



**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 26 November 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 26 November 2015. The Decision informed the applicant that her weekly payments of compensation would cease on 7 March 2016. The applicant sought internal review by the Insurer on 7 December 2015. The Internal Review Decision was dated 31 December 2015 and confirmed that the applicant's weekly payments of compensation would cease.
2. The applicant sought Merit Review from the Authority by way of application dated 19 January 2016. The Authority delivered its Findings and Recommendations dated 2 February 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).
3. The applicant then made an application to this office for procedural review by way of application dated 24 February 2016. I am satisfied that the application has been made within time and in the proper form.



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4. On 31 July 1998 the applicant sustained injury to her lower back whilst lifting a container of orange juice from the bottom shelf of a refrigerator during the course of her employment as a catering assistant. At the time of the Work Capacity Decision the applicant was working as a Dietary Aide 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 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’s submissions relate to Merit Review and are not relevant to this procedural review.

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

8. The Insurer has made submissions dated 3 March 2016 that the applicant’s submissions are merit based.

#### **Decision**

9. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
10. The Insurer has informed the applicant that her pre-injury average weekly earnings (PIAWE) are \$993.70 which is the ‘*transitional rate*’. The Insurer has failed to explain to the applicant why and how the ‘*transitional rate*’ is relevant to her case. The Insurer has incorrectly advised the applicant that her PIAWE has been calculated in accordance with Sections 35(1) and Sections 44C to 44I of the 1987 Act, and a decision to use this amount has been made in accordance with Section 43(1)(d) of the 1987 Act. The Insurer has referred to the



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incorrect legislation in respect of using the transitional rate for the PIAWE.

11. To further compound its error the Insurer has then invited the applicant to provide any additional information regarding the calculation of her PIAWE to her case manager.
12. The Insurer has failed to explain to the applicant that as she has received 655 weeks of compensation payments and is an existing recipient Schedule 6 Part 19H clause 2 of the 1987 Act means that the *'transitional rate'* applies to her case. The *'transitional rate'* is legislated and does not need to be calculated.
13. The Insurer has failed to reference the correct legislation and explain the use of the *'transitional rate'* to the applicant. The Insurer has failed to comply with the legislation and Guidelines.
14. According to the Work Capacity Decision made by the Insurer the applicant has the capacity to work 24 hours per week and had returned to work 24 hours per week. This information is contained on page 1 of the Work Capacity Decision. Despite the applicant having returned to work the applicant's *'current weekly earnings'* at page 2 are recorded as \$0.
15. At page 5 of the Work Capacity Decision the Insurer notes that the applicant has been able to maintain employment as a Dietary Aide working an average of 24 hours per week and earning \$669.57 per week.
16. Despite the above the Insurer obtained a functional capacity report and earning capacity assessment dated 13 April 2015. These reports concluded that the vocations of a call centre operator, customer service advisor and medical receptionist were suitable employment options for the applicant.
17. At page 7 of the Work Capacity Decision the Insurer states:

*"You continue to be employed by [named employer] working suitable duties as a Diet Aide Technical 1 working 24 Hours per week and*



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*earning \$669.57 on average per week, however the following roles have been identified as suitable employment options for you of Call Centre Operator, Customer Service Advisor and Medical receptionist.*

*[Named Insurer] has determined that you have the capacity to work 24 hours per week as a Call Centre Operator, Customer Service Advisor and Medical receptionist with the ability to earn \$825.84 in these roles. Based on the information reviewed [named Insurer] has determined you do not meet the requirements under section 38 of the Workers Compensation Act 1987 and have no ongoing entitlement to weekly benefits."*

18. The first error in the aforementioned paragraphs is the statement by the Insurer that the applicant had the ability to earn \$825.84 "in these roles". Based upon the information contained in the Work Capacity Decision the only role in which the applicant was able to earn \$825.84 per week for a 24 hour week is Customer Service Advisor. The role of Call Centre Operator had the earning capacity of \$568.56 per 24 hour week and the role of Medical Receptionist was \$648.00 per 24 hour week.
19. The Insurer has completely overlooked the applicant's capacity working 24 hours per week in suitable duties as a Dietary Aide and earning \$669.57 per week.
20. I note that under Section 44BB of the 1987 Act I am unable to review and judgment or discretion exercised by the Insurer however, it is incumbent upon the Insurer to clearly explain the line of reasoning for the decision it has made.
21. In this case the Insurer has not provided any reasoning for preferring the vocation of Customer Service Advisor over that of Dietary Aide which the Decision notes that the applicant was performing at the time of the work capacity assessment and Decision. Without any explanation being proffered it appears that the Insurer has selected the vocation with the highest earning capacity.
22. Guideline 5.1 outlines the approach the Insurer should take when making a Work Capacity Decision. This approach includes:



- Ensure that all reasonable opportunities to establish capacity for work have been provided to the worker;
- Evaluate all available and relevant material and relevant considerations; and
- Have regard to the particular facts and circumstances of the worker.

23. The Insurer has not provided sufficient reasoning in accordance with the Guidelines for not accepting the vocation of Dietary Aide as *'suitable employment'* within the meaning of Section 32A of the 1987 Act and not accepting \$669.57 per week as the amount the applicant is able to earn in suitable employment in accordance with Section 43(1)(c) of the 1987 Act.

24. 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 26 November 2015.

### **Finding**

25. 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**

26. The Work Capacity Decision by the Insurer dated 26 November 2015 is set aside.

27. 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*.



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28. 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 "T. Emanuel".

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