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RECOMMENDATION FOLLOWING AN APPLICATION FOR REVIEW OF THE INSURER'S WORK CAPACITY DECISION PURSUANT TO SECTION 44BB(1)(c) OF THE *WORKERS COMPENSATION ACT 1987*.

SUMMARY:

- a. The Work Capacity Decision by the Insurer dated 25 May 2016 is set aside.**
- b. Such weekly payments as the applicant is receiving by virtue of the stay pursuant to Section 44BC of the *Workers Compensation Act 1987* are to continue until a new decision is made in accordance with Section 43(1) of the *Workers Compensation Act 1987*.**
- c. Pursuant to Section 44BB(1)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.**

Introduction and background

1. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 25 May 2016. The Decision informed the applicant that her weekly payments of compensation would reduce on 31 August 2016. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 8 July 2016. The Internal Review Decision advised the applicant that her weekly payments will cease on 15 October 2016.
2. The applicant sought Merit Review from the Authority by way of application dated 29 July 2016. The Authority delivered its Findings and Recommendations dated 17 August 2016. The Authority made a finding that the applicant did not meet the special requirements under Section 38(3) of the *Workers Compensation Act 1987* (1987 Act) for continuation of weekly payments of compensation. The Authority did not make any recommendations.



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3. The applicant then applied to this office for procedural review by way of application dated 19 August 2016. I am satisfied that the application has been made within time and in the proper form.
4. The applicant previously sought a review of a Work Capacity Decision dated 31 May 2013. The applicant was successful and the Work Capacity Decision was set aside by an earlier recommendation of this office.¹
5. The facts and circumstances surrounding 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).

Submissions by the applicant

7. Section 44BB(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.
8. The applicant has made submissions as to the determination of suitable duties being customer service and that she had attempted to obtain additional employment but it was unsuitable due to her having to lift mattresses.
9. The submissions by the applicant are not relevant to procedural review. I am unable to consider neither the applicant’s personal circumstances, the status of the labour market or the determination of suitable duties by the Insurer. I am only able to review the procedures of the Insurer in making the Work Capacity Decision.

¹ Reported and numbered as 14014



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Submissions by the Insurer

10. The Insurer advised by email dated 22 August 2016 that they had no submissions to make in response to the application.

Decision

11. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.

12. Guideline 5.3.2 requires the Insurer to:

- Reference the relevant legislation;
- Explain the relevant entitlement periods;
- State the decision and give brief reasons for making the decision; and
- Clearly explain the line of reasoning for the decision.

13. The Insurer made a Work Capacity Decision pursuant to Section 43(1)(a) of the 1987 Act that the applicant has current work capacity of 8 hours per day / 3 days per week in accordance with the Certificate of Capacity of the nominated treating doctor. This decision is procedurally correct.

14. The Insurer has also informed the applicant that she has received 565 weeks of compensation payments and that her ongoing entitlement is subject to Section 38 of the 1987 Act.

15. The Insurer has failed to explain Section 38 to the applicant and in particular the special requirements for continuation of weekly payments of compensation as follows:

- There is no explanation from the Insurer that the applicant must have returned to work for a period of not less than 15 hours per week and is in receipt of at least \$155 (as indexed) per week;
- The Insurer has listed the weekly hours that the applicant has worked from 31 December 2015 to 20 April 2016 but HAS failed to make a determination of the hours worked ON A WEEKLY BASIS



and whether the applicant has complied with Section 38(3)(b) of the 1987 Act.

- The Insurer has failed to explain Section 38(3)(c) and whether the applicant has been assessed as likely to continue indefinitely to be incapable of undertaking further additional employment or work that would increase her current weekly earnings; and
- The Insurer has calculated the applicant's ongoing entitlement pursuant to Section 38(7) of the 1987 Act which is the incorrect section.

16. The errors above are breaches of the Guidelines and legislation. The next issue is to consider the effect of the breach. Justice Davies in *The Trustees of the Sisters of Nazareth v Simpson*² found that "Every failure to follow the Guidelines could not result in the setting aside of the insurer's decision."

17. The breaches in respect of this particular Work Capacity Decision include not informing the applicant of the special requirements with which she must comply for the continuation of her entitlements and calculating the applicant's benefits based upon the incorrect subsection of the 1987 Act.

18. The applicant is entitled to know the requirements which she must fulfil in order for her payments of compensation to continue, and secondly if her payments are to be reduced or terminated this must be done so using the relevant legislation. The Insurer has failed to comply with either of these requirements and the breaches are sufficient to set aside the Work Capacity Decision.

19. It is noted that the Insurer has attempted to rectify these breaches in the Internal Review Decision dated 8 July 2016 however that is not sufficient to validate the Work Capacity Decision.

20. In these circumstances the non-compliance of the Insurer with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the Work Capacity Decision dated 25 May 2016.

² [2015]NSWSC 1730



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Finding

21. 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

22. The Work Capacity Decision by the Insurer dated 25 May 2016 is set aside.

23. Such weekly payments as the applicant is receiving by virtue of the stay pursuant to Section 44BC of the *Workers Compensation Act 1987* are to continue until a new decision is made in accordance with Section 43(1) of the *Workers Compensation Act 1987*.

24. Pursuant to Section 44BB(1)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.

A handwritten signature in black ink that reads "Tracey Emanuel".

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
25 August 2016