

**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 application for procedural review is dismissed.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 30 April 2015.**
- c. The payments are to be back-dated from 30 April 2015 in accordance with clause 30 Schedule 8 to the *Workers Compensation Regulation 2010*.**
- d. Such payments are to continue until the receipt by the applicant of this recommendation.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 16 January 2015. The insurer advised the applicant that his weekly payments of compensation would reduce to \$48.45 per week from 30 April 2015. The applicant sought internal review and on 11 February 2015 the Insurer confirmed the original decision.
2. The applicant then sought Merit Review from the Authority on 23 March 2015 and they delivered a recommendation dated 21 April 2015. The finding was that the applicant was in fact entitled to \$58.45 per week, being a \$10 weekly increase on the amount calculated by the Insurer.
3. The applicant applied to this office for procedural review and the application was received on 8 May 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. The applicant had previously sought procedural review of a work capacity decision dated 24 May 2013. The application resulted in that decision being set aside. The recommendation of this office was reported as 3613.¹
5. The facts and circumstances concerning the background of this claim are set out in the aforementioned recommendation and need not be repeated.
6. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).
7. The relevant version of the Guidelines was dated 4 October 2013 and came into effect on 11 October 2013.

Submissions by the applicant

8. 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 requested a procedural review.
9. The applicant seeks to rely on an “agreement” between his solicitors and the Insurer that he would continue to be paid \$220 per week. He hopes to retire in around 18 months and wants the payments to continue for at least that duration.
10. These submissions beg the question, wrongly assuming that a prior agreement can override a statute. As such they are misguided and of no assistance.

Submissions by the Insurer

11. The Insurer has not made submissions in response to this application.

The Decision

¹ 3613 represents “number 36 of 2013.”

12. In accordance with Guideline 5.3.2 the Insurer advised the applicant that work capacity assessments were completed on 12 May 2013 and 8 January 2015. The applicant was advised of the work capacity decision by letter dated 16 January 2015.
13. The correct notice period was given under section 54(2)(a).
14. By explaining the relevant entitlement periods and referring to Section 38 the insurer has complied with the Guideline 5.3.2 and the legislation.
15. "Suitable employment" was fully explained, with the relevant parts of section 32A of the 1987 Act extracted.
16. "Current work capacity" was explained, also with the relevant parts of section 32A extracted.
17. "Current weekly earnings" were identified and explained with relevant extracts from section 44I.
18. The relevant entitlement periods were fully explained, as was the operation and applicability of section 38(3) and 38(7).
19. The formulae applied under section 38(7) to the pronumerals appearing in section 35 were correctly explained and fully set out, as required.
20. All reports and related documents relied upon by the insurer were fully and clearly listed.
21. The decision of the Insurer dated 16 January 2015 displayed a much more careful consideration of the requirements of the Guidelines and the legislation than the original decision from May 2013.

Finding

22. There are no procedural errors identifiable in the decision. The insurer has complied with the Guidelines and relevant legislation. The decision by the Insurer (as amended by the merit review service of the Authority) must stand.



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RECOMMENDATION

23. The application for procedural review is dismissed.
24. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 30 April 2015.
25. The payments are to be back-dated from 30 April 2015 in accordance with clause 30 Schedule 8 to the *Workers Compensation Regulation* 2010.
26. Such payments are to continue until the receipt by the applicant of this recommendation.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
16 June 2015