



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 8 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 8 September 2015. The Decision informed the applicant that his weekly payments of compensation would cease on 4 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 23 December 2015. The Authority delivered its Findings and Recommendations dated 28 January 2016. The Authority made a finding that the applicant's current weekly earnings and the amount he is able to earn in suitable employment is \$1,153.80 per week. The Authority made no recommendation in this case because no change was necessary to the Insurer's Work Capacity Decision.
3. The applicant then made an application to this office for procedural review by way of application dated 23 February 2016. I am satisfied that the application has been made within time and in the proper form.



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4. On 13 September 2002 the applicant suffered injury to his back in the course of his duties as a labourer. The applicant was re-deployed as a construction compliance officer in or about May 2008. At the time of the Work Capacity Decision the applicant had remained in that position and was in receipt of weekly payments of compensation.
5. Section 44A of the *Workers Compensation Act 1987* (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.

Submissions by the Insurer

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

Decision

8. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
9. Guideline 5.3.2 requires the Insurer to state the impact of the decision on the worker in terms of their entitlement to weekly payments.
10. Section 54(2)(a) of the 1987 Act states when the discontinuation or reduction of weekly payments results from a work capacity decision of the insurer 3 months notice must be provided. Also the Insurer must take Section 76(1)(b) of the *Interpretations Act 1987* into consideration which allows an additional 4 days notice for postage.
11. The Work Capacity Decision is dated 8 September 2015. The Insurer has informed the applicant that his payments will cease on 4 December 2015. This is the incorrect notice period as it is not 3 months and four



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working days. The Insurer has failed to comply with the legislation and Guidelines.

12. 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 8 September 2015.

Finding

13. 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 breach 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

14. The Work Capacity Decision by the Insurer dated 8 September 2015 is set aside.
15. 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*.
16. 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". The signature is written in a cursive, flowing style.

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