



**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 25 May 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 25 May 2015. The Decision informed the applicant that his weekly payments of compensation would cease on 1 September 2015. The applicant sought internal review by the Insurer on 9 December 2015 and the Internal Review Decision was dated 8 January 2016 confirming the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application dated 8 February 2016. The Authority delivered its Findings and Recommendations dated 4 March 2016. The Authority made a finding that the applicant has current work capacity and the Insurer must determine the applicant's entitlement to weekly payments of compensation under Section 38 of the *Workers Compensation Act 1987* (1987 Act) as amended on 4 December 2015.
3. The applicant then made an application to this office for procedural review by way of application dated 30 March 2016. I am satisfied that the application has been made within time and in the proper form.



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4. On 20 January 2005 the applicant suffered injury to his legs in the course of his employment as a crane driver. The applicant attempted to return to duties but was unsuccessful and his employment terminated in or about 2007. Since that time the applicant has attempted various types of employment. At the time of the Work Capacity Decision the applicant was not employed and was receiving 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 has provided extensive submissions which are not relevant to 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 *“outline the evidence considered in making the decision, noting the author, the date and any key information. All evidence considered should be referred to, regardless of whether or not it supports the decision.”*
10. The Insurer has made a Work Capacity Decision pursuant to Section 43(1)(a) of the 1987 Act that the applicant has current work capacity of *“38hrs per week x 5 days per week. These restrictions include to vary work conditions, limited typing, limited writing and limited sitting.”*



11. The Insurer has failed to particularise and refer to the evidence upon which it has based the above Work Capacity Decision. There is no reference to a Certificate of Capacity which according to Section 44B of the 1987 Act is primary evidence as to work capacity.
12. In the list of documents on the final page of the Work Capacity Decision there is reference to "*correspondence*" from Dr B dated 17 April 2015 however there is no clarification as to the nature of this correspondence or its contents.
13. The Insurer has failed to comply with the Guidelines and legislation in failing to outline the evidence it has relied upon to make the decision as to the applicant's current work capacity.
14. The Insurer made a Work Capacity Decision pursuant to Section 43(1)(b) of the 1987 Act that suitable employment for the applicant includes "*Case Worker and Community/Family Support Worker.*"
15. The Insurer has referred to a case conference and report from [name withheld] dated 20 April 2015 in making the above decision. The Insurer has correctly referred to that evidence in accordance with the Guidelines.
16. However, the Insurer then advises the applicant at page 2 of the Decision that the employment options were discussed with "*your doctor*" and that "*The doctor thought the options were suitable.*"
17. The Insurer has again failed to refer to evidence which can support the Decision it has made. Reference to a report or Certificate from the Doctor advising of his opinion would be appropriate. It is not sufficient to convey the doctor's "*thoughts*". The Insurer has failed to comply with the Guidelines and legislation.
18. 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 25 May 2015.

## **Finding**



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19. 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**

20. The Work Capacity Decision by the Insurer dated 25 May 2015 is set aside.

21. 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*.

22. 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  
2 May 2016