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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 24 June 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 24 June 2015. The decision informed the applicant that her weekly payments of compensation would cease on 1 October 2015. The applicant sought internal review on 15 July 2015 and the internal review decision dated 14 August 2015 confirmed the work capacity decision.
2. The applicant then applied to the Authority for Merit Review on 8 September 2015 and they delivered findings and recommendations dated 8 October 2015. The Authority made a finding that the applicant did not satisfy the special provisions under Section 38 of the *Workers Compensation Act 1987* ("*the 1987 Act*") and is not entitled to ongoing weekly payments of compensation.
3. The applicant then made an application to this office dated 26 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 10 May 2005 the applicant suffered injury to her shoulders whilst in the course of her employment as a picker/packer. The applicant's employment was terminated in 2007. Since that time she has participated in work trials however at the time of the work capacity decision the applicant was not working and she was in receipt of weekly payments of compensation from the Insurer.
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. In addition to requesting a procedural review the applicant has submitted that she continues to suffer incapacity as a result of her shoulder injuries and that she has also suffered injury to her lower back with the same employer and Insurer.
8. I cannot review any discretion or judgment exercised by the insurer when they are making a decision in respect of the applicant's capacity to work. I can only review the procedures undertaken by the Insurer when making the work capacity decision. I cannot consider the applicant's personal position with respect to her injuries. The specific submissions made by the applicant are not relevant to this procedural review.

Submissions by the Insurer

9. By way of email dated 27 October 2015 the Insurer advised that they did not have any submissions to make.

The Decision



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10. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
11. Guideline 5.3.2 requires the Insurer to advise of the date of the work capacity assessment and the effect the work capacity decision will have on the applicant's entitlements. In this decision the Insurer has advised the applicant that the work capacity assessment commenced on 29 May 2015. The applicant was informed that a work capacity decision was made on 24 June 2015 and she was notified by letter dated that day.
12. The Insurer also informed the applicant that her weekly payments of compensation would cease on 1 October 2015. This is the proper notice period taking into consideration both Section 54(2)(a) of the 1987 Act and Section 76(1)(b) of the *Interpretations Act 1987*. I note that the Insurer cited both sections of legislation and provided an adequate explanation.
13. The Insurer has made a work capacity decision that the applicant has the capacity to work 25 hours per week. This decision was made in accordance with Section 43(1)(a) of the 1987 Act and was based upon the certificate of capacity dated 4 May 2015 from the nominated treating doctor.
14. In accordance with Guideline 5.3.2 the Insurer has also informed the applicant that she has received 349 weeks of compensation payments and as a result her ongoing entitlement is subject to the provisions of Section 38 of the 1987 Act. The Insurer sets out the special provisions of Section 38(3) at page 4 of the work capacity decision. All these requirements were more than adequately dealt with and overall the Insurer has for the most part complied with the Guidelines.
15. In making the work capacity decision the Insurer has determined that the applicant has the capacity to work for 25 hours per week. The Insurer has also informed the applicant that she must earn at least \$173 per week in accordance with Section 38(3)(b) of the 1987 Act. The Insurer stated that the applicant could find suitable employment as a receptionist, administration assistant or customer service assistant. The insurer has failed to take the added step of quoting an hourly or daily



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rate of remuneration for such labour. This would appear to fail the test of “suitable employment” since it does not even state that the work would attract payment at all, let alone the rate of payment.

16. In Dewar¹ Deputy President Roche stated:

“In context, the phrase ‘employment in work’, in the definition of suitable employment, ‘in relation to a worker’, must refer to real work in the labour market. That is, it must refer to a real job in employment for which the worker is suited.” [at 59]

17. In the absence of an hourly or daily rate of remuneration the “suitable employment” identified by the Insurer might be of no more use in assessing an injured worker’s work capacity than any volunteer or community activity she might be able to perform. Such activity would not be a “real job” as stipulated in *Dewar*.

18. Whilst the remainder of the decision has displayed an adequate consideration of the Guidelines and legislation the error referred to above is sufficient to set aside the work capacity decision dated 24 June 2015.

Finding

19. 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

20. The work capacity decision by the Insurer dated 24 June 2015 is set aside.

¹ *Wollongong Nursing Home Pty Ltd v Dewar [2014] NSWCCPD 55*



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21. 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.

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
19 November 2015