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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 application for procedural review is dismissed.**
- b. **Such weekly payments as the applicant is entitled to receive by virtue of the stay pursuant to Section 44BC of the *Workers Compensation Act 1987* are to continue until receipt by the applicant of this recommendation.**
- c. **Pursuant to Section 44BB(3)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.**
- d. **In the event of a failure by the Insurer to comply with the recommendation in paragraph 31, the Authority should take appropriate action.**

**Introduction and background**

1. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 18 September 2015. The Decision informed the applicant that her weekly payments of compensation would cease on 31 December 2015. The applicant sought internal review by the Insurer on 26 October 2015. The Internal Review Decision was dated 16 November 2015 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 10 December 2015. The Authority delivered its Findings and Recommendations dated 13 January 2015 (sic). The Authority made a recommendation that the applicant's entitlement to weekly payments of compensation is after the second entitlement period



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and must be determined under Section 38 of the Workers Compensation Act 1987 (1987 Act).

3. The Authority also recommended that the Insurer was to determine the applicant's entitlement to weekly payments of compensation under Section 38 of the 1987 Act (as amended on 4 December 2015).
4. The applicant then made an application to this office for procedural review dated 26 January 2016 received 3 February 2016. I am satisfied that the application has been made within time and in the proper form.
5. As a result of the nature and conditions of the applicant's employment as a medical receptionist she suffered injury to her right elbow, right shoulder and both wrists. The agreed date of injury is 27 June 1999. The applicant remained employed performing suitable duties until she resigned in or about 2009. In or about September 2009 the applicant opened a clothing store which she runs as a sole trader working 15 hours per week. She remains 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 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.
8. In addition to making the application for review the applicant has made the following submissions:
  - She has been granted "*weekly make up pay*" and she has been working "*my 15 hours*" per week;
  - She has been suffering constant pain in the right shoulder, elbow and wrist for which she is taking constant medication which is making her sick in the stomach;



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- She is suffering from depression and unable to work more hours;
- She is currently hoping that her surgeon will be able to operate as her pain is debilitating.

9. I note that I am only able to review the procedures the Insurer has implemented in making the Work Capacity Decision and notifying the applicant of same. Unfortunately I am unable to have any regard to the applicant's personal situation or circumstance. The applicant's submissions are merit based and are not relevant to this procedural review.

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

10. The Insurer by way of email dated 4 February 2016 has noted that the applicant's submissions are merit based and have made no submissions in response.

#### **Decision**

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

12. Guideline 5.3.2 requires the Insurer to advise the applicant of the date of the work capacity assessment. On this occasion the Insurer informed the applicant that the work capacity assessment was completed on 17 September 2015. The applicant was notified of the Work Capacity Decision by letter dated 18 September 2015.

13. The same Guideline requires the Insurer to advise the date when the Decision takes effect. Section 54(2)(a) of the 1987 Act requires at least three months and four working days notice be given if payments are being reduced or ceased. This notice period takes into account Section 76(1)(b) of the *Interpretations Act 1987*. As a result the applicant was advised that her payments would cease from 31 December 2015. This is the appropriate notice period.

14. The Guideline requires the Insurer to advise the applicant of the impact the decision has on her entitlement to medical and related treatment expenses. The Insurer has referenced and explained Section 59A (2)



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and (3) of the 1987 Act and advised the applicant that her entitlement to medical expenses will cease 2 years after her entitlement to weekly payments ceases. The Insurer has adequately explained the legislation.

15. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer has informed the applicant that she has received 546 weeks of compensation payments. Therefore any ongoing entitlement to weekly payments of compensation is subject to Section 38 of the 1987 Act. The Insurer has set out the special requirements of Section 38(3) of the 1987 Act at pages 4 and 5 of the Work Capacity Decision.
16. Pursuant to Section 43 of the 1987 Act the Insurer has noted that the applicant has been certified with capacity of 5 hours per day, 3 days per week as per the Certificate of Capacity dated 7 September 2015. The Insurer also confirmed the applicant has been certified for this capacity since 2007 by Dr S and Dr M. The Insurer preferred alternate medical opinions provided by Dr C, Dr B, Dr Me, Dr K, Dr Mu and Dr P certifying the applicant has the capacity to work 26 hours per week (pre-injury hours).
17. The Insurer determined, pursuant to the same section, the role of retail manager to be suitable employment. The Insurer based this decision upon Certificates of Capacity from the nominated treating doctor and that the applicant was actually performing the duties for 15 hour per week and has been since in or about 2009.
18. In making these determinations pursuant to Section 43 of the 1987 Act the Insurer has displayed an adequate understanding of the relevant Guidelines and legislation.
19. The Insurer reviewed the self-employed Income Statements from the applicant dated from March 2014. The applicant has consistently been working 15 hours per week but has not been drawing any income for the hours worked.
20. The Insurer informed the applicant that she was required to comply with Section 38(3)(b) and (c) in order to be entitled to ongoing weekly payments of compensation. The Insurer conceded that the applicant



was working 15 hours per week however the evidence did not support that she was earning at least \$176.00 per week (adjusted figure).

21. Furthermore the medical evidence preferred by the Insurer supported that the applicant could work 26 hours per week. The applicant was only working 15 hours per week. Therefore the applicant was deemed not incapable of undertaking further additional employment that would increase her current weekly earnings (Section 38(3)(c)).

22. In this Work Capacity Decision the Insurer determined the applicant failed to fulfil the special requirements of Section 38(3)(b) as she was 'earning' nil per week and was not earning the required \$176.00 per week and she failed to fulfil the special requirement of Section 38(3)(c) in that the medical evidence preferred by the Insurer indicated she had additional capacity. The Insurer did not make a determination as to the amount the applicant could earn in suitable employment but based upon the reasoning of Davies J in the case of *Simpson*<sup>1</sup> that determination was not relevant in this instance.

23. The Work Capacity Decision of the Insurer dated 18 September 2015 has otherwise displayed a careful consideration of the requirements of the Guidelines and legislation.

### **Finding**

24. There are no procedural errors identifiable in the decision. The Insurer has complied with the Guidelines and relevant legislation.

### **The Stay**

25. Section 44BC of the 1987 Act operates so as to entitle a worker, during the course of a Section 44BB review, to receipt of the same compensation payments to which he was entitled immediately prior to the making of the adverse Work Capacity Decision.

26. The entitlement has no time cap or deadline or other limitation on it beyond receipt by the worker of the review decision. This is an

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<sup>1</sup> *The Trustees of the Sisters of Nazareth v Simpson* [2015] NSWSC paras 47-48



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entitlement which exists irrespective of the existence or duration of any notice given to the worker under Section 54 of the 1987 Act.

27. Payments which continue under Section 54 are subject to the usual requirements of providing updated work capacity certificates and other compliance with the legislation by the worker. There is no such requirement under Section 44BC. The worker has already fully qualified to receive their ongoing payments as at the date of the work capacity decision. The applicant is automatically entitled to payments again upon application for review under section 44BB (unless the application for review is outside the “*within 30 days*” time limit).

28. Section 44BC of the 1987 Act operates so that the Work Capacity Decision is the subject of a stay during the review process. This not only stays the decision, but also prevents the Insurer taking “*any action based on the decision whilst it is stayed.*” By definition the cessation of payments, which is clearly based on the decision, is such an “*action*” and may not take place during the relevant period of review.

29. If the Insurer has already stopped payments prior to an application for merit or procedural review, there is a view that payments need not be resumed during such review, since the Insurer cannot take “*any action*” during that time. This is erroneously interpreted to include a prohibition on the resumption of weekly payments. Such an analysis not only assumes the work capacity decision was correct, but it also defeats the purpose of the legislative amendment, which was to ensure that workers are paid for the duration of Section 44BB review. It follows that the resumption of payments is not an action “*based on the decision*” (since the decision resulted in a reduction or cessation) and therefore cannot be the subject of prohibition. The action of reinstating payments during section 44BB review is “based on” section 44BC and is mandatory. There is no discretion.

## **RECOMMENDATION**

30. The application for procedural review is dismissed.



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31. Such weekly payments as the applicant is entitled to receive by virtue of the stay pursuant to Section 44BC of the *Workers Compensation Act 1987* are to continue until receipt by the applicant of this recommendation.
32. Pursuant to Section 44BB(3)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.
33. In the event of a failure by the Insurer to comply with the recommendation in paragraph 31, the Authority should take appropriate action.

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