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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 6 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 6 June 2015. The decision informed the applicant that his weekly payments of compensation would cease on 14 September 2015. The applicant sought internal review on 6 July 2015 and the Internal Review Decision was dated 31 July 2015. That decision confirmed the work capacity decision.
2. The applicant then applied to the Authority for Merit Review on 31 August 2015 and they delivered findings and recommendations dated 1 October 2015. The Authority made a finding that the applicant did not satisfy the special provisions under Section 38(3) of the 1987 Act and was therefore not entitled to ongoing payments of weekly compensation.
3. The applicant then made an application to this office dated 30 October 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 7 June 1992 the applicant suffered injury when he fell 5 metres onto a concrete floor in the course of his employment as a lift electrician. The applicant's employment was terminated that year. In 1999 the applicant



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was successful in obtaining employment making folding clothes lines. That applicant was made redundant from that employment in 2010. The applicant then found casual employment as a proof reader and course formatter at a University. That employment ceased in 2011. At the time of the work capacity decision the applicant was 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. In addition to requesting a procedural review the applicant has made the following submissions:
  - The Insurer relied on medical information as to the applicant’s physical capacity for work which was out of date;
  - The Insurer failed to outline the evidence considered in making the decision as to the applicant’s mental capacity for work or failed to evaluate all available and relevant evidence in making that decision;
  - The Insurer failed to accurately state the reason for its decision under Section 38(3)(b) at page 3 (and at page 7) of the Work Capacity Decision;
  - The Insurer erred in making a decision as to how much the applicant was able to earn in suitable employment by determining a weekly gross amount and hourly rate for the identified employment based on averages for these amounts;
  - The Insurer failed for reasons of which the applicant is not aware to comply with the legislation, the Regulation and the Guidelines in order to produce a procedurally correct result.

### **Submissions by the Insurer**



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8. The Insurer made the following submissions dated 6 November 2015 in response to the applicant's application:

- They used current information when making the work capacity decision and based the assessment of the applicant's capacity to work upon a certificate of capacity from the applicant's nominated treating doctor dated 12 December 2014;
- They considered the applicant's mental capacity when making the decision including a medical report from an independent medical examination by a psychiatrist dated 20 March 2015;
- They explained that the reason for the decision made under Section 38(3) of the 1987 Act was that the applicant had not returned to work for a period of not less than 15 hours per week and not in receipt of current weekly earnings of at least \$173.00 per week. The Insurer does note the unfortunate error that the amount of \$173.00 is referred to as \$73.00 in two parts of the work capacity decision;
- The Insurer acknowledges that the rate of \$1000 per week for the vocational option of customer service officer is incorrect as it is not an amount the worker will be able to earn in the open labour market and instead they should have used the rate identified in the labour analysis provided by the employers;
- The Insurer concedes that it *"did not comply with the legislation, the Regulation and the Work Capacity Guidelines when making the work capacity decision."*

### **The Decision**

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

10. I refer to the concession made by the Insurer in their submissions dated 6 November 2015:

*"[Insurer] did not comply with the legislation, the Regulation and the Work Capacity Guidelines when making the work capacity decision. [Insurer] is currently gathering current information to make a new work*



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*capacity decision once the WIRO Recommendation following the Application for Review is received.”*

11. The concession made by the Insurer that they did not comply with the Guidelines and the legislation is sufficient to set aside the work capacity decision of 6 June 2015.

### **Finding**

12. 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 the Insurer concedes that 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**

13. The work capacity decision by the Insurer dated 19 June 2015 is set aside.
14. 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  
24 November 2015