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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 original decision is set aside.**
- b. The Insurer is to make a new work capacity decision as soon as practicable.**

Introduction and background

1. The applicant suffered injury to his lumbar spine in the course of his employment as a Baggage Handler. In 2000 he had four days off work with a lumbar injury after unloading a pallet. In September 2007 and November 2008 there were further claims for back injury. The applicant was certified fit for pre-injury work in April 2009. He was further unfit for work from 28 September 2010 to Australia Day 2011, when he returned to work. Between 29 July 2013 and 16 December 2013 the applicant was again unfit for work due to back injury. On 3 October 2014 the applicant submitted a further claim for back injury. This is the injury the subject of the current claim.
2. As a result of the injury the applicant was offered redeployment as a Resource Allocator Assistant by the employer for a period, which was less physically demanding than his pre-injury employment. On 10 May 2016 the applicant made a claim for secondary psychological injury. That claim was declined by the insurer and has no relevance to the work capacity decision-making process. For a time the applicant successfully performed the identified suitable employment until he was medically terminated on 25 November 2016. Weekly payments of compensation were made for all relevant periods.



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3. The applicant now seeks procedural review of a work capacity decision made by the Insurer on 23 March 2017. The decision informed the applicant that his weekly payments of compensation, paid at the rate of \$923.74 per week under section 37, would cease on 28 June 2017. This decision was made on the basis that his ability to earn in suitable employment is assessed at an amount which exceeds his PIAWE.
4. The applicant sought internal review and by letter dated 05 May 2017 was advised that the original decision to cease weekly payments was affirmed. Despite the decision remaining the same, the Insurer inserted on page 8 some details which are clearly referring to a different worker or a different claim. First, the Insurer purports to be reviewing a work capacity decision dated 25 November 2016. This is clearly the wrong date. Secondly, it is asserted that the applicant was “terminated from” his employment on 13 March 2013. This is simply untrue. His employment was terminated on 25 November 2015. Thirdly, the law is incorrectly applied and wrongly explained. The following appears:

As an existing recipient of weekly payments immediately before the commencement of weekly payments amendments, and given that you received 91 weeks in weekly payments of weekly payments of compensation since your date of injury, your entitlement to weekly compensation is referenced in accordance to section 38 of the *Workers Compensation Act* 1987.

5. There are so many errors in what appears above that it is hard to know where to start. Between 26 January 2011 and July 2013 the applicant was at work full time. There is no suggestion that he was in receipt of weekly payments at the same time. It follows that he was not an existing recipient. There is no mention in the original decision of the applicant being an existing recipient. Section 38 applies to a worker who has received a minimum of 130 weeks of payments, not 91 weeks. Elsewhere in the course of the decision the applicant is referred (correctly) to section 37.
6. The insurer then goes further and refers to the applicant’s non-compliance with section 38(3) as grounds for terminating payments. This is erroneous and clearly misleading to the applicant.



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7. Perhaps understandably, the applicant applied to the Authority for Merit Review, received on 02 June 2017 and they delivered findings and recommendations dated 28 June 2017. The Authority made findings that the applicant: (i) is able to return to work in suitable employment; and (ii) is able to earn \$1,156.80 per week in suitable employment. No recommendation was made.
8. An application for procedural review was received in this Office on 05 July 2017. I am satisfied that the application was made within time and in the correct form.
9. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the relevant *Guidelines*.

Submissions by the applicant

10. Section 44BB(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.*"
11. The applicant submitted thus:
 1. Correct procedure was not followed; and
 2. The decision is wrong in both fact and law.

Submissions by the Insurer

12. The Insurer made no submissions in reply.

The Decision

13. The Insurer made no errors of any sort in the original work capacity decision.
14. Despite this, the Insurer issued a document following internal review which had within it the serious errors referred to above in paragraphs 4-6.

15. The *Guidelines* which came into effect on 1 August 2016 are very clear in stating that parties must not be misled, disadvantaged or caused to suffer procedural unfairness in the course of the work capacity decision-making process (see *Guidelines* at page 6). This would *mutatis mutandis* include section 44BB review when the insurer is conducting internal review.
16. The applicant would have no way of knowing that the contents of page 8 of the internal review were based on a different worker or based on a misunderstanding of the law by the insurer, or perhaps both. That content clearly contradicts what he was told in the original decision.
17. I accept the submissions made by the applicant that the decision was wrong in both fact and law and accordingly it must be set aside for procedural error.

Finding

18. The internal review conducted by the insurer was incorrect and misleading to the applicant who was clearly prejudiced by the errors made.

RECOMMENDATION

19. The original decision is set aside.
20. The Insurer is to make a new work capacity decision as soon as practicable.



Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
26 July 2017