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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 14 September 2015 is set aside.**
- b. Such weekly payments as the applicant is receiving 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 14 September 2015. The Decision informed the applicant that his weekly payments of compensation would cease on 23 December 2015. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 27 November 2015 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application dated 18 December 2015. The Authority delivered its Findings and Recommendations dated 21 January 2016. The Authority made a finding that the applicant did not meet the special requirements under Section 38(3) of the *Workers Compensation Act 1987* (1987 Act) for continuation of weekly payments of compensation. The Authority also made a recommendation that the Insurer must determine the applicant's entitlement to weekly payments under Section 38 of the 1987 Act as amended on 4 December 2015.



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3. The applicant then made an application to this office for procedural review by way of application dated 16 February 2016. I am satisfied that the application has been made within time and in the proper form.
4. On 30 June 2002 the applicant sustained a right knee injury whilst attempting to restrain a patron during the course of his employment as a security officer. The applicant has undergone three knee reconstructions the most recent including an allograft on 30 April 2015. At the time of the Work Capacity Decision in September 2015 the applicant was still undergoing rehabilitation treatment. The applicant commenced part time work as a community and web manager on 30 June 2015 and 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. In addition to making the application for review the applicant has made four primary submissions:
 - He has undergone three knee reconstructions and at the time of the Work Capacity Decision was still undergoing rehabilitation treatment and any permanent impairment had not been able to be properly assessed;
 - The Insurer did not undertake an independent medical examination to determine the applicant’s capacity prior to making its decision;
 - The Work capacity Decision states that the applicant has not returned to work for at least 15 hours per week. The applicant submits that he commenced employment on 30 June 2015 for a minimum 20 hours per week; and



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- The Work Capacity Decision has not been determined under the most recent changes to the *Workers Compensation Act 1987* – the *Workers Compensation Amendment (Transitional Provision) Regulation 2015* which were assented to on 21 August 2015.

Submissions by the Insurer

8. The Insurer has made the following submissions dated 24 February 2016 in response to this application:

- At the time of the Work Capacity Decision the applicant's nominated treating doctor had certified the applicant to have capacity for 8 hours per day, 5 days per week with restrictions. On 1 September 2015 the applicant's capacity for work was downgraded to 24.36 hours per week;
- At the time of making the Work Capacity Decision the Insurer did not consider it necessary to have an independent medical examination as the applicant's nominated treating doctor had made an assessment as to the applicant's capacity;
- The Insurer concedes that the applicant sent an email confirming he was working 20 hours per week and earning at least \$500USD per month. The Insurer notes that it is unclear why it had been stated that the applicant has not returned to work for at least 15 hours per week;
- Following the recommendations from the Authority at Merit Review the Insurer has to make a Work Capacity Decision in accordance with the "*current 2015 amendments*," in particular to determine whole person impairment and "*his entitlements under Section 54A of the Workers Compensation Act 1987*."

Decision

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

10. Guideline 4.2 allows for a work capacity assessment to be conducted at any stage throughout the life of a claim. Further Guideline 5.1 notes that work capacity decisions will be made at many points throughout the life of a claim. Therefore, in response to the applicant's first submission the



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Insurer is able to make a work capacity assessment and decision at any time. The issue is whether the Insurer has made a meritorious and procedurally correct decision.

11. The Insurer is not required to undertake an independent medical examination to assess the applicant's capacity. In this instance the Insurer has accepted the assessment of capacity from the applicant's nominated treating doctor dated 2 September 2015. That certificate provided that the applicant has capacity for suitable duties 8 hours per day, 5 days per week with restrictions as to lifting, sitting, standing, pushing, pulling, bending, twisting, squatting, driving and to avoid running, jumping and physical contact.
12. However, in its submissions dated 24 February 2016 the Insurer advised *"Since 1 September 2015, [named applicant] capacity for work downgraded to 24.36 hours per week."* The Insurer does not provide any further information as to whom the statement is attributed, how the odd number of hours is calculated or its significance to the decision. It is noted that the Insurer thought it important enough to refer to in submissions.
13. Guideline 5.3.2 requires the Insurer to outline the evidence considered in making the decision, noting the author, the date and any key information. All evidence considered should be referred to, regardless of whether or not it supports the decision.
14. The assessment of capacity referred to in the Insurer's submissions pre-dates the Work Capacity Decision of 14 September 2015 by some 13 days. However, no mention of the downgraded assessment is made by the Insurer in the Work Capacity Decision.
15. The Guidelines require the Insurer to consider all relevant evidence when making a work capacity decision. This is particularly significant with competing assessments of capacity of the applicant. It is open to the Insurer to accept the assessment which they prefer however, the other opinions should be referred to and a reason provided as to why one assessment was preferred over the remaining assessments.



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16. The applicant has made submissions referable to the assessment of his capacity. Therefore, it is a significant issue in this instance. It is not procedurally correct for the Insurer to only refer to the assessment of capacity which it accepts when clearly there was evidence to the contrary available at the time the Work Capacity Decision was made. That evidence must be referred to and a reason provided for why it was not accepted.
17. This omission by the Insurer is sufficient to set aside the Work Capacity Decision.
18. The Insurer stated at page 3 of the Work Capacity Decision "*You have not returned to work for at least 15 hours per week.*" The applicant has submitted and the Insurer has accepted that this statement is incorrect. The Insurer in its submissions has conceded that the applicant supplied an email dated 16 July 2015 confirming he is working at least 20 hours per week. The Insurer admitted that it was "*unclear*" as to why the decision stated that the applicant was not working for at least 15 hours per week.
19. In these circumstances the assessment of downgraded capacity is of more significance as the applicant was working at least 20 hours per week.
20. Finally the applicant submitted that the Insurer had not made the work capacity decision in accordance with the most recent legislative changes. The amendments (which the Authority at Merit Review recommend that the Insurer take into consideration when making a new decision) actually came into effect on 4 December 2015.
21. The Insurer has advised in submissions that they have commenced to make a Work Capacity Decision in accordance with the current 2015 amendments and the fair notice call and letter was issued on 23 February 2016.
22. 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 14 September 2015.



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Finding

23. 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

24. The Work Capacity Decision by the Insurer dated 14 September 2015 is set aside.

25. Such weekly payments as the applicant is receiving 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*.

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

A handwritten signature in black ink that reads "Tracey Emanuel".

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
6 April 2016