weekly compensation payments.
11. The same Guideline requires the insurer to explain the relevant entitlement periods and explain the line of reasoning for the decision.

12. The insurer has advised the worker that if he is to be entitled to weekly payments of compensation after the second entitlement period he must meet the special requirements of Section 38(3) of the 1987 Act. The insurer advises the worker to refer to the *“attached information sheet titled – NSW Workers Compensation – Weekly Payment Entitlements.”* This is not sufficient to comply with the Guidelines which require an explanation of the relevant entitlement periods. The insurer should have informed the worker of the *“special requirements”* he must fulfil in order for him to be entitled to ongoing weekly payments of compensation. Section 38(3) requires the worker must have returned to work for not less than 15 hours per week and must be earning at least \$173.00 per week and must be assessed as likely to continue to indefinitely be incapable of undertaking further employment which would increase his current weekly earnings.
13. The insurer has failed to comply with the Guideline in so far as it has not explained the legislation and informed the worker of the requirements he must fulfil in order to be entitled to ongoing weekly payments of compensation.
14. In addition to the above the insurer has informed the worker at page 2 of the decision *“As you have a current work capacity, this means that you will continue to have an entitlement to weekly payments of compensation and your entitlement rate is determined by Section 37(2) of the Workers Compensation Act 1987...”* This is a demonstrable error.
15. The insurer has informed the worker that he has received 598 weeks’ worth of compensation payments. Section 37 of the 1987 Act is only relevant to workers who are in the second entitlement period of receiving weekly payments between 14 to 130 weeks. The worker clearly does not fall into this category. Furthermore it is contradictory to the preceding paragraph informing the worker that he must comply with Section 38(3) of the 1987 Act.
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 5 December 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 5 December 2014 is set aside.
19. The applicant is to be reinstated to his weekly payments at the rate applicable as at 18 March 2015.
20. The payments are to be back-dated to 18 March 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
26 May 2015