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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 by the Insurer dated 3 December 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 December 2015. The Decision informed the applicant that his weekly payments of compensation would cease on 10 March 2016. The applicant sought internal review by the Insurer on 11 January 2016 and the Internal Review Decision was dated 3 February 2016 confirming the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application dated 26 February 2016. The Authority delivered its Findings and Recommendations dated 22 March 2016. The Authority made a finding that the applicant has current work capacity and he does not meet the special requirements under Section 38(3) of the *Workers Compensation Act 1987* (1987 Act) for continuation of weekly payments after the second entitlement period.



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3. The applicant then made an application to this office for procedural review by way of application dated 4 April 2016. I am satisfied that the application has been made within time and in the proper form.
4. On 13 April 2004 the applicant reported injury to his lower back suffered at various times throughout the course of his employment as a truck driver. At the time of the Work Capacity Decision the applicant 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. The first part of the Work Capacity Decision made by the Insurer appears at page 1 of the Decision. The Insurer has stated:

“Under subsection 43(1)(a), I have determined that you have a current work capacity of 2 to 12 hours a day, depending on work load and pain levels and up to 7 days per week...”

10. If the applicant performs the calculations for his work capacity it is from 2 hours to a maximum of 84 hours per week.



11. Section 43(1)(a) of the 1987 Act allows an Insurer to make a decision about a worker's current work capacity.
12. Guideline 5.1 requires that a Work Capacity Decision "*should be logical, rational and reasonable.*"
13. The "*Decision*" made by the Insurer that the applicant has capacity of anywhere from 2 to 84 hours per week and 1 to 7 days per week is flawed. The latitude between the assessments made by the Insurer renders them nonsensical. The Insurer must be referring to a dimorph rather than a normal worker, as it cannot possibly be the same individual that can work either two hours per week on one day and also work up to 84 hours over 7 days in the very same week.
14. The Insurer has also made a Decision at page 5 of the Work Capacity Decision that pursuant to Section 43(1)(c) of the 1987 Act the applicant can earn \$919.80 per week as a receipt and dispatch officer. The Insurer has merely phrased this as "*the average weekly earnings.*" However, the assessment of the applicant's capacity is anything but average. It would not be possible for the applicant in this case, who may work the minimum of 2 hours on 1 day and/or up to 84 hours over 7 days to earn the "*average weekly earnings*" to which it refers.
15. The Insurer's Decisions in respect of the applicant's current work capacity and the amount the applicant is able to earn in suitable employment are not consistent. The Insurer has failed to comply with the Guidelines.
16. 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 3 December 2015.

Finding

17. 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



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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

18. The Work Capacity Decision by the Insurer dated 3 December 2015 is set aside.
19. 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*.
20. 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
6 May 2016