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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 28 July 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 28 July 2015. The decision informed the applicant that her weekly payments would cease on 6 November 2015. The applicant requested an internal review on 18 September 2015 and the Internal Review Decision was dated 15 October 2015. That decision advised the applicant's payments would cease on 22 January 2016 and assessed the applicant to have a different capacity for work.
2. The applicant applied to the Authority for Merit Review on 2 November 2015 and they delivered findings and recommendations dated 10 December 2015. The Authority made a finding that the applicant's entitlement to weekly payments falls after the second entitlement period and is to be determined in accordance with Section 38 of the *Workers Compensation Act 1987* (1987 Act).
3. The Authority recommended that the Insurer should make a new Work Capacity Decision determining whether the applicant is a worker with '*high needs*' and her entitlement to weekly payments of compensation under Section 38 of the 1987 Act.



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4. The applicant then made application to this office dated 8 January 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
5. The applicant had previously sought procedural review of a work capacity decision dated 31 July 2013. The applicant was successful and the work capacity decision was set aside by an earlier recommendation of this office¹.
6. The facts and circumstances concerning the background of this claim are set out in the aforementioned recommendation and need not be repeated.
7. 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

8. 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.
9. The applicant’s submissions include the following:
 - The decision does not refer to Section 38(3A) of the 1987 Act and did not make an assessment of ‘*high needs*’; and
 - The Insurer did not rely upon correct information when making a calculation of current weekly earnings.
10. I am not in a position to review the discretion of the Insurer in assessing pre-injury average weekly earnings and current weekly earnings. I am only able to review the procedures of the Insurer in making the actual Work Capacity Decision. I am not able to review the Internal Review Decision from the Insurer or the Merit Review Decision from the Authority.

¹ Reported and numbered as 21714



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Submissions by the Insurer

11. The Insurer has provided submissions dated 15 January 2015 in response to the application:

- The applicant's submissions in respect of payslips and current weekly earnings are relevant to merit review and not procedural review;
- The Insurer considered the payslips provided at the time of the Work Capacity Decision;
- At the time of the Work Capacity Decision the amendments in respect of a worker with '*high needs*' were not enacted.

The Decision

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

13. In accordance with Guideline 5.3.2 the Insurer has informed the applicant that she has received 946 weeks of compensation payments. Therefore any ongoing entitlement to weekly compensation is subject to the provisions of Section 38 of the 1987 Act.

14. Pursuant to Section 42(1)(a) of the 1987 Act the Insurer made a decision that the applicant had the capacity to work 24 hours per week. The Insurer relied upon a report from Dr S, Injury Management Consultant, dated 29 June 2015 in making this decision. The Insurer preferred this opinion over the nominated treating doctor who had assessed the applicant to have 16 hours capacity per week.

15. As previously indicated I am not able to review the discretion exercised by the Insurer. I can only review the procedures which have been followed by the Insurer. The Insurer has made a procedurally correct decision in respect of the capacity of the applicant.

16. The Insurer has noted that the applicant is presently working as a Medical Laboratory Technician. In accordance with Section 43(1)(b) of the 1987 Act the Insurer has determined that those duties along with Customer Service/Liaison Officer, Call Centre Operator and Medical



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Receptionist were all roles deemed to be suitable employment. The Insurer relied upon a vocational assessment report. The determination made by the Insurer was procedurally correct.

17. The Insurer has then made a determination in accordance with Section 43(1)(c) about the amount the applicant is able to earn in suitable employment. At page 2 of the Work Capacity Decision the Insurer noted that the applicant was earning \$1075.27 per week as a Medical Laboratory Technician and was working 28 hours per week. The Insurer has advised in the Work Capacity Decision that it relied upon the payslips of the applicant to make this determination. This is a procedurally correct decision.
18. The Insurer has correctly informed the applicant that as she has received in excess of 130 weeks of compensation payments her ongoing entitlements are subject to Section 38 of the 1987 Act.
19. The Insurer has advised the applicant that she must satisfy the special provisions of Section 38(3)(b) and (c) of the 1987 Act which it has set out at page 3 of the Work Capacity Decision. The Insurer has correctly informed the applicant that she has satisfied Section 38(3)(b) in that she has returned to work for not less than 15 hours per week and is earning at least \$176 per week.
20. Somewhat curiously and confusingly the Insurer then informed the applicant that she did not satisfy Section 38(3)(c) of the 1987 Act. That Section states that the applicant must be assessed as being likely to continue to be indefinitely incapable of undertaking further additional employment that would increase her current weekly earnings.
21. In this instance the Insurer has determined the applicant to have capacity to work 24 hours per week. The applicant is working in excess of those hours according to the Work Capacity Decision.
22. At page 10 of the decision the Insurer has informed the applicant:

"I have determined that you currently have capacity to work 24 hours per week in suitable employment. You have demonstrated the capacity to work 28 hours per week."



Then later at the same page:

“We further consider that as your hours of capacity and earning exceeds your current certified capacity, and earning potential you are not indefinitely incapable of undertaking further employment to increase your current earnings and as such you do not meet the requirements under Section 38 of the Workers Compensation Act 1987 and have no ongoing entitlement to weekly benefits.”

23. The above explanation and application of the Section is incorrect. Section 38(3)(c) is to be used in respect of cases where an insurer determines that a worker has the capacity to work say 24 hours per week and is only working 20 hours per week. That is, they have satisfied Section 38(3)(b) however they are not working to the capacity determined by the Insurer.
24. In this case the applicant is actually working in excess of the capacity which has been determined by the Insurer. Therefore, she has satisfied Section 38(3)(b) and (c) of the 1987 Act. Based upon the information in the Work Capacity Decision the applicant's ongoing entitlement should have been assessed pursuant to Section 38(7) of the 1987 Act.
25. The Insurer has applied the incorrect subsection in assessing the applicant's entitlements and the error is sufficient to set aside the Work Capacity Decision dated 28 July 2015.

Finding

26. 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 has been a breach 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



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27. The work capacity decision by the Insurer dated 28 July 2015 is set aside.

28. 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*.

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
3 February 2016