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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 16 March 2015 is set aside.

b. Such weekly payments as the applicant is receiving by virtue of the stay are to continue until a new decision is made in accordance with the requirements of section 43(1) of the Workers Compensation Act 1987.

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 16 March 2016. The decision followed an earlier work capacity decision which had been the subject of both merit review and procedural review, resulting in the decision being overturned.[1] The work capacity decision dated 16 March 2016 informed the applicant that his weekly payments of compensation would be reduced to $262.05 per week from 21 June 2016. The applicant requested internal review by the Insurer and the Internal Review Decision was dated 18 May 2016. The insurer varied the work capacity decision by changing the entitlement to weekly payments from $262.05 to $262.09.[2]

2. The applicant sought Merit Review from the Authority, which delivered recommendations and findings dated 22 July 2016. The Authority concluded that the applicant's maximum entitlement to weekly payments of compensation was something to be determined by the Insurer, based on a PIAWE of $1,066.27 for the first 52 weeks and $1,005.04 thereafter. The Merit Reviewer found that the applicant had an ability to earn $554.10 per week in suitable employment, based on 30 hours at $18.47 per week.

[1] See WIRO recommendation 1616, dated 17 February 2016.
[2] The four cent differential was caused by a rounding error committed in the course of the previous merit review and copied by the insurer – it was corrected in the course of internal review.

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3. The applicant made an application to this office for procedural review by way of application dated 19 August 2016, received on 25 August 2016. I am satisfied that the application has been made within time and in the proper form.

4. The factual background to the claim is set out in procedural review recommendation 1616 and need not be repeated here.

Submissions by the applicant

5. 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 provided extensive submissions, which are summarised by him as follows:

- The work capacity decisions "made"[3] by the Insurer dated 16 March 2016 had not been provided with accompanying reasons, workings and relevant legislation as required by *Work Capacity Guideline* 5.3.2 – requirements of written advice of a work capacity decision.
- The Insurer had not complied with *Work Capacity Guideline* 5.2 – Fair notice provisions, the period between phone notification and work capacity decision was 7 days and not the 'At least two weeks' and also no written notification was provided.
- Internal Review (IR) had altered the description of suitable employment from one of 'the role of laundry assistant with [name of employer]' to that of 'Laundry Assistant.' The distinction here is that the role of laundry assistant has been accepted by the Insurer previously as that of a restricted role within the role of laundry assistant as employed with [name of employer]. I would not have been able to be employed as a "Laundry Assistant" in the open market due to medical restrictions.
- IR had made new decisions which are not able to be reviewed on merit review by the Authority.[4]

[3] An apparently ironic set of inverted commas, probably designed to reflect the belief by both the Insurer and the Merit Review Service that a work capacity decision with three or four elements, such as calculation of PIAWE, return to work prospects, and identification of suitable duties, is really a series of separate decisions, each reviewable independently, rather than a single decision constituted by several parts.

[4] Interestingly, merit review says (at paragraph 21) that since a "dispute" about the role of "Laundry Assistant" was not referred for internal review, that "decision" cannot be subject to merit review, because it is a precondition for merit review that the relevant dispute be so referred. Hard to do when the dispute only arises following the outcome of internal review. As

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- IR had made decisions in two separate entitlement periods under section 37 and 38 of the 1987 Act.
- IR had at time not taken full consideration of the subject of the work capacity decision considering all available information. The resulting decisions had more likely been incorrect than correct.
- The Insurer has refused to abide by the recommendations on merit review by the Authority dated 22 July 2016 – [see various emails].

6. The most important submission is the one concerning Fair Notice. Both the Merit Review Service of the Authority and this Office had required the Insurer to make a new work capacity decision. Any such decision must comply with the *Work Capacity Guidelines*. The Fair Notice provisions not only require the Insurer to advise the worker that a decision will be made, they also require the Insurer to advise the worker that any new information, documents or submissions they may wish to have considered can be tendered within a specified time. The minimum time in the Guidelines is "at least two weeks."

Submissions by the Insurer

7. The Insurer made what can only be described as novel submissions in response to this application, as follows:

> [The Insurer] submits that the work capacity decision of 16 March 2016 is not a reviewable decision. It is a decision to enact subordinate legislation. Please see the explanation for this below.
>
> **Review Process Timeline:**
>
> Initial Work Capacity Decision & Reviews
> 13/08/15 – Work Capacity decision – Wkr has capacity (30hrs), Suitable Employment identified, Wkr has capacity to earn $675.60, entitlement under s37 max of $84.60pw
> 14/10/15 – Internal Review Decision – Wkr has capacity (21hrs), Suitable Employment identified, Wkr has capacity to earn $578.92, PIAWE is $1005.04, entitlement under s37 max of $426.12
> 14/12/15 – Merit Review Outcome – Wkr has capacity (30hrs), Suitable employment is identified, Wkr has capacity to earn $692.70, PIAWE is $1005.00, entitlement under s37 max of $262.05

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far as I am aware, there is no provision in the Act for an Insurer to be required to internally review its own internal review.

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17/02/16 – WIRO Outcome – Work Capacity decision dated 13/08/15 is set aside, wkr's entitlement is returned to immediately prior to the WCD of 13/08/15.

At this point, the confusion arises.[5]

16/03/16 – Work Capacity Decision issued in accordance with s44(3)(g) [now s44BB(3)(g)] of the Act to reflect the Merit Decision issued on 14/12/16.

[Note: This decision should have been issued at the time of the Merit Outcome in December 2014, however it is was issued after the WIRO Outcome and this delay has created extraordinary confusion. The only effect of this decision is to provide [the applicant] with entitlements recommended via Merit outcome for the period between the Merit and WIRO outcomes being issued. In my opinion, given this is a decision to enact subordinate legislation (i.e. we are instructed in the Merit Outcome to issue a WCD decision to reflect the outcome of the Merit Review, and s44BB(3)(g) requires us to give effect to this instruction), it is therefore not a reviewable decision.]

18/05/16 – Internal Review Decision of the Work Capacity Decision dated 16/03/16 – This decision is redundant because it reviews a non-reviewable decision.
22/07/16 – Merit Review Decision of the Work Capacity Decision dd 16/03/16 – This decision is redundant because it reviews a non-reviewable decision.

In effect, both the Internal Review decision (18/05/16) and the Merit Review Outcome (22/07/16) are reviews of the previous Merit Review Findings dated 14 December 2015, and neither of these bodies have authority to conduct such a review, therefore, both sets of findings are redundant. The only appropriate review was the WIRO review dated 17 February 2016.

8. First, an insurer is scarcely in a position to enact anything, let alone subordinate legislation. That submission is based on a false premise.
9. The submission that the Insurer made no decision but simply did what merit review told them to do is dangerous, since it seems to be an admission of "dictation," one of the classic grounds for rendering a decision *ultra vires*.[6] A decision will be thus impugned if the decision-maker merely

[5] An arguable proposition, at best.

[6] See generally *R v Anderson: ex parte Ipec-Air* (1965) 113 CLR 177, followed and applied in *Ansett Transport Industries (Operations) v The Commonwealth* (1977) 139 CLR 54 and

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cuts and pastes together the decision of another body and then reissues it in their own name.

10. Contrary to the assertion by the Insurer, the merit review service had required the Insurer to make its own determination, in accordance with certain findings of fact the merit review service had made. The precise wording of the recommendation dated 14 December 2015 was in these terms:

> **RECOMMENDATION BASED ON FINDINGS**
>
> 11. The following recommendation made by the Authority is binding on the Insurer and must be given effect to by the Insurer in accordance with section 44(3)(g) of the 1987 Act.
>
> 12. The Insurer is to determine [the applicant's] entitlement to weekly payments of compensation on a week by week basis in accordance with the above findings.

11. The subsequent determination by the Insurer dated 16 March 2016 was clearly a work capacity decision and therefore it had to be made in conformity with the legislation and the Guidelines.

Decision

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

13. Guideline 5.2 is in these terms:

> **Fair notice provisions**
>
> Before making a work capacity decision that may result in a reduction or discontinuation of the worker's weekly payments the insurer must, at least two weeks prior to the work capacity decision, communicate this to the worker in a way that is appropriate in the circumstances of the case, and preferably by telephone or in person.
>
> …….
>
> This information should also then be confirmed in writing to the worker.

Bread Manufacturers of New South Wales v Evans (1981) 180 CLR 404. Any decision maker with a discretion to make a decision must exercise that discretion freely, albeit they may be required to apply certain principles and adopt factual findings from another body.

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14. The Insurer made no submissions contradicting the applicant on the question of fair notice. The applicant says he received a telephone call on 9 March 2016, one week prior to the date of the work capacity decision dated 16 March 2016. He received nothing in writing. On the basis of this uncontested submission, it is clear that the Guidelines were breached, and in a material way. An obvious further example is the confusion which subsequently arose in the course of internal review when the insurer decided that "Laundry Assistant' was suitable employment, without adding the qualification that any such work had to involve modified duties.

15. Since that finding concerning suitable employment did not form any part of the original work capacity decision dated 16 March 2016 it is clear that the applicant was not on notice that this was an issue likely to arise in the course of internal review. Because the applicant did not make representations to the insurer about this in the course of internal review, he was prejudiced in the course of merit review, due to the (admittedly eccentric) view taken by the merit reviewer that there was no power to review this part of the work capacity decision, since it had not been subjected to internal review.

16. Leaving aside the obvious rejoinder that it is the whole of the decision which is subject to merit review, the approach of the merit review service leads to some interesting questions:

    i. What happens if an insurer refuses to conduct an internal review or is so snowed under that they cannot complete it within the statutory time frame and 30 days elapse and the worker goes straight to merit review? This is the very circumstance allowed for in section 44BB(3)(b).

    ii. Why would any insurer decide to review a contentious issue, such as the calculation of PIAWE, when they can just issue a one paragraph letter saying "we reviewed our decision and it remains unchanged"? According to the view that only such "decisions" as are specifically reviewed in the course of procedural review may go to merit review, the Insurer's original work capacity decision could not be scrutinized at all.

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17. It seems clear that the view currently held by the merit review service may lead to unintended consequences and it might be beneficial for that view to be revised.

Finding

18. 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. This also applies even if the decision is made after merit review and or procedural review under section 44BB. In the current instance there was a material breach of the Guidelines which are to be treated as delegated legislation. Accordingly the Work Capacity Decision must be found to be invalidly made.

RECOMMENDATION

19. The Work Capacity Decision by the Insurer dated 16 March 2016 is set aside.

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

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
16 September 2016