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RECOMMENDATION FOLLOWING AN APPLICATION FOR REVIEW OF THE INSURER'S WORK CAPACITY DECISION PURSUANT TO SECTION 44(1)(c) OF THE *WORKERS COMPENSATION ACT* 1987.

SUMMARY:

a. **The work capacity decision of the Insurer dated 6 June 2014 is set aside.**

b. **The applicant is to be reinstated to his weekly payments at the rate applicable as at 13 September 2014.**

c. **The payments are to be back-dated to 13 September 2014.**

d. **Such payments are to continue until such time as a further work capacity decision is made and comes into effect.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 6 June 2014. The decision advised the applicant that his weekly payments of compensation would cease on 13 September 2014. The applicant sought internal review, which upheld the original decision. It was noted in the course of merit review that the Insurer undertook the internal review on 7 October 2014, "well outside of the 30 day limit prescribed by the legislation." Given that the only known remedy available to a worker for an Insurer breaching the 30 day rule is for the worker to go immediately to merit review, nothing seems to turn on this breach in the present matter.

2. The applicant sought Merit Review on or about 17 September 2014 and the Authority issued the Merit Review recommendation on 17 October 2014. The original decision was once again affirmed.

3. The applicant made application to this office on 31 October 2014. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. On 23 May 2009 the applicant suffered fracture injuries to both the ulna and radius in the left arm in the course of his employment as a delivery driver. Liability for the injury was accepted. The applicant underwent

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surgery and remained off work until the following year when he resumed work, but with a different employer and reduced duties. In the subsequent employment the applicant had no responsibility for loading and unloading goods. He currently drives an airport mini-bus transporting passengers who presumably carry and load their own luggage.

5. The applicant was in receipt of weekly payments immediately before 1 October 2012 and according to *Clause 8* of *Part 19H* of *Schedule 6* of the *Workers Compensation Act* 1987 (the 1987 Act) the Insurer is required to conduct a work capacity assessment.

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).* The relevant version of the *Guidelines* came into effect on 11 October 2013.

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 through his legal representatives has made submissions, including one concerning the calculation of the transitional rate which has never seen the light of day before and which I extract in full:

> *"At the time of the workers injury, the worker was working two jobs with two different employers and was working in excess of 40 hours per week prior to his injury. Accordingly, the worker's deemed average pre-injury earnings for each job is $960.50 giving a deemed total of $1,921.00."*

It may well be the case that the 2012 amendments have completely failed to come to grips with the former case law under the version of section 40 which applied between 4 pm on 30 June 1987 and June 2012 as represented by *Nowakowska v Home Care Services of NSW* [2008] NSWWCCPD 62 (19 June 2008) and more importantly *Sydney City Council v Ince* [1989] 16 NSWLR 690 and *Alcan Australia Ltd v Jordan* (1995) 11 NSWCCR 475. The latter two decisions are binding

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authority for the proposition that a worker can be entitled to two concurrent partial awards and the first decision says that the combined payment may not exceed the workers pre-injury earnings. Given that the effect of the applicant's submissions would be to say that he is entitled to double the *deemed* PIAWE represented by the transitional rate, it would appear to breach the rule set down in *Nowakowska,* even though that case was decided in 2008 and was an attempt to explain the application of the maximum payable under section 40 in lieu of section 35, as they then both were.

8. Since it is tolerably clear that the transitional rate applies to workers who were existing recipients at the relevant time no matter what their pre-injury earnings actually were, the factors given such close consideration in *Alcan v Jordan*, *SCC v Ince* and *Nowakowska* are at best irrelevant. Other submissions were made on behalf of the applicant, some of which were relevant.

Submissions by the Insurer

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

The Decision

10. *Guideline 5.3.2* requires the insurer to reference the relevant legislation and explain the relevant entitlement periods in the work capacity decision. The Insurer fully complied in this respect.

11. The same Guideline goes on to say that the Insurer needs to explain the full impact of the decision on the worker, including the impact it will have on medical expenses. To this end it is imperative that section 59A is referenced and carefully explained. Despite the Insurer complying in every other way with both the legislation and the Guidelines, the decision is deficient in that it makes no reference to the impact of the decision on the applicant's entitlement to medical expenses. It follows that Guideline 5.3.2 has been breached. Given that the Guideline is expressed in the jussive mood it must be construed strictly and any breach is sufficient to invalidate the insurer's decision. A breach by omission remains a breach and it follows that the decision must be set aside.

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FINDING

12. 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 serious breach of the *Guidelines* which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

RECOMMENDATION

13. The work capacity decision of the Insurer dated 6 June 2014 is set aside.

14. The applicant is to be reinstated to his weekly payments at the rate applicable as at 13 September 2014.

15. The payments are to be back-dated to 13 September 2014.

16. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
22 December 2014