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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 dated 30 June 2015 is set aside.
- b. Such payments as the applicant continues to receive pursuant to the statutory stay are to continue until a new decision is made and the notice provided therein under section 54(2)(a) has elapsed.

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 30 June 2015. The decision informed the applicant that his weekly payments of compensation would cease on 8 October 2015. The applicant sought internal review (received by the Insurer on 14 September 2015) and the subsequent review decision confirmed the work capacity decision. The Internal review decision was dated 9 October 2015.
2. The applicant applied to the Authority for Merit Review on 21 October 2015 and they delivered findings and recommendations dated 16 November 2015. The Authority made a finding that the Insurer should calculate the weekly payments to which the applicant was entitled under Section 37(3) of the *Workers Compensation Act 1987* (the 1987 Act).
3. This was not the entirety of the recommendation. It followed on from an earlier finding that the applicant had an ability to earn \$996 per week post-injury, even though he does not actually have a job. The figure of \$996 differed from the figure arrived at by the Insurer, which had averaged no less than nine different pay-rates from three different occupations to arrive at a figure of \$959.91. It might be thought that whatever procedural anomalies were behind the calculation of the Insurer's weekly earnings figure are now irrelevant, since it has subsequently been supplanted by the Authority's finding. But the finding of the Authority is vitiated for other reasons (see paragraph 18, *infra*).



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4. The applicant then made an application to this office dated 16 November 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
5. The applicant suffered an injury to his left hand on 11 June 2014. He had been employed at the time as a Floor Finisher and has not worked since. 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. The applicant has provided the following submissions:
 - The Insurer did not increase the notice period under section 54(2)(a) following the completion of internal review, which is described as a "new decision";
 - The employer provided incorrect earnings information to the Insurer. The Insurer was told that the applicant earned \$400 per week pre-injury, whereas his actual earnings were \$687.50 per week, as determined by the Fair Work Commission;
 - Consequently the applicant was paid incorrect amounts by the Insurer at all times;
 - The applicant has no idea how the weekly rate of \$251.20 per week was arrived by the Insurer;
 - The Insurer did not provide Fair Notice to the applicant in accordance with the Guidelines prior to the decision of 30 June 2015; and
 - The Insurer used an average of three different occupations to arrive at a figure of \$959.91, which is a figure not paid in any of the jobs used as a guide. This is in clear breach of the requirement to identify "suitable employment."



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Submissions by the Insurer

9. The Insurer submits that:
 - Fair Notice was provided on 28 May 2015.

The Decision

10. The relevant Guidelines came into effect on 11 October 2013.
11. Guideline 5.2 requires the insurer to advise the worker, at least two weeks prior, that it is making a work capacity decision that may result in the reduction or termination of the worker's weekly payments. There is clear documentary evidence that the Insurer provided such notice on 28 May 2015, more than four weeks prior to the decision being made. The applicant's submission fails on this point.
12. Guideline 5.3.2 requires the Insurer to advise the date of the work capacity assessment. The insurer advised the applicant that the work capacity assessment commenced on 18 February 2015 and was completed on 23 June 2015. This is procedurally correct.
13. The same guideline requires the Insurer to state the impact the decision has on the applicant's entitlement to medical and related treatment expenses. On page 2 of the decision the Insurer has meticulously set out the effect of section 59A(2) and (3). This is procedurally correct.
14. Section 43(1)(b) of the 1987 Act allows an insurer to make a decision as to what constitutes suitable employment for the applicant. In this decision the insurer identified the occupations of Carpet Layer, Forklift Driver, Scaffolder, Sales Assistant and Customer Service Operator as suitable employment.
15. Section 43(1)(c) of the 1987 Act allows the insurer to make a decision about the amount an injured worker is able to earn in suitable employment. The insurer sets out the various weekly amounts the applicant would be able to earn working a 40 hour week. The insurer



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specifies a weekly amount for each of three occupations selected for suitable duties (namely Carpet layer, Sales Assistant and Customer Service Operator).

16. The insurer then states:

“The average earnings in the above roles is \$959.91 per week. Based on this information, we consider you have the ability to earn \$959.91 working 40 hours per week in suitable employment”

This is a procedural error. There is no occupation identified in which the applicant could possibly earn the amount of \$959.91 per week.¹

17. The non-compliance with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 30 June 2015.

18. It is noted that the Authority has made a recommendation dated 16 November 2015. In the course of that recommendation the following appears at paragraph 21:

*“[The applicant’s] legal representative has made submissions that go to the processes and procedures of the Insurer in making the work capacity and internal review decisions. These submissions include, but are not limited to, issues with the notice period/s, **the Insurer using incorrect information in making the decision/s, the current legal standing of the Insurer’s work capacity decision and the Insurer’s purported breach of the legislation and guidelines.**”² [Emphasis added.]*

The use of “incorrect information” cannot be thought a matter irrelevant to merit review. The Fair Work Commission has determined that the applicant’s minimum weekly entitlement in his pre-injury occupation was \$687.50, whereas the insurer based all of its calculations on the

¹ See the decision of Roche, D-P in *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWCCPD 55 in which the learned Deputy President reaffirmed the principle that any work which is said to be suitable for an injured worker must be “real” work in an identifiable job (at paragraphs 51-60).

² It is unlikely that the insurer actually “purported” to breach the legislation and guidelines – perhaps “alleged” is the correct word.



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incorrect figure of \$314 per week. This is obviously a procedural error, but equally obviously it goes to the merits of the decision as well.

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 dated 30 June 2015 is set aside.

21. Such payments as the applicant continues to receive pursuant to the statutory stay are to continue until a new decision is made and the notice provided therein under section 54(2)(a) has elapsed.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
24 December 2015