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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 13 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 13 August 2015. The decision informed the applicant that his weekly payments of compensation would be reduced to $264.00 per week from 20 November 2015. The applicant requested internal review by the Insurer on 14 September 2015 and the Internal Review Decision was dated 14 October 2015. The Insurer determined that the maximum weekly payment entitlement of the applicant pursuant to Section 37 of the *Workers Compensation Act* 1987 (1987 Act) was $426.12 per week.

2. The applicant sought Merit Review from the Authority on 11 November 2015. The Authority delivered recommendations and findings dated 14 December 2015. The Authority concluded that the applicant's maximum entitlement to weekly payments of compensation was $262.05 per week.

3. The applicant then made an application to this office for procedural review by way of application dated 14 January 2016. Taking into consideration the public holidays over the Christmas / New Year period I am satisfied that the application has been made within time and in the proper form.

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4. On 9 September 2013 the applicant suffered injuries to his arms in the course of his employment as an electrical transformer assembler. The applicant suffered further injury when he dislocated his fifth finger on his right hand following the initial injury. The applicant's employment was terminated at or about the end of 2013.

5. The applicant obtained employment as a laundry assistant in December 2014. At the time the Work Capacity Decision was made the applicant was in receipt of weekly payments of compensation.

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. In addition to requesting a procedural review the applicant has made six pages of submissions. Many of the applicant's submissions refer to the Internal Review Decision of the Insurer and the Merit Review by the Authority. I am unable to review these documents. I cannot review any discretion or judgment exercised by the Insurer in making a decision. I am only able to review the procedures of the Insurer in making the Work Capacity Decision.

9. A summary of the relevant submissions which I am able to consider at procedural review:

    - The Insurer failed to provide calculations as to how the applicant's capacity to earn was calculated at $675.60 per week;
    - The Insurer failed to advise how the applicant's pre-injury average weekly earnings (PIAWE) were calculated at $989.06 per week;

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- The Insurer has made two separate work capacity decisions by finding that the applicant has the capacity to work both 30 hours per week and 38 hours per week; and
- The hourly rate which the Insurer has determined that the applicant can earn being $22.5184 per week was inclusive of 25% casual loading and this figure should not have been used as Section 44G of the 1987 Act.

**Submissions by the Insurer**

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

**Decision**

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

12. At page 1 of the Work Capacity Decision the Insurer advises the applicant:

> *"Under subsection 43(1)(a), I have determined that you have a current work capacity of 30 hours with a lifting restriction of no more than 10kg."*

13. Following at page 2 of the Work Capacity Decision the Insurer advised further:

> *"I forwarded a copy of Dr M [name withheld] report on the 16 March 2015 to Dr K [name withheld] requesting an upgrade to 38 hours per week based on Dr M's opinion. I acknowledge that Dr K issued you with a new certificate on the 24 March 2015, and has not increased your capacity to 38 hours as per Dr M's recommendations.*
>
> *I have used the information from your specialist – that you have a capacity to work in suitable employment for 38 hours per week."*

14. Then at page 3 of the Work Capacity Decision the Insurer states that:

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> *"As evident from your payslips you are submitting to [the Insurer] your hours of work do vary on a weekly basis but on average you work 22 hours per week, which confirms your capacity as per Dr M advise and report."*

15. The statement at paragraph 14 above is perplexing as Dr M has provided an opinion that the applicant has the capacity to work 38 hours per week.

16. Therefore in the first three pages of the six page Work Capacity Decision the Insurer has made three different statements in respect of the applicant's current work capacity.

17. Guideline 5.3.1 requires the Insurer to communicate a clear message to the applicant. Following on from this Guideline 5.3.2 requires the Insurer to state the decision and give brief reasons for making the decision.

18. In this instance the Insurer has made conflicting statements which serve only to confuse the applicant. The decision lacks clarity and consistency. The Insurer's failure to comply with Guidelines 5.3.1 and 5.3.2 is a procedural error.

19. The applicant has submitted that no calculations were provided in explaining how the Insurer calculated the amount he is able to earn in suitable employment.

20. At page 2 of the Work Capacity Decision the Insurer has stated:

> *"Under subsection 43(1)(c), I have determined that you are able to earn $675.60 gross per week in suitable employment being your current role with [employer's name withheld] working as a work as laundry assistant." (sic)*

21. Further down page 2 of the Decision the Insurer states:

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> *"With your current role as dispatch assistant and driver with [employer's name withheld] laundry operations, you are able to earn $22.52 per hour."*

I do note that the applicant was only employed as a laundry assistant. He only participated in a job trial as a dispatch assistant and driver and was never in paid employment in that position.

22. The only way for the applicant to work out how the Insurer made the Work Capacity Decision that he was able to earn $675.60 gross per week was to do his own mathematical calculations using the various figures supplied throughout the Decision. The appropriate calculation turns out to be 30 hours per week x $22.52 per hour.

23. The Insurer in failing to clearly explain the line of reasoning in calculating the amount the applicant is able to earn has not complied with Guideline 5.3.2.

24. At page 2 of the Decision the Insurer determined:

> *"Under subsection 43(1)(d), I have determined that your pre-injury average weekly earnings (PIAWE) amount is $989.06."*

25. The Insurer has not outlined any reasons for coming to the above figure. The Insurer has failed to explain its calculation of the applicant's PIAWE. The Insurer has not referred to any legislation, namely Sections 44C, 44D, 44E, 44G and 44H of the 1987 Act.

26. In his submissions the applicant has noted that *"no workings or information"* as to how the PIAWE was derived has been provided by the Insurer. The applicant also correctly pointed out that the Internal Review Decision and Merit Review calculated the applicant's PIAWE to be $1005.04 and $1005.00 per week respectively.

27. As stated earlier I am unable to review the Internal Review Decision by the Insurer and the Merit Review Recommendations and Findings from the Authority. I am also unable to review the discretion used by the Insurer in calculating PIAWE. However, I am able to review the

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procedures implemented by the Insurer in making the Work Capacity Decision.

28. Guideline 5.3.2 requires the Insurer to reference the relevant legislation, outline the evidence considered in making the Decision and to clearly explain the line of reasoning for the Decision.

29. Upon review of the documents relied upon to make the Decision, which are listed at page 4, there is no mention of any payslips from the applicant's pre-injury employer. Likewise throughout the Decision there is no reference to any material or pay period used in calculating the applicant's PIAWE. In this instance the Insurer has failed to comply with the Guideline.

30. The Insurer's failure to comply with the legislation and Guidelines referred to in the preceding paragraphs is sufficient to result in procedural error.

31. The issue which arises from these procedural errors is the effect the failure of the Insurer to comply with the legislation and Guidelines has on the Insurer's decision.[1]

32. The Insurer's clumsy and contradictory expression of its Decision as to the applicant's current work capacity by itself would not be legally reasonable to set aside the Decision. However the Insurer's failure to explain to the applicant the way in which his PIAWE was calculated and its silence as to the evidence used to base its calculation upon amounts to a procedural error sufficient to set aside the Work Capacity Decision.

33. The applicant's PIAWE is an integral part of the calculation of the applicant's ongoing entitlements as set out in Section 37(2) of the 1987 Act. It is important that the applicant is aware as to how this figure is calculated and what information was used. The applicant must be aware of such information in order to allow him the opportunity to critically analyse and review the Decision of the Insurer. In the absence of such information the applicant has not been provided with sufficient information in order to decide whether to seek a review and, if so, make appropriate submissions.

[1] See *The Trustees of the Sisters of Nazareth v Simpson*[2015] NSWSC1730

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34. It is on this basis that the omission of the Insurer could not be considered *"irrelevant to the matters needed to be determined."*[2]

35. In this instance 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 13 August 2015.

**Finding**

36. 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**

37. The Work Capacity Decision by the Insurer dated 13 August 2015 is set aside.

38. 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
17 February 2016

[2] *The Trustees of the Sisters of Nazareth v Simpson*[2015] NSWSC1730 para 47