



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 23 October 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 23 October 2015. The Decision informed the applicant that his weekly payments of compensation would cease from 29 January 2016. The applicant sought internal review by the Insurer on 25 December 2015 and the Internal Review Decision was dated 20 January 2016 confirming the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application dated 15 February 2016. The Authority delivered its Findings and Recommendations dated 11 April 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). The Authority noted that the applicant's entitlement calculated under Section 38(7) of the 1987 Act is nil.



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3. The applicant made an application to this office for procedural review by way of application dated 29 April 2016. I am satisfied that the application has been made within time and in the proper form.
4. As a result of the nature and conditions of the applicant's employment as a freight handler he suffered injury to his lumbar spine. The accepted date of injury is 27 September 2001. The applicant's employment was terminated in or about 2005. The applicant obtained employment as a truck driver with another employer on 3 January 2006. There was a downturn in business and the applicant's employment was terminated in September 2007. He then began working with a courier company in March 2008 and remains in that employment. At the time of the Work Capacity Decision the applicant 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 the following submissions:
 - The applicant has an inability to return to his pre-injury employment;
 - The applicant is unable to work long hours and this affects his everyday life and family;
 - The applicant requires the Insurer to make up the difference in his wages so that he is able to live a comfortable life.
7. I am unable to have regard for the personal circumstance of the applicant and I am only able to review the procedures used by the Insurer in making this Work Capacity Decision. The submissions made by the applicant are not relevant to this review.



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Submissions by the Insurer

8. By way of email dated 6 May 2016 the Insurer indicated it had no additional submissions to make other than the documents provided which included the Work Capacity Decision, Internal Review Decision and Merit Review Service Recommendations and Findings.

Decision

9. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
10. Guideline 5.3.2 requires the Insurer to state the decision and give brief reasons for making the decision. The Insurer is also to outline the evidence considered in making the decision, noting the author, the date and key information.
11. The Insurer made a decision pursuant to Section 43(1)(a) that the applicant has a current work capacity of 8 hours per day 5 days per week in accordance with the Certificate of Capacity dated 31 July 2015 and suitable employment approval dated 22 September 2015 both from the nominated treating doctor.
12. The next decision the Insurer made was under Section 43(1)(b) that delivery driver was suitable employment for the applicant. This was supported by a vocational assessment report dated 29 September 2015 and approval from the nominated treating doctor dated 22 September 2015. The Insurer also noted that the applicant had been performing these types of duties since 2008.
13. Up until this stage the Insurer had displayed a reasonable understanding and compliance with the Guidelines and legislation.
14. The remaining decision made by the Insurer was under Section 43(1)(c) as to the amount the applicant was able to earn in suitable employment. The Insurer relied upon the vocational report dated 22 September 2015 in which it was reported that contact was made on 16 September 2015 with an employer in the labour market enquiring as to earnings of a delivery driver. The weekly wage for that role with that employer was



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\$1140 per week based on a 38 hour week. The Insurer determined this amount to be the amount the applicant could earn in suitable employment.

15. Guideline 5.1 requires the Work Capacity Decision made by the Insurer to be *logical, rational and reasonable*. The Insurer has noted that the applicant has been working as a delivery driver, which was determined to be suitable employment, since 2008. The Insurer appropriately used this as supporting evidence in determining suitable employment for the applicant.

16. However, in determining the amount the applicant is able to earn in that suitable employment the Insurer has failed to refer to the actual earnings of the applicant over the past 8 years. I note that I am not able to review the discretion used by the Insurer in making decisions however, it would be deemed to be *logical, rational and reasonable* to take into consideration the actual earnings of the applicant over the preceding 8 years when determining capacity to earn. At the very least the Insurer should provide an explanation as to why the applicant's earnings were not accepted or considered in making this decision.

17. Guideline 5.3.2 requires the Insurer to explain the relevant entitlement periods and reference the relevant legislation.

18. At page 4 of the Work Capacity Decision the Insurer has informed the applicant that he has received 712 weeks of compensation payments. The Insurer advises the applicant that his benefits are '*currently calculated*' using Section 38. The Insurer then explains the relevant entitlement period as:

"Section 38 – Special requirements for continuation of weekly payments after second entitlement period (after 130 weeks).

19. At no stage has the Insurer informed the applicant of the '*special requirements*' referred to in Section 38. The Insurer has failed to inform the applicant that in order to be entitled to a continuation of weekly payments after the second entitlement period he must have returned to work for not less than 15 hours per week and be in receipt of \$155 per week (as adjusted).



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20. Throughout the Work Capacity Decision the Insurer has failed to reference the number of hours or the current earnings of the applicant. It is not established by the Insurer that the applicant has complied with the '*special requirements*' set out in Section 38 in order to be entitled to ongoing weekly payments of compensation.
21. It may be inferred that the applicant has complied as the Insurer has then used the algorithm to determine the applicant's entitlement as set out in Section 38(7) of the 1987 Act which represents the weekly payment of compensation to which an injured worker who has current work capacity is entitled after the second entitlement period.
22. However, it is only a person with specialised knowledge of the 1987 Act and the entitlement periods who would be able to infer this information from the lack of detail provided by the Insurer. The Insurer has failed to adequately explain the entitlement periods to the applicant.
23. When calculating the applicant's entitlement the Insurer has informed the applicant that '*Under section 38 the formula used to calculate your benefits is $993.70 \times 80\%$ ($\$794.96 - \$1140 = \$-345.34$).*'
24. The Insurer has failed to explain to the applicant the figures which it has used in the algorithm. The Insurer has not informed the applicant that he is an '*existing recipient*' and therefore his pre-injury average weekly earnings are the '*transitional amount*' contained in Schedule 6, Part 19H, Clause 2 of the 1987 Act which is \$993.70 per week (as adjusted).
25. The Insurer has failed to explain to the applicant why his ongoing entitlement is to be calculated under Section 38(7) of the 1987 Act.
26. 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 23 October 2015.

Finding



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27. 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

28. The Work Capacity Decision by the Insurer dated 23 October 2015 is set aside.

29. 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*.

30. 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
20 May 2016