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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 by the Insurer dated 29 June 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 29 June 2015. The decision informed the applicant that his weekly payments of compensation would cease from 6 October 2015. The applicant requested internal review by the Insurer on 22 October 2015 and the Internal Review Decision was dated 23 November 2015. That decision confirmed the cessation of the applicant's weekly payments of compensation.
2. The applicant sought Merit Review from the Authority on 7 December 2015. The Authority delivered recommendations and findings dated 6 January 2016. The Authority made a finding that the applicant's entitlement to weekly payments of compensation is after the second entitlement period and must be determined under Section 38 of the *Workers Compensation Act 1987* (the 1987 Act).
3. The applicant then made an application to this office for procedural review by way of application dated 3 February 2016. I am satisfied that the application has been made within time and in the proper form.



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4. On 10 March 1998 the applicant suffered injury to his back whilst performing his pre-injury duties. The applicant accepted a voluntary redundancy from the employer on 5 May 2001. The applicant then commenced his own lawn care and maintenance business up until 2014 at which time he purchased a hire/rental business. The applicant has subsequently become self-employed as an equipment hire manager. According to the Work Capacity Decision the applicant was working 30 hours per week 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.
7. In addition to requesting a procedural review the applicant has made a submission that the Insurer failed to advise that any document not already provided can be provided upon request to the Insurer.

Submissions by the Insurer

8. The Insurer has made submissions dated 4 February 2016 in response to the application. The Insurer conceded that it did fail to advise the applicant that any documents not provided could be provided upon request.
9. The Insurer has submitted that this omission does not materially impact upon the basis of the work capacity decision that was made. The Insurer relies upon the Supreme Court decision in *Simpson*¹.
10. In addition to the above the Insurer has submitted that as the applicant has obtained legal representation they should have provided the applicant with the aforementioned information and furthermore the

¹ *The Trustees of the Sisters of Nazareth v Simpson* [2015] NSWSC 1730



information primarily relied upon to make the Work Capacity Decision was provided by the applicant in the form of business records and salary information.

Decision

11. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
12. The applicant has submitted that the Insurer has erred in failing to advise that any document not already provided can be provided on request to the Insurer. This is contained in Guideline 5.3.2. The Insurer has conceded the omission.
13. I do not consider this error to be such as to cause the work capacity decision to be set aside. There is no material decision which turns on that error. The applicant and / or his legal advisor were clearly aware of the aforementioned entitlement given the submission made.
14. The Insurer made a work capacity decision pursuant to Section 43(1)(a) of the 1987 Act that the applicant had current capacity *"40 hours per week x 5 days per week"* (sic). This was based upon the Certificate of Capacity from the nominated treating doctor arising from the consultation/conference on 12 May 2015.
15. In accordance with Section 43(1)(b) of the 1987 Act the Insurer made a decision that suitable employment for the applicant was *"Business Owner of an Equipment Hire Company."* According to the Work Capacity Decision the applicant is performing duties which include telephone sales, administration / data entry / computer work, light maintenance on small machinery including two and a half tonne truck, cherry picker, scissor lifts, quick cuts, jack hammers, floor sanders and drills as well as managerial duties (management of a contractor).
16. The Insurer also made a decision under Section 43(1)(c) that the applicant was able to earn *"\$2500 per week in a similar role to the role you are performing as a Business Owner."*



17. The Insurer notes at page 2 of the Work Capacity Decision that *“You have been providing copies of your payslips to [named Insurer] and I note that your payslips state you are working 30 hours per week for [named employer] and you are earning \$15.67 per hour.”*
18. Guideline 5.3.2 requires the Insurer to state the decision and give brief reasons for making the decision and clearly explain the line of reasoning for the decision. The decision is silent as to how the figure of \$2500 per week was attained. The Insurer has failed to comply with the Guideline.
19. It is noted that the applicant has received 822 weeks of compensation payments and his ongoing entitlement is subject to Section 38 of the 1987 Act. The Insurer has determined that the applicant has the capacity to work 40 hours per week and payslips reveal that the applicant is working 30 hours per week. Therefore the Insurer has determined that the applicant has not complied with the special requirements within Section 38(3)(c) in that he has not been *“assessed by the insurer as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker’s current weekly earnings.”*
20. The issue is whether in light of the *Simpson* case if this omission by the Insurer which has resulted in procedural error is sufficient to set aside the Work Capacity Decision.
21. This particular case can be differentiated from *Simpson’s* case in that the Insurer is relying upon Section 38(3)(c) of the 1987 Act. That section does require the Insurer to establish that the applicant has the capacity to work additional hours which would increase his current weekly earnings. In *Simpson’s* case the Insurer relied upon Section 38(3)(b) in that the applicant had not returned to work for 15 hours per week.
22. In this particular instance the Insurer has conceded that the applicant has produced payslips which show that he is working 30 hours per week earning \$15.67 per hour. There is no explanation from the Insurer which would clarify their assertion that the applicant is able to work 40 hour per week and earn \$2500 per week in suitable employment.



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23. I refer to 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). It would follow as a consequence to that requirement that an insurer must be able to identify performable duties and an hourly, daily or weekly payment rate. This is particularly the case in light of Section 43(1)(b) and (c), which identify elements of a Work Capacity Decision as including “a decision about what constitutes suitable employment for a worker”(43(1)(b)) and “a decision about the amount an injured worker is able to earn in suitable employment”(43(1)(c)).

24. In this instance the Insurer has failed to provide an explanation as to how it determined \$2500 to be the appropriate weekly capacity to earn. In so failing to detail a basis for this decision the Insurer has not properly complied with the requirements of identifying suitable employment for the applicant and has failed to comply with both the legislation and the Guidelines.

25. In this instance the non-compliance of the Insurer with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the work capacity decision dated 29 June 2015.

Finding

26. 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

27. The Work Capacity Decision by the Insurer dated 29 June 2015 is set aside.



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28. 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
8 March 2016