



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 9 July 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* 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 9 July 2015. The decision informed the applicant that his weekly payments would cease on 15 October 2015. The applicant requested an internal review and the internal review decision was dated 7 September 2015 and confirmed the original work capacity decision.
2. The applicant applied to the Authority for Merit Review on 6 October 2015 and they delivered findings and recommendations dated 4 November 2015. The Authority made a finding that the applicant did not satisfy the special requirements for continuation of weekly payments pursuant to Section 38(3) of the *Workers Compensation Act 1987* (the 1987 Act).
3. The applicant then made application to this office dated 7 December 2015. The applicant has submitted that he did not receive the Merit Review decision until 11 November 2015. The Insurer does not dispute this submission. As Section 44BB(3)(a) of the 1987 Act requires the application for procedural review to be made within 30 days after the worker receives the Authority's decision at Merit Review 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. The applicant had previously sought procedural review of a work capacity decision dated 14 April 2014. The applicant was successful and the work capacity decision was set aside by earlier recommendations of this office¹.
5. The facts and circumstances concerning the background of this claim are set out in the aforementioned recommendation and need not be repeated.
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. The applicant’s submissions include the following:
 - The Insurer makes the applicant go through suffering and put pressure on his doctors and breaches the law by doing so and for this they “*should be jailed.*”
 - All injuries, including the two motor vehicle accidents should be taken into consideration.
9. As I am only able to review the procedures undertaken by the Insurer in making the work capacity decision I am not in a position to consider the personal circumstances of the applicant.

Submissions by the Insurer

10. The Insurer has not provided submissions in response to the application.

¹ Reported and numbered as 11414



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The Decision

11. The relevant *WorkCover Work Capacity Guidelines* are dated 4 October 2013 and came into effect on 11 October 2013.
12. It is noted at paragraph 5 on page 1 of the work capacity decision the Insurer has advised the applicant that it has conducted the work capacity assessment in accordance with the Guidelines dated 9 August 2013. I note that these Guidelines have been superseded by the Guidelines dated 4 October 2013.
13. At point 8 on page 2 of the work capacity decision the Insurer states:

“Despite your medical certificate stating you have no capacity for work we prefer the evidence of the ECA IMC Dr [K], the ECA Earning Capacity Assessment report dated 13.08.13, ECA Earning Capacity Assessment report dated 01.08.12 and IME Dr [B] report dated 23.10.13 who are highly experienced and well versed in assessing fitness for work and accordingly we conclude you are fit for part time 12 hours per week suitable employment physically and psychologically.”
14. The certificate of capacity referred to by the Insurer is from the applicant’s nominated treating doctor and is dated 16 June 2015.
15. Section 43 of the 1987 Act states that a work capacity decision is a decision about a worker’s **current** work capacity. The evidence which the Insurer has preferred and based the work capacity decision upon is two to three years out of date. The certificate of capacity which is the only evidence contemporaneous in time has been discounted by the Insurer.
16. I also note the reports relied upon are essentially the same reports the Insurer used in the work capacity decision dated 14 April 2014. One of the reasons that decision was set aside was because the medical evidence was out of date at that time.
17. The Insurer in the latest work capacity decision has referred to some more recent medical evidence as follows:



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“In addition we have received IMC Dr [T] report dated 17.03.15 and IME Dr [B] report dated 03.11.14 which also affirm you to have a capacity for appropriate suitable employment.”

18. The quoted words in paragraph 17 are at odds with what appears at paragraphs 13 and 14 *supra*. No attempt is made by the Insurer to explain why earlier reports by an IMC and an IME are preferred to a later certificate of capacity given by the NTD.
19. Guideline 5.3.2 requires the Insurer to outline the evidence considered in making the decision, noting the author, the date and any key information. The Insurer on this occasion has not explained the opinions of the doctors in the reports to which it has referred. It is not evident whether or not the reports support the determination of the Insurer of the applicant's capacity to work. The key information has not been presented.
20. Whilst I note Section 44BB(2) of the 1987 Act does not permit me to review any judgment or discretion exercised by the Insurer in making its decision I am able to review the procedures followed by the Insurer in making the decision.
21. Section 32A of the 1987 Act defines “*current work capacity*” in relation to a worker, “*means a present inability arising from an injury such that the worker is not able to return to his or her pre-injury employment but is able to return to work in suitable employment.*” The definition is constructed in the present tense and suggests an existing inability.
22. Section 43 of the 1987 Act allows the Insurer to make a decision about the worker's current capacity. It is a matter for the Insurer as to which medical opinion it prefers, however when assessing ‘**current**’ work capacity it can be implied from the Act that the Insurer should consider medical evidence that is contemporaneous in time with the decision being made. The evidence which has been accepted by the Insurer is over two years old and by definition cannot be evidence of ‘**current**’ capacity to work.



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23. The Insurer, by accepting medical evidence of the applicant's capacity which was in excess of two years out of date over evidence more contemporaneous in time, has failed to comply with the Guidelines and legislation and this has resulted in a procedural error in the making of the decision.
24. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 9 July 2015.

Finding

25. 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 must be found to be invalid.

RECOMMENDATION

26. The work capacity decision by the Insurer dated 9 July 2015 is set aside.
27. 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 and any period of notice given therein has expired.

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