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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 work capacity decision dated 7 September 2016 is set aside.

b. The applicant should be paid for all relevant periods at the rate to which he was entitled immediately prior to the decision being made.

c. Such payments should continue until the Insurer makes a new decision and any notice period therein expires.

Introduction and background

1. The applicant suffered a knee injury in the course of his employment as an Industrial Property Analyst on 23 June 2016. The Insurer accepted liability and made weekly payments for about 11 weeks.

2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 7 September 2016. The Decision informed the applicant that his payments of compensation would reduce to $502.80 per week forthwith, since he had a PIAWE of $2,283.11 and an ability to earn $1,540.00 per week. This decision was made on a date when the insurer knew the applicant would be out of the country, he having previously advised the Insurer that he would be outside metropolitan Australia between 7 September and 8 October 2016.

3. Upon his return to Australia and receipt of the decision of the Insurer, the applicant applied for internal review. The Insurer informed the applicant that he was ineligible for a stay because his payments were reduced during the first 12 weeks and under section 54 no notice is required. Although his application for internal review was made more than 30 days after the work capacity decision was delivered, it was made within 30 days of his receipt of the decision.

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4. As a result of internal review dated 24 October 2016 the Insurer reduced the amount payable to Nil. This was said to be because the applicant could earn $2,200 per week as a Valuer. Peculiarly, the Insurer also found that the applicant could perform his pre-injury work as an Industrial Property Analyst, but only earn $1540.00 per week in the same occupation for which he was said to have a PIAWE of $2,283.11. The Insurer found he had capacity to work for 40 hours per week, could work in "suitable employment" as an Industrial Property Analyst, an Asset/Property Manager or a Valuer and was currently in the second entitlement period. He was advised that his payments would cease on 6 February 2017.

5. The applicant sought Merit Review from the Authority by way of application received 7 November 2016. The Authority delivered findings dated 30 November 2016. It was found that the applicant: (i) is able to return to work in suitable employment; (ii) is able to work as an Industrial Property Analyst, Asset/Property, or Valuer; (iii) has a current work capacity; and (iv) is able to earn $2,000.00 per week in suitable employment as a Valuer. The Authority went on to make 'no recommendation' based on the findings.

6. An application was made to this Office for procedural review received on 13 December 2016. I am satisfied that the application was made within time and in the correct form.

Submissions by the applicant

7. 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."*

8. The applicant made submissions about: (a) lack of notice, (b) the Insurer making the decision knowing the applicant would be out of the country at the time, and (c) not disclosing "how his personal impairment was calculated and which documents on file were considered."

Submissions by the Insurer

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9. Nothing was provided by the Insurer in response the applicant's submissions, although reading their 'Notes' it appears that they have a different timeline about the proposed overseas travel. The Insurer has a note saying that the applicant was to be out of the country from 8 September 2017. Specifically they say:

> On 24 August 2016 [the applicant] advised his case manager that he would be overseas from 8 September 2016 for a month. On 7 September 2016, prior to him going on holidays, [the applicant's] case manager attempted to contact [him] to advise of the outcome of the work capacity decision, left several messages on his mobile to return calls and a copy of the decision notice was sent via email the same day.

10. It would appear that the Insurer was under a misapprehension about the date of departure, although the reason for that is unclear.

The relevant Guidelines

11. On 1 August 2016 the *Guidelines for Claiming Workers Compensation* (the Guidelines) came into effect and replaced, *inter alia*, the former documents styled as *WorkCover Guidelines for Work Capacity* dated 4 October 2013 and *Guidelines for Work Capacity decision internal reviews by insurers and merit reviews by the Authority* dated 4 October 2013.

12. The new Guidelines repeat some of the same errors which plagued the predecessors, and include some new concepts which appear to be otherwise strangers to the law. Highlights include, but are by no means limited to, the following:

- The statement at page 4 that the Guidelines "*operate by force of law as delegated legislation*." This would be news to the NSW Court of Appeal – see *Ali v AAI Ltd* [2016] NSWCA 110 at 74-99, per Leeming, JA.

- The doctrine of "Substantial Compliance" which appears at the top of page 6 in the following terms:

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> *If a worker or insurer provides information or takes action that is substantially compliant with these guidelines, but is a technical breach of these guidelines, then the information or action remains valid unless a party has, as a result of that breach:*
>
> *been misled*
>
> *been disadvantaged, or*
>
> *suffered procedural unfairness.*
>
> *This does not affect the obligation on workers, employers or insurers to fully comply with* ***all applicable workers compensation legislation***.[1]

13. It appears that "all applicable workers compensation legislation" does not include **purported delegated legislation**. And in case Insurers are having difficulty deciding whether or not a worker has suffered from a breach of the rules of procedural fairness, they can now look to Guidelines B1.2 (on page 21, concerning work capacity assessments) and B1.3 (on page 24, concerning work capacity decisions) which are, relevantly, in the following near-identical[2] terms:

> Insurers **should**[3] consider the principles of procedural fairness, including fair notice, when making any [assessment/decision] that may affect a worker's rights or interests. Insurers **will need to**[4] determine what the principles of procedural fairness require, on a case by case basis, having regard to the nature and potential consequences of each decision that may be made.

[1] Emphasis added.
[2] I said 'near-identical' because they are word-for-word the same with the exception of "assessment" appearing in Guideline B1.2 and "decision" appearing in Guideline B1.3.
[3] Note, where they do not say "must," the Guidelines purport only to be reflecting the preferences of SIRA, not the legislation. If they are reflecting the legislation, they say "must." So we are told on page 4 under the heading "About these guidelines." Another way of reading this is to say that "should" means "are not legally required to so act."
[4] It is not known where "will need to" sits on the "'must'-to-'should'" spectrum. Given that the exercise itself is expressed to be under the "should" rubric, it seems that this statement is particularly confusing.

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14. No doubt his Honour Justice Davies of the Supreme Court of New South Wales will be interested to see that SIRA regards the rules of procedural fairness as an optional extra, to be determined by insurers themselves as they see fit. In the case of *The Trustees of the Sisters of Nazareth v Simpson*, his Honour found that the procedures of an Insurer reviewable in the course of section 44BB review "certainly include procedural fairness."[5]

15. The most risible effort in the entire document appears at page 27 under the heading "The stay of a work capacity decision." Making no attempt to distinguish between the stay, on the one hand, and the prohibition on taking any action "based on the decision" for the duration of section 44BB review on the other, both of which form the two limbs of section 44BC(1), the Guidelines reach something of a Malapropic crescendo with the following comment on the effect of a stay:

> "It cannot reinstate what has already occurred."

16. It may take parties some time to come to grips with the new Guidelines, which have completely different numbering and substantial differences in content to those which came before. Given that the wrong version of the Guidelines appeared on the SIRA web-site for a period, there may be reason to anticipate difficulties with compliance, substantial or otherwise.

Decision

17. The reason I devoted so much valuable space to a discussion of the applicable Guidelines is that they formed no part of the Insurer's decision-making process. I know this because of what appears towards the foot of page 1 of the work capacity decision. The full sentence is as follows:

> The reasons for this work capacity decision and all other important details are provided below as required under clause 5.3.2 of the *WorkCover Work Capacity Guidelines*.

[5] [2015] NSWCS 1730 at 36.

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18. This is a reference to the former Guidelines which were in effect from October 2013 until 31 July 2016, but were not in effect as at 7 September 2016, being the date of the work capacity decision.

19. A failure to cite the correct Guidelines must result in a procedural unfairness to the applicant. This is because a worker must be able to check whether or not an Insurer has complied with the relevant legislation, regulations and Guidelines before deciding whether or not to take steps to have the decision reviewed under section 44BB.

20. There is a further anomaly in the decision, which is compounded by the decision of the merit reviewer. The Insurer found that the applicant could work for 40 hours per week in his pre-injury occupation, but earning considerably less than his PIAWE. The reason this oddity is compounded in the course of merit review becomes clear from a perusal of paragraph 27 of the merit review:

> 27. *Although the reasons (sic) for the termination of [the applicant's] employment was as a result of the employer's opinion of unsatisfactory performance on the part of [the applicant]* ***and not due to his work related injury****, in the circumstances, it is unlikely in my view that [the applicant] will return to his pre-in jury employment in the foreseeable future. I am therefore satisfied that [the applicant] is not able to return to his pre-injury employment*.

21. The definition of "current work capacity" in section 32A requires a component of "inability arising from an injury." Since both the Insurer and the merit reviewer found the applicant capable of working as an Industrial Property Analyst for 40 hours per week, and given that the applicant was working as an Industrial Property Analyst on the date of his injury, I am struggling to see how either the Insurer or the merit reviewer were able to conclude that the applicant had "current work capacity" as defined. It is far more likely that the "internal review" decision should have been called a liability dispute and the insurer should have issued as a section 74 notice.

22. Leaving aside the question of whether or not the internal review decision was really a section 74 notice in disguise, the failure of the Insurer to

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use and cite the correct Guidelines is a clear breach of the rules of procedural fairness and the decision must be set aside.

Finding

23. The decision was invalidly made.

RECOMMENDATION

24. The work capacity decision dated 7 September 2016 is set aside.

25. The applicant should be paid for all relevant periods at the rate to which he was entitled immediately prior to the decision being made.

26. Such payments should continue until the Insurer makes a new decision and any notice period therein expires.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
17 January 2017