



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 20 August 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 20 August 2015. The decision informed the applicant that her weekly payments would cease on 30 November 2015. The applicant requested an internal review on 16 September 2015 and the Internal Review Decision was dated 12 October 2015. That decision confirmed the Work Capacity Decision.
2. The applicant applied to the Authority for Merit Review on 13 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.
4. The applicant then made application to this office dated 12 January 2015. Taking into consideration public holidays over the Christmas /



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New Year period 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 26 February 2015. 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. In addition to requesting a procedural review the applicant has made the following submissions:
 - As a parking patrol officer she is exempt from a work capacity assessment and decision;
 - She was medically retired from the employer prior to parking patrol officers being transferred to Councils. There is no other example matching her situation and the Insurer is misinterpreting the Guidelines in respect of her transition to work capacity assessments;
 - The applicant was in the process of making submissions in respect of review of this Work Capacity Decision when she received a further Work Capacity Decision dated 21 December 2015; and

¹ Reported and numbered as 11315



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- The Insurer ceased the applicant's benefits on 28 December 2015 which is unlawful as she was in the review process.

10. The remaining submissions by the applicant are not relevant to procedural review.

Submissions by the Insurer

11. The Insurer has provided submissions dated 15 January 2016 in response to the application:

- The issue of the applicant's exempt status is a question of law;
- The Insurer issued a further Work Capacity Decision at the direction of the Merit Review; and
- The submission by the applicant in respect of her capacity is an issue for merit review and not procedural review.

The Decision

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

13. The applicant's first submission is that as a parking patrol officer at the time of the injury she is exempt from being subjected to a work capacity assessment and decision. This submission from the applicant was discussed in the earlier WIRO decision referred to above. I reiterate that it is a question of law whether or not an applicant can be entitled to the exemption. Under Section 105 of the *Workplace Injury Management and Workers Compensation Act 1998* the Workers Compensation Commission of New South Wales would appear to have exclusive jurisdiction to decide the point. This issue was also previously addressed in an earlier recommendation of this office.²

14. Section 43 of the 1987 Act notes that a Work Capacity Decision is a decision about "a worker's **current work capacity**" (emphasis added). In this instance the work capacity decision is dated 20 August 2015. The most recent and relevant evidence upon which the Insurer has purported

² Reported and numbered as 1313



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to rely is a *'WorkCover Medical Certificate'* from the nominated treating doctor dated 15 March 2015 and an Earning Capacity Assessment report dated 26 September 2014.

15. The Insurer has relied upon these documents when determining the applicant's **current** work capacity in accordance with Section 43(1)(a) and what constitutes suitable employment for the worker in accordance with Section 43(1)(b) of the 1987 Act. The certification from the nominated treating doctor approving the suitable vocational options was dated 23 September 2014.
16. The definition of the word **current** includes "*belonging to the time actually passing; the current month*"³ and "*belonging to the present time; happening or being used or done now*".⁴
17. In assessing a worker's **current** capacity the Insurer should be relying upon up to date evidence in order to make a relevant decision. In this instance the Insurer is relying upon a medical certificate certifying the applicant's capacity which is in excess of 5 months out of date and an Earning Capacity Assessment which is 11 months out of date. Neither of these documents could be considered to be **current** with reference to the definitions above. The decision which the Insurer has made based upon this documentation would not result in an assessment of the applicant's **current** work capacity.
18. The Work Capacity Decision dated 26 February 2015 which was earlier set aside by this office for reasons different to the above relied upon essentially the same evidence. At that time the medical reports and evidence would have been considered current but with the efflux of time the evidence has become out of date.
19. At page 9 of the 20 August 2015 Work Capacity Decision the Insurer has particularised the documents which were considered in making this decision. The Insurer has included "*WorkCover Certificates of Capacity, by Dr C [name withheld], Nominated Treating Doctor, various dates,*" in the list. Guideline 5.3.2 requires the Insurer to outline the evidence

³ Macquarie Dictionary

⁴ Oxford Dictionary



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considered in making the decision, noting the author, the date and key information.

20. Whilst I concede that the Insurer may have numerous Certificates of Capacity from the Nominated Treating Doctor on its file it is still incumbent upon it to note the date of the certificates, at least the certificates covering the preceding 12 months and the date of the most current certificate. Otherwise the applicant is not aware of the documents upon which the decision has been based.

21. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 20 August 2015.

22. The Findings and Recommendations on Merit Review by the Authority dated 10 December 2015 recommended:

“The Insurer should make a new work capacity decision determining whether” the applicant [name withheld] “is a worker with high needs and her entitlement to weekly payments of compensation under Section 38 of the 1987 Act, as amended.”

23. The Insurer made a work capacity decision dated 21 December 2015 in accordance with the Authority’s recommendation. The applicant received this work capacity decision on 24 December 2015. The applicant made a submission that she was in the process of making an application to this office seeking a procedural review of the work capacity decision dated 20 August 2015 when she received the 21 December 2015 Work Capacity Decision.

24. Section 44BC of the 1987 Act provides:

(1) A review of a work capacity decision in respect of a worker operates to stay the decision that is the subject of the review and prevents the taking of action by an insurer based on the decision while the decision is stayed.

(2) However, a review operates to stay the decision that is the subject of the review only if the application for review is made



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by the worker within 30 days after the day on which the worker is notified (or required under section 44BB to be notified) of:

(a) the work capacity decision to be reviewed (in the case of an application for internal review), or

(b) the decision on the internal review (in the case of an application for review by the Authority), or

(c) the findings of the merit review (in the case of an application for review by the Independent Review Officer).

(3) A stay operates from the time the application for review is made until the worker is notified of the findings of the review (or the application for review is withdrawn).

25. In this instance the applicant received the Findings and Recommendations on Merit Review by the Authority on or about 10 December 2015. The applicant had 30 days to make an application for procedural review to this office. Taking into consideration the Christmas / New Year period I am satisfied that the applicant made her application within the prescribed time frame.

26. During this period of time the work capacity decision was still the subject of review and the Insurer is prevented from taking action on the decision whilst it is stayed. This would include making a further work capacity decision as recommended by the Authority. In accordance with Section 44BC of the 1987 Act the Insurer is required to wait until the review process has completed prior to taking any action in respect of the decision.

27. Furthermore, the Authority's recommendations were dated 10 December 2015 and the Insurer's Work Capacity Decision was dated 21 December 2015. The Insurer could not have complied with Guideline 5.2 by providing the applicant fair notice of the assessment and decision. That Guideline states that *'before making a work capacity decision that may result in a reduction or discontinuation of the worker's weekly payments and the insurer must, at least two weeks prior to the work capacity decision, communicate this to the worker.'* At the time the applicant



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received the December 2015 Work Capacity Decision she was still in receipt of weekly payments of compensation.

28. I note that I am not in a position to review the Work Capacity Decision dated 21 December 2015 as it has not been the subject of Internal Review or Merit Review by the Authority. However, I merely draw attention to the above as to whether the most recent Work Capacity Decision has been validly made in the circumstances.

Finding

29. 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 dated 20 August 2015 must be found to be invalid.

RECOMMENDATION

30. The Work Capacity Decision by the Insurer dated 20 August 2015 is set aside.

31. 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
8 February 2016