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

SUMMARY:

- a. **The work capacity decision by the Insurer dated 14 May 2015 is set aside.**
- b. **Such weekly payments as the applicant is receiving by virtue of the stay arising out of clause 30 of Schedule 8 to the Workers Compensation Regulation 2010 are to continue until a new decision is made in accordance with the requirements of section 43(1) of the Workers Compensation Act 1987 and any period of notice given therein has expired.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 14 May 2015. The decision informed the applicant that his weekly payments of compensation would cease on 21 August 2015. The applicant sought internal review on 16 July 2015 and the Internal Review Decision was dated 17 August 2015. That decision confirmed the work capacity decision.
2. The applicant applied to the Authority for Merit Review on 20 August 2015 and they delivered findings and recommendations dated 18 September 2015. The Authority made a finding that the applicant did not satisfy the special requirements under Section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act) to be entitled to a continuation of his weekly payments of compensation.
3. The applicant then made an application to this office dated 6 October 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.



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4. On 30 May 2011 the applicant sustained injury to his right knee when he lost balance, struck a toilet bowl and fell to the ground. The applicant continued working several days with persisting symptoms however, he had to cease duties when pain caused him an increased difficulty with walking. At the time of the work capacity decision the applicant was not working and in receipt of weekly payments of compensation.
5. 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

6. Section 44(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.
7. The applicant has made a submission which raises the validity of statements from the insurer, questions ulterior motives from the insurer and asserts the insurer is depriving the applicant of his rightful claim in order to drive up corporate profit. In addition it is submitted incorrect data was used to stop the applicant’s ‘*well deserved*’ payments.
8. I am unable to review any discretion exercised by the insurer in making decisions in respect of suitable duties for the applicant and capacity to work. My review is limited to ensuring that the insurer has followed proper procedures in making the work capacity decision.

Submissions by the Insurer

9. The Insurer has not made any submissions in response to this procedural review.

The Decision

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



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11. Guideline 5.2 requires that 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.
12. On the first page of the work capacity decision at paragraph 2 the insurer has informed the applicant *"On 14/05/2015 I contacted you to advise our intention to make a decision about your work capacity in 3 month (sic) and 6 days and invited you to provide me with additional information you believe I should consider when making this decision."* I note that the work capacity decision sent to the applicant is actually dated 14/05/2015. Therefore, clearly this statement by the insurer is incorrect. As at 14/05/2015 a decision in respect of the applicant's work capacity had already been made. The statement by the Insurer is confusing and erroneous. The statement is sufficient to make the work capacity decision invalid.
13. In the work capacity decision the insurer purports to rely upon an assessment of capacity from the nominated treating doctor. It is noted in the decision that the most recent certificate of capacity from the nominated treating doctor downgraded the applicant's capacity to work. The decision does not inform the applicant of the assessed capacity contained in that certificate nor does it inform the applicant of the date of the certificate.
14. Guideline 5.3.2 requires an Insurer to outline the evidence considered in making the decision, noting the author, the date and any key information. All evidence should be referred to regardless of whether or not it supports the decision. In failing to outline the hours of capacity assessed by the nominated treating doctor and the date of the certificate the Insurer has failed to comply with the Guideline.
15. Section 44B of the 1987 Act sets out the evidence as to work capacity. Guideline 4 expands on the nature of that evidence. A certificate of capacity, provided it complies with the Section 44B, is acknowledged evidence of capacity.



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16. The work capacity decision contains the following extract at page 3:

[The Insurer] have made contact with your treating doctor, [Dr K] on 2 occasions, the 31/01/15 and 21/04/15, as twice she has downgraded your certificate of capacity after agreeing with Dr [H] that you were fit for full hours.

[Dr K] agreed that you could work full hours – 8 hours / 5 days on light sedentary work, and I told her that is what you are applying for and that is what we are assisting you with. [Dr K] agreed that medical restrictions still need to be applied.

[Dr K] stated that she will amended (sic) the certificate of capacity again to 8 hours / 5 days a week and will advise you in the future that she believes you can work full hours, which will give you more opportunity to find work, which I spoke to [Dr K] on th 31/03/2015 and on the 21/04/15.

[Dr K] will now issue an amended certificate of capacity, stating you are fit for some capacity for 8 hours / 5 days a week as from 20/04/2015.

17. It would appear from the work capacity decision that no such amended certificate of capacity was forthcoming from Dr K by the time the decision was completed. Despite this the insurer made a work capacity decision that the applicant had the capacity to work “8 hours /5 days a week.”

18. Upon examination of the internal review decision dated 17 August 2015 it is noted by the Insurer “and the hourly capacity was reduced to 30 hours at the next certificate on 20 April 2015, and has remained unchanged since then.” From this statement it appears that the nominated treating doctor has not changed the applicant’s work capacity despite the assertion from the insurer that she would.

19. The insurer relied upon its own recollection of a telephone conversation with a third party, the nominated treating doctor, in making the decision in respect of the applicant’s capacity to work. The insurer did not obtain any written confirmation or clarification from the nominated treating



doctor as to whether she agreed that the insurer's recollection of the conversation was correct.

20. Whilst it is correct that procedural review may not impugn "*any judgment or discretion exercised by the insurer,*" it cannot be within the discretion of any party to rely on evidence which is obtained in a way conducive of procedural error. The error may not be the insurer's - they may well have understood the nominated treating doctor to have said something and reported it in good faith. But it was incumbent upon the insurer to provide the NTD with an opportunity to confirm or dispute the written account of the conversation before making a decision which would adversely affect the applicant. To the extent that the decision was based upon the telephone conversations with the nominated treating doctor the decision has been invalidly made.

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 14 May 2015.

Finding

22. 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

23. The work capacity decision by the Insurer dated 14 May 2015 is set aside.

24. Such weekly payments as the applicant is receiving by virtue of the stay arising out of clause 30 of Schedule 8 to the Workers Compensation Regulation 2010 are to continue until a new decision is made in accordance with the requirements of section 43(1) of the Workers



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Compensation Act 1987 and any period of notice given therein has expired.

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
22 October 2015