



**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 22 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 22 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 dated 22 October 2015 and the Internal Review Decision was dated 20 November 2015 and confirmed the cessation of the applicant's weekly payments of compensation.
2. The applicant sought Merit Review from the Authority by way of application dated 16 December 2015. The Authority delivered its Findings and Recommendations dated 28 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 found that the applicant was able to earn \$473 per week in suitable employment. They also made a finding that the Insurer is to determine the applicant's entitlement to weekly payments of compensation under Section 38 of the 1987 Act.



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3. The applicant then made an application to this office for procedural review by way of application dated 26 February 2016. I am satisfied that the application has been made within time and in the proper form.
4. The applicant developed a gradual onset of back pain radiating to the lower parts of her body arising out of the course of her employment as a media liaison officer. The applicant left her pre-injury employer in or about 2003 – 2004. At this time she became self employed as a craniosacral therapist and she remains in this employment until the present time. At the time of the Work Capacity Decision the applicant was also 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 submissions to the effect that as a consultant her weekly earnings should be calculated as a whole and not as an hourly payment as the time also covers non-consulting hours worked.

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

8. The Insurer provided copies of the Work Capacity Decision, Internal Review Decision and Merit Review Recommendation under email dated 29 February 2016. The Insurer indicated that they had no further submissions to make.

#### **Decision**



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9. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
10. Guideline 5.3.2 requires the Insurer to outline the evidence considered in making the decision, noting the author, the date and key information. All evidence should be referred to, regardless of whether or not it supports the decision.
11. At page 1 of the Decision the Insurer makes a Work Capacity Decision in accordance with Section 43(1)(a) of the 1987 Act that the applicant has current work capacity of 28 hours per week. A perusal of the Decision reveals that no evidentiary basis for this Decision has been particularised by the Insurer.
12. The list of documents relied upon to make the Decision is itemised at page 3 of the Decision and refers to a document titled "*WorkCover Certificate*" from Dr T [name withheld], nominated treating doctor, dated 21 September 2013. However, there is no mention of that Certificate in the body of the Decision.
13. The Insurer does request that the applicant obtain an updated "*WorkCover Certificate*" as "*Based on our records you have not provided [named insurer] an updated WorkCover Certificate since 8 September 2013.*"
14. From the above it can be concluded that the Insurer has based a Decision of the applicant's current work capacity on a certificate that is in excess of 30 months out of date. Although it is noted that the contents of the Certificate are not disclosed by the Insurer.
15. Section 44B(4) of the 1987 Act states that a certificate of capacity must "*certify as the worker's incapacity for work and whether the worker has a current work capacity or has no current work capacity during the period, not exceeding 28 days, stated in the certificate.*"
16. The evidence relied upon by Insurers to make a Work Capacity Decision must be recent and up to date. The use of the word "*current*" in the phrase "*current work capacity*" and the legislative obligation for a certificate of capacity to provide assessments for 28 day intervals establishes this requirement.



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17. The definition of the word *current* includes “*passing in time, or belonging to the time actually passing: the current month*”<sup>1</sup> and “*belonging to the present time; happening or being used or done now.*”<sup>2</sup>
18. The Certificate itemised by the Insurer in the document list cannot be said to fall within the definition of the word “*current*”.
19. The Insurer has failed to comply with both the Guidelines and Legislation by failing to refer to the Certificate in the body of the Decision and for failing to obtain an updated Certificate of Capacity upon which a decision of “*current work capacity*” could be made.
20. The Insurer has also purported to have relied upon an Independent Medical Examination report of Dr R [name withheld] dated 27 February 2015. Again, in breach of Guideline 5.3.2 the Insurer has failed to refer to the document in the body of the Decision noting the author, date and key information.
21. The Insurer has failed to particularise any medical evidence or opinion upon which they have based the Work Capacity Decision.
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 22 September 2015.

### **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.

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<sup>1</sup> Macquarie Dictionary

<sup>2</sup> Oxford Dictionary



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## RECOMMENDATION

24. The Work Capacity Decision by the Insurer dated 22 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  
12 April 2016