



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 3 July 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 3 July 2015. The Decision informed the applicant that his weekly payments of compensation would cease on 13 October 2015. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 23 December 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 22 January 2016. The Authority delivered its Findings and Recommendations dated 16 February 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 recommended the Insurer to determine the applicant's entitlement to weekly payments of compensation under Section 38 of the 1987 Act insofar as whether the applicant is a *'worker with high needs.'*



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3. The applicant then made an application to this office for procedural review by way of application dated 14 March 2016. I am satisfied that the application has been made within time and in the proper form.
4. The applicant previously sought a review of a work capacity decision dated 7 November 2014. The applicant was successful and the work capacity decision was set aside by an earlier recommendation of this office.¹
5. The facts and circumstances concerning the background of this claim are set out in the aforementioned recommendation and need not be repeated.
6. 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

7. 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.
8. In addition to making the application for review the applicant has made specific submissions which are not relevant to procedural review.

Submissions by the Insurer

9. The Insurer made submissions dated 21 March 2016 in response to this application. The Insurer submitted that the Work Capacity Decision was made in line with Section 44BB of the 1987 Act.

Decision

¹ Reported and numbered as 8615



10. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
11. 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.
12. 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 15 hours per week. A perusal of the Decision reveals a reference at page 4 that *"You are currently certified with capacity to work 3-5 hours per day, 5 days per week with analgesia as the treatment noted."* The assessment is from the nominated treating doctor. However, the Insurer has failed to reference the date of the certificate.
13. At page 8 of the decision the Insurer has referenced the documents relied upon. When referring to the aforementioned document the Insurer has stated *"Multiple WorkCover medical certificates."* This reference does not assist in ascertaining the date of the doctor's assessment of capacity and it is not in accordance with the Guidelines. Furthermore, Workcover medical certificates are no longer the relevant document upon which assessments may be based and have not been since 2012. The appropriate assessment should be based upon a Certificate of Capacity. There is no reference to a Certificate of Capacity in the documents considered.
14. At page 2 of the Work Capacity Decision the Insurer makes a decision in accordance with Section 43(1)(b) of the 1987 Act that sales assistant is suitable employment for the applicant and a further decision in accordance with Section 43(1)(c) that the applicant can earn \$345.00 per week in that suitable employment.
15. The Insurer has based the aforementioned decisions upon a functional capacity assessment dated 11 June 2014 and a vocational capacity assessment dated 24 July 2014.



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16. From the above it can be concluded that the Insurer has based a Decision of the applicant's current work capacity upon a certificate of which the date has not been specified and vocational assessment reports obtained 12 months prior to the decision being made.
17. 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."*
18. 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.
19. The definition of the word current *includes "passing in time, or belonging to the time actually passing: the current month"*² and *"belonging to the present time; happening or being used or done now."*³
20. The reports itemised by the Insurer in the document list cannot be said to fall within the definition of the word *"current"*.
21. The Insurer has failed to comply with both the Guidelines and Legislation by failing to refer correctly to the Certificate in the body of the Work Capacity Decision and for failing to obtain updated evidence upon which a decision of *"current work capacity"* could be made.
22. It is noted that the Insurer's Internal Review Decision has relied upon evidence which was not available at the time of The Work Capacity Decision. The Internal Review refers to a Certificate of Capacity from the Nominated Treating Doctor dated 9 November 2015 and a labour analysis report dated 22 December 2015. It would have been more appropriate for the Insurer to have obtained this updated information prior to making the Work Capacity Decision.

² Macquarie Dictionary

³ Oxford Dictionary



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23. I also note that as a result of the Insurer obtaining this updated information that the Internal Review Decision, although still resulting in the cessation of the applicant's weekly payments of compensation, differed to the Work Capacity Decisions originally made under Section 43(1)(b) & (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 22 September 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 3 July 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*.

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 "Tracey Emanuel". The signature is written in a cursive, flowing style.

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