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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 13 August 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 13 August 2015. The Decision informed the applicant that his weekly payments of compensation would cease from 20 November 2015. The applicant sought internal review by the Insurer on 11 December 2015 and the Internal Review Decision was dated 28 January 2016 confirming the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application dated 25 February 2016. The Authority delivered its Findings and Recommendations dated 23 March 2016. The Authority made a finding that the applicant has current work capacity and his entitlement to weekly payments falls after the second entitlement period and is to be determined in accordance with Section 38 of the *Workers Compensation Act 1987* (1987 Act). I note that the Insurer made a Work Capacity Decision dated 18 April 2016 but such is not relevant to this procedural review.



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3. The applicant made an application to this office for procedural review by way of application dated 14 April 2016. I am satisfied that the application has been made within time and in the proper form.
4. On 27 February 2013 the applicant, during the course of his employment, fell approximately 1 metre off a platform resulting in three fractured ribs and a lung contusion. Since that time the applicant has been certified with varying capacity. At the time of the Work Capacity Decision the applicant was not working and was in receipt of 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 submissions through his solicitor including:
 - The Insurer failed to comply with Guideline 2.2 which requires decisions to be considerate of the worker’s and employer’s primary language;
 - The Insurer failed to advise the applicant of the exception under Section 39 of the 1987 Act and that he may be entitled to weekly payments if his level of whole person impairment is greater than 20%;
 - The Insurer failed to provide a method of contact; and
 - The Insurer failed to advise of the process for requesting a review.

Submissions by the Insurer



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7. The Insurer has made the following submissions in response to this application:
- The Insurer informed the applicant he was able to obtain further assistance if required at page 18 of the Work Capacity Decision;
 - The information in respect of requesting a review is at page 18 of the Work Capacity Decision;
 - The applicant was advised of his case manager's number in the fair notice letter; and
 - At the time of the Work Capacity Decision the stay provisions had not been introduced.

Decision

8. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
9. Guideline 5.1 requires the Work Capacity Decision to be logical, rational and reasonable.
10. Guideline 5.3.2 requires the Insurer to explain the relevant entitlement periods.
11. As at the date of the Work Capacity Decision the applicant had been in receipt of weekly payments of compensation for 117 weeks. This placed the applicant in the "*second entitlement period*" which is defined in Section 32A of the 1987 Act and means his ongoing entitlements are subject to Section 37.
12. At page 17 of the Work Capacity Decision the Insurer informed the applicant:
- "As you are not currently working and have been in receipt of weekly payments for a period of 117 weeks, your ongoing entitlement to weekly payments are (sic) to be determined under Section 38(3) of the Workers Compensation Act 1987."*
13. This statement by the Insurer is incorrect and is a procedural error. At the time of the Work Capacity Decision the applicant's entitlements are



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clearly subject to the provisions of Section 37 of the 1987 Act. As the Insurer has made a decision under Section 43(1)(a) that the applicant has the capacity to work 40 hours per week (page 6 of the Work Capacity Decision) and that the applicant has not returned to work his ongoing entitlements are subject to Section 37(3) of the 1987 Act.

14. The Insurer has attempted to circumvent the entitlement periods by assessing the applicant's entitlement as at the time the Work Capacity Decision comes into effect rather than assessing it at the time the work capacity assessment and Decision were made.
15. The Insurer assessed the applicant's ongoing entitlement by using criteria that did not apply to the applicant at the time of the work capacity assessment and Decision.
16. I note Section 38 (4) of the 1987 states:

"(4) An insurer must, for the purpose of assessing an injured worker's entitlement to weekly payments of compensation after the expiry of the second entitlement period, ensure that a work capacity assessment of the worker is conducted:

(a) during the last 52 weeks of the second entitlement period, and

(b) thereafter at least once every 2 years."

17. However, I consider this section allows for an *assessment* to be made during the last 52 weeks of the first 130 weeks for reasons related to the calculation of PIAWE and the relevant number of weeks over which earnings must be calculated. The section does not require the Insurer to make a *decision* in the relevant period.
18. Such reason for the above is quite logically contained in Section 38 (3) of the 1987 Act :

"38(3) A worker (other than a worker with high needs) who is assessed by the insurer as having current work capacity is entitled to compensation after the second entitlement period only if:



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*(b) the worker **has** returned to work (whether in self-employment or other employment) for a period of not less than 15 hours per week and is in receipt of current weekly earnings (or current weekly earnings together with a deductible amount) of at least \$155 per week.”*
(emphasis added)

19. This section does not say that the worker must be certified as capable of performing such work but rather the worker has to have *actually returned* to work. This is not a matter for assessment or decision – it is a question of fact and is only answerable at the relevant time.
20. In this instance the Insurer should have made the Work Capacity Decision under Section 37 of the 1987 Act and advise the applicant that if he wishes to qualify for payments after 130 weeks he will have to comply with the special requirements in Section 38(3)(a) – (c) at the relevant future time. The Insurer cannot prematurely assert that the applicant does not meet the requirements of Section 38(3) since he does not have to meet them until week 131, it is therefore an irrelevant consideration and the applicant may meet the requirements when the time comes (even if it seems unlikely at the time).
21. 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 13 August 2015.

Finding

22. 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



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23. The Work Capacity Decision by the Insurer dated 13 August 2015 is set aside.
24. 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*.
25. 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
16 May 2016