



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 18 September 2015 is set aside.**
- b. **Such weekly payments as the applicant is receiving (or entitled to receive) by virtue of the stay pursuant to Section 44BC of the *Workers Compensation Act 1987* are to continue until a new decision is made in accordance with Section 43(1) of the *Workers Compensation Act 1987*.**
- c. **Pursuant to Section 44BB(1)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.**

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 15 October 2015. The Internal Review Decision was dated 23 October 2015 and apart from three paragraphs it replicates the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application dated 26 November 2015. The Authority delivered its Findings and Recommendations dated 11 January 2016. The Authority made a finding that the applicant did not satisfy the special requirements for continuation of weekly payments of compensation after the second entitlement period pursuant to Section 38(3) of the *Workers Compensation Act 1987* (1987 Act). The Authority made a recommendation that the Insurer is to decide if the applicant is a 'worker with high needs' and the Insurer is to determine the applicant's



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entitlement to weekly payments of compensation, if any, in accordance with Section 38 of the 1987 Act.

3. The applicant then made an application to this office for procedural review by way of application dated 9 February 2016. I am satisfied that the application has been made within time and in the proper form.
4. On 29 May 2013 the applicant was using a vacuum pack and noticed pain in her back which was diagnosed as a disc bulge at L4/5. At the time of the Work Capacity Decision the applicant had not returned to work and she was 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 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.
7. The applicant, through her solicitor, has made the following submissions:
 - The Insurer has failed to give any weight to the medical opinion contained in the certificates of capacity;
 - The applicant has not been advised as to the effect the Work Capacity Decision has on her entitlement to medical expenses past 31 December 2015; and
 - The Insurer has failed to refer to the legislation as required by Guideline 5.3.2.
8. In respect of the first submission I note that I am only able to perform a review of the procedures used by the Insurer in making the Work Capacity Decision. I am not able to review any judgment or discretion exercised by the Insurer in choosing to accept or disregard various medical opinions. The first submission from the applicant is not relevant



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to procedural review. The remaining submissions from the applicant are addressed later in this recommendation.

Submissions by the Insurer

9. The Insurer has not made submissions in response to this application.

Decision

10. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
11. The Work Capacity Decision is dated 18 September 2015. The Decision is printed under the letterhead of *WorkCover Authority of NSW- Claims Operations*. The Decision is signed under the title *Icare workers insurance – Claims Operations Branch*.
12. As at 1 September 2015 WorkCover's regulatory and insurance functions were assumed by Insurance and Care NSW, State Insurance Regulatory Authority and SafeWork NSW. It is intriguing that as at 18 September 2015 a Work Capacity Decision can be written on the letter head of an entity that no longer existed.
13. To compound the issue further the '*Insurer*' being *Icare* fails to explain in the decision the reason for the claim being managed by that entity. Presumably the applicant's pre-injury employer did not have any workers compensation insurance. However, this is not evident from the Decision. This type of information should be explained and conveyed to the applicant.
14. The Insurer made a decision that the applicant had current work capacity to perform duties for 12 hours per week pursuant to Section 43(1)(a) of the 1987 Act. At page 2 of the Decision under the heading '*Reasons for the Decision*' at paragraph 4, the Insurer refers to a Certificate of Capacity dated 3 September 2015 from Dr I [name withheld], the nominated treating doctor. The doctor has certified the applicant capable of '*working in some type of employment for 4 hours per day, 3 days per week.*' It was noted that the doctor recommended the applicant '*go for up skilling rather than paid work and that you could*



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not actively look for work. The next sentence by the 'Insurer' is of grave concern - 'A fax was sent to Dr I [name withheld] on 8 September requesting that the restriction on no job seeking be removed.'

15. I recommend that SIRA investigate the conduct of the 'Insurer' in requesting / directing medical practitioners to alter Certificates of Capacity without any collaboration or consideration. It is observed that the Insurer did not ask the doctor to reconsider his position but rather the restriction 'be removed.'

16. The Insurer has also made a Work Capacity Decision pursuant to Section 43(1)(b) that the role of a customer service officer constitutes suitable employment. However the Insurer then states, 'you may be provided with the reasonable adjustment in the workplace of a sit/stand desk.' The Insurer then goes on to say that any employer who would not provide same would be in breach of Section 5A of the *Disability Discrimination Act 1992 (Cth)*. I consider that expecting the applicant to obtain employment with this 'reasonable adjustment' and threatening non-compliance with federal legislation to any potential employer with suitable employment is a more than slightly unrealistic expectation.

17. At page 8 of the Work Capacity Decision the Insurer states the 'Impact of this Decision.' The Insurer provides the applicant with the proper notice period for the cessation of payments pursuant to Section 54(2)(a) of the 1987 Act and takes into account the additional allowance of four days pursuant to Section 76(1)(a) of the *Interpretation Act 1987*. This is in accordance with both Guideline 5.3.2 and the legislation. However, this notice is provided at page 8 of the decision. It would be far more appropriate to advise the applicant of such important information at the commencement of the decision.

18. Although the Insurer has made procedural errors up to this stage of the Work Capacity Decision based upon the decision in the case of *Simpson*¹ the breaches thus far may not warrant the setting aside of the decision.

19. However, Guideline 5.3.2 requires the Insurer to explain the impact the decision has on the applicant's entitlement to reasonable medical and

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



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related treatment expenses. The Insurer has failed to inform the applicant that her entitlement to medical and related treatment expenses is affected by Sections 59A(1) and (2) of the 1987 Act and that unless she attains the relevant thresholds of a *'worker with high needs'* her entitlement to medical and related treatment expenses will cease two years after her entitlement to weekly payments cease.

20. The same Guideline also requires the Insurer to advise of the process available for requesting review of the decision and how to access the required form. In this instance the Insurer has advised the applicant:

"You can request an application for internal review by the Claims Branch of this decision."

21. The aforementioned sentence is actually advising the applicant that she can request an *'application.'* I do note that the Insurer has enclosed a copy of the application form with the Work Capacity Decision. However, the Insurer has also failed to advise the applicant of the further review processes available being merit review and procedural review.

22. In this instance the above breaches of the Guidelines and the legislation are sufficient to set aside the Work Capacity Decision dated 18 September 2015.

23. I do note that Section 44BB of the 1987 Act prevents me from reviewing the Internal Review Decision of the Insurer. However, on this occasion I feel compelled to point out the failings of the Insurer in that decision. The Insurer has completed an Internal Review Decision dated 23 October 2015. Apart from the first two paragraphs on page 1 and the final paragraph on the last page the two decisions are identical. The reviewer informed the applicant in the first paragraph of the Internal Review Decision that a review was undertaken. The outcome of that internal review is not conveyed to the applicant. The body of the Internal Review Decision merely reiterates word-for-word the original Work Capacity Decision.

24. Further the last paragraph of the Internal Review Decision informs the applicant that she may request:



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'a further for internal review by Claims Operations of this decision through the methods previously used. Alternatively, you can request an independent review of this decision through the Merit Review Service.' (sic)

25. I assume that the Insurer is referring to a *'further'* internal review. If so, this is a review process that is not in the legislation or Guidelines. The *'independent review'* referred to by the Insurer is the merit review of the decision which is performed by the Authority. A major concern is that the Insurer has failed to inform the applicant of the provisions of Section 44BB(1) in that the applicant must make an application for the merit review within 30 days of receipt of the Internal Review Decision. If the applicant does not make the application within the 30 day period the Review cannot take place as the application would be out of time in accordance with legislative requirements.

26. These are major breaches of the legislation and Guidelines and should urgently be reviewed and addressed by the Insurer and SIRA.

Finding

27. 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.

The Stay

28. 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 she was entitled immediately prior to the making of the adverse Work Capacity Decision.

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

30. 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).
31. 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 non-payment of weekly payments, which is clearly based on the decision, is such an “*action*” and may not take place during the relevant period of review.
32. There appears to be a view that if an Insurer has already stopped payments prior to an application for merit or procedural review, then payments need not be resumed during such review, since the Insurer cannot take “*any action*” during that time, which is erroneously interpreted to include a prohibition on the resumption of weekly payments. Such an analysis begs the question, since it assumes the work capacity decision was correct, and it also completely defeats the purpose of the legislative amendment, which was to ensure that workers are paid for the duration of Section 44BB review. It also 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.

RECOMMENDATION

33. The work capacity decision dated 18 September 2015 is set aside.
34. Such weekly payments as the applicant is receiving (or entitled to receive) by virtue of the stay pursuant to Section 44BC of the *Workers*



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Compensation Act 1987 are to continue until a new decision is made in accordance with Section 43(1) of the *Workers Compensation Act 1987*.

35. Pursuant to Section 44BB(1)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.

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