



**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 12 October 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*.**

**Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 12 October 2015. The decision informed the applicant that his weekly payments would cease on 18 January 2016. The applicant requested internal review by the Insurer on 30 October 2015 and the Internal Review Decision was dated 27 November 2015. That decision confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority on 21 December 2015. The Authority delivered recommendations and findings dated 20 January 2016. The Authority found that the applicant did not meet the special requirements of Section 38(3) of the *Workers Compensation Act 1987* (1987 Act) and that the Insurer should determine whether the applicant is a worker with high needs in accordance with the definition under Section 32A of the 1987 Act.
3. The applicant then made an application to this office for procedural review by way of application dated 1 February 2016. I am satisfied that the application has been made within time and in the proper form.
4. During the course of his employment as a delivery offsider the applicant experienced a gradual onset of back pain. The accepted date of injury is 1 January 2003. The applicant resigned from the pre-injury employer



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on or about 21 January 2005. The applicant commenced with an alternate employer on 21 July 2014 as a general hand following a successful work trial. It is not evident from the Work Capacity Decision however, an examination of the Merit Review Recommendation, indicates that the applicant's employment ceased towards the end of 2015. 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 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. In a procedural review I am only able to review the procedures of the Insurer in making the Work Capacity Decision.
7. In addition to requesting a procedural review the applicant, through his solicitor, has made the following submissions:

- Guideline 2.2. requires the decision to be considerate of the applicant's primary language, cultural background and literacy skills;
- Weekly payments beyond 5 years was not explained to the applicant in accordance with Guideline 5.3.2;
- Inconsistent advice was given as to the date the decision would take effect;
- The Insurer failed to evaluate all available and relevant material and relevant considerations namely Dr L [name withheld] certificates dated 22 July 2015 and 10 August 2015 and the employer's inability to offer increased hours of employment; and
- The decision was incorrectly based upon the assumption that the applicant was able to cope with 16 hours of work per week.

#### **Submissions by the Insurer**



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8. The Insurer has made the following submissions dated 3 February 2016 in response to this application:

- In contacting the applicant to provide fair notice and then delivering the Work Capacity Decision the Insurer engaged the services of a Vietnamese Interpreter to assist the applicant in understanding the impact of the decision on his weekly payments and medical expenses. Furthermore, the applicant engaged a solicitor to represent him and it would be reasonable to conclude that the solicitor was capable of clarifying and explaining any queries or misunderstandings of the applicant;
- In this situation Section 39 of the 1987 Act is not relevant – and explaining an irrelevant piece of legislation would have only added to confuse the applicant;
- The correct notice period was provided to the applicant. The Work Capacity Decision was dated 12 October 2015 and not 19 October 2015 as in the applicant's submissions;
- In response to the submission that the Insurer failed to consider relevant medical information and a deterioration of the applicant's condition the Insurer noted that the WorkCover Certificates of Capacity have remained unchanged in actual capacity since 9 July 2015; and
- The hours of employment which could be provided by the employer were an irrelevant consideration in connection with the applicant's current capacity to work.

### **Decision**

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

10. I address the applicant's submissions as follows:

- Guideline 5.3.1 states that *"Insurers must make reasonable efforts to communicate work capacity decisions that affect the amount of weekly payments a worker is entitled to receive, in an appropriate way, preferably by telephone or in person as well as*



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*in writing. If needed, an accredited interpreter should be engaged to assist in giving effective communication.”*

It is noted that in this particular instance the Insurer engaged the services of a Vietnamese Interpreter both at the Fair Notice and Work Capacity Decision stages.

Guideline 2.2 requires that any decisions associated with claims management must include plain language communication and be considerate of the applicant's and employer's primary language, cultural background and literacy skills. Communication issues and difficulties should be promptly addressed.

The Insurer addressed any communication issues with the engagement of the Interpreter. Furthermore, I also agree with the Insurer's submission that as the applicant has engaged a solicitor to act in his interests during the review process any queries or misunderstandings could be explained by the solicitor, albeit without any remuneration to the solicitor. However, I do note an issue with the Insurer's explanation of Section 38. That issue is dealt with later in this decision.

- The Insurer has cited the relevant entitlement periods at page 6 of the Work Capacity Decision and has informed the applicant that his ongoing entitlements are subject to Section 38.

The Insurer is not required to explain the entitlement period which is associated with Section 39 of the 1987 Act as it is not relevant to the applicant.

- The submission that the Insurer has provided the incorrect notice period pursuant to Section 54(2)(a) of the 1987 Act and Section 76(1)(b) of the *Interpretations Act 1987* is prefaced on the Work Capacity Decision being dated 19 October 2015. The Decision is dated 12 October 2015 and the notice period provided by the Insurer is correct.
- The applicant's submission with respect to failure to consider and accept relevant medical evidence and the availability of



employment are issues which are relevant to Merit Review and not procedural review.

- The final submission that the Work Capacity Decision was incorrectly based on the assumption that the applicant was able to work 16 hours per week is a submission relevant to Merit Review and not procedural review.

11. I do not consider that any of the applicant's specific submissions have resulted in a procedural error sufficient to set aside the Work Capacity Decision.

12. However in conducting a procedural review of the Work Capacity Decision, as requested by the applicant, I do note irregularities.

13. At page 5 of the Work Capacity Decision the Insurer has informed the applicant that he has received 547.2 weeks of compensation payments and any ongoing entitlements are subject to the provisions of Section 38 of the 1987 Act. The Insurer has complied with the Guidelines on this issue.

14. Then at page 6 of the Work Capacity Decision the Insurer has informed the applicant that he is in the "*Special Entitlement Period*." I assume that the Insurer is referring to the applicant having to comply with the '*special requirements*' for a continuation of weekly payments after the second entitlement period. This is legislated by Section 38(3) of the 1987 Act.

15. The Insurer has attempted to explain the '*special requirements*' of Section 38 at page 6 of the Work Capacity Decision as follows:

*"I confirm you are in the Special Entitlement Period. In order to continue receiving Workers Compensation benefit, you will need to be working > 15 hours per week and earning \$176.00 gross per week."*

16. This explanation is erroneous and does not comply with the Guidelines. The ">" symbol represents "*greater than*." Therefore in transposing the definition for the symbol the Insurer has informed the applicant that in



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order for him to continue receiving weekly payments of compensation he must be working greater than 15 hours per week. This is incorrect. Section 38(3)(b) states *“the worker has returned to work.....for a period of **not less than 15 hours per week**”*(emphasis added).

17. Guideline 2.2 requires the Insurer to include plain language communication, and be considerate of the worker's primary language, cultural background and literacy skills. I am of the opinion that “>” used in a sentence may not be obvious to the applicant what the symbol means. Not only is the use of the symbol confusing it is also the incorrect symbol to convey the meaning of the *“special requirements”* in Section 38(3)(b) of the 1987 Act.

18. If the Insurer is intent on using a symbol then it should have referred to *“not < 15 hours per week.”*

19. The Insurer made a Work Capacity Decision pursuant to Section 43(1)(a) of the 1987 Act that the applicant has the capacity to work 20 hours per week. This was based upon the Work Capacity Certificate from the nominated treating doctor dated 10 August 2015.

20. At page 6 of the Work Capacity Decision the Insurer has informed the applicant that should he *“...secure work for > 15 hours per week and earning \$176.00 gross per week whilst in the Special Entitlement Period and continued benefits are to be paid,...Should you meet this criteria, please advise me as your work capacity decision may need to be reviewed.”*

21. The Insurer is entitled to review and make a Work Capacity Decision at any time throughout the life of a claim. So if the applicant's circumstances do change the Insurer is able to review its Decision. However, again the Insurer has misled the applicant as to the requirement of Section 38(3)(b) as it only requires the applicant to be working **not less than** 15 hours per week, not **greater than** 15 hours per week as stated by the Insurer.

22. The Insurer has failed to comply with the legislation and Guideline 5.3.2 in that it has not properly explained the line of reasoning for the decision and it has misrepresented the relevant Sections of the 1987 Act. I must



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consider whether or not these procedural errors are sufficient to set aside the Work Capacity Decision.

23. Justice Davies commented in *Simpson*<sup>1</sup> that “Every failure to follow the Guidelines could not result in the setting aside of the insurer’s decision.”

24. The procedural errors made by the Insurer in this instance result in the applicant being advised incorrectly of the special requirements he is to comply with in order to be entitled to ongoing payments of weekly compensation. Despite the view held in *Simpson* the Insurer should be held to a high standard when making a Work Capacity Decision.

25. In the matter of *Mokohar*<sup>2</sup> Roche DP cited the judgment of Windeyer J in *Iovanescu v McDermott [2004] NSWCA 106*: “It cannot just be a question of prejudice and ability to have a fair trial. If that were the position and everything else could be sorted out by appropriate costs orders then the accepted requirements for case management would go out the window. Hence the principles of case management assume that the parties will comply with rules or give proper reasons for failure to do so.”

26. Though the applicant in the instance of this Work Capacity Decision is not entitled to ongoing payments of weekly compensation that issue itself does not excuse the Insurer from having to comply with the Guidelines and legislation when making the Work Capacity Decision.

27. In a procedural review the overriding consideration cannot become whether the result of the Work Capacity Decision was correct, the consideration must be whether the Insurer complied with legislative requirements, including the Guidelines, in coming to that decision.

28. In *Mokohar*<sup>3</sup> Roche DP stated “...procedural fairness is concerned with providing a person whose rights are potentially affected in a matter the opportunity to deal with relevant issues (*Victims Compensation Fund Corporation v Nguyen [2001] NSWCA 264; 52 NSWLR 213 at 219[37] per Mason P*). The appellant had every opportunity to present its case

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<sup>1</sup> *The Trustees of the Sisters of Nazareth v Simpson [2015] NSWSC 1730 at para 54.*

<sup>2</sup> *Volkswagen Financial Services Australia Pty Ltd v Mokohar [2016] NSWCCPD 13 at para 36*

<sup>3</sup> *Volkswagen Financial Services Australia Pty Ltd v Mokohar [2016] NSWCCPD 13 at para 70*



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*and the only reason it was not able to present the evidence in the late documents was because of its own non-compliance with the Rules and extremely dilatory preparation.”*

29. The reason for the Work Capacity Decision not being valid is the Insurer’s own non-compliance with the Guidelines as referred to in the preceding paragraphs of this Recommendation. This non-compliance is sufficient to set aside the work capacity decision dated 12 October 2015.

### **Finding**

30. 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**

31. The Work Capacity Decision by the Insurer dated 12 October 2015 is set aside.

32. 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*.

Tracey Emanuel  
Delegate of the Workers Compensation  
Independent Review Officer  
4 March 2016