



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 10 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 10 September 2015. The Decision informed the applicant that his weekly payments of compensation would cease on 30 November 2015. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 2 November 2015 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application dated 30 November 2015. The Authority delivered its Findings and Recommendations dated 10 February 2016. The Authority made a finding that the applicant's entitlement to weekly payments of compensation falls after the second entitlement period and is to be determined under Section 38 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 8 March 2016. I am satisfied that the application has been made within time and in the proper form.



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4. On 3 April 2007 the applicant suffered injury to his right wrist in the course of his duties as a labourer. The applicant's employment was terminated in or about 2007. The applicant subsequently commenced working at a fruit shop and presently works 24 hours per week. At the time of the Work Capacity Decision the applicant was also 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. The applicant's submissions include that he was not afforded the correct fair notice period prior to the Work Capacity Decision being made.

Submissions by the Insurer

7. The Insurer has made submissions dated 9 March 2016 in response to this application. The Insurer has explained the basis upon which the Work Capacity Decision was made.

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



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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 10 September 2015. The Authority performed a Merit Review of this Work Capacity Decision and in its list of documents the Insurer refers to the Work Capacity Decision dated 10 September 2015.
12. The Insurer has informed the applicant at both page 2 and page 3 of the Decision that his payments will cease on 30 November 2015. This is the incorrect notice period as it is not 3 months and four working days. The Insurer has failed to comply with the legislation and Guidelines.
13. The Insurer compounded the error by failing to even address it in the Internal Review Decision dated 2 November 2015. I note however, that even if the Insurer had addressed the incorrect notice period it would still not have been sufficient to validate the Work Capacity Decision.
14. 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 10 September 2015.

Finding

15. 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

16. The Work Capacity Decision by the Insurer dated 10 September 2015 is set aside.
17. 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



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

18. 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
14 April 2016