



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 15 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 15 December 2015. The Decision informed the applicant that her weekly payments of compensation would cease on 21 March 2016. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 5 February 2016 and confirmed the cessation of the applicant's weekly payments of compensation.
2. The applicant sought Merit Review from the Authority by way of application dated 2 March 2016. The Authority delivered its Findings and Recommendations dated 5 April 2016. The Authority made a finding that the applicant did not meet the special requirements under Section 38(3) of the *Workers Compensation Act 1987* (1987 Act) for continuation of weekly payments of compensation.
3. The applicant then applied to this office for procedural review by way of application dated 3 May 2016. I am satisfied that the application has been made within time and in the proper form.



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4. The applicant previously sought a review of a Work Capacity Decision dated 21 October 2014. The applicant was successful and the Work Capacity Decision was set aside by an earlier recommendation of this office.¹
5. The facts and circumstances surrounding the background of this claim are set out in the aforementioned recommendation and need not be repeated.
6. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the WorkCover Work Capacity Guidelines (Guidelines).

Submissions by the applicant

7. 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.
8. In addition to making the application for review the applicant has made a submission that her weekly payments ceased without notice or explanation on 16 April 2016. Further the applicant made submissions which specifically referenced the Merit Review by the Authority.
9. Pursuant to Section 44BB of the 1987 Act I am only able to review the Insurer’s procedures in making the Work Capacity Decision. I am unable to review any of the Recommendations and Findings by the Authority. These submissions by the applicant are not relevant to procedural review.

Submissions by the Insurer

¹ Reported and numbered as 5515



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10. The Insurer provided submissions dated 9 May 2016 in response to the application. The Insurer pointed out that the majority of the applicant's submissions related to the Merit Review.
11. In respect of the cessation of weekly payments the Insurer has submitted that the applicant was advised verbally and in writing that, as per the legislation, her payments would cease.

Decision

12. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
13. Guideline 2.3 requires all decisions made in relation to the applicant's recovery and work capacity should be timely, informed and evidence based. In this particular instance it is noted that the Insurer completed a work capacity assessment on 5 August 2015. The Work Capacity Decision was sent to the applicant on 15 December 2015. This is in excess of four months after the assessment was completed.
14. Section 43(1)(a) of the 1987 Act allows an Insurer to make a decision about a worker's **current** work capacity.
15. On page 1 the Insurer makes a Work Capacity Decision in accordance with Section 43(1)(a) of the 1987 Act that the applicant has current work capacity of 20 hours per week. A perusal of the Decision reveals that the Insurer has based this decision upon an Earning Capacity Assessment report dated 13 February 2014. The Insurer states "*it has been determined you initially have capacity for 4 hours/day 5 days/week and gradually upgrade to full hours.*"
16. At page 4 of the Work Capacity Decision the Insurer refers to a Certificate of Capacity from the applicant's nominated treating doctor certifying the applicant to have *no current work capacity* for employment from 16 October 2015 to 16 January 2016.
17. I note that pursuant to Section 44BB of the 1987 Act I am unable to review any judgment or discretion exercised by the Insurer in making its



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decision. However, I am able to review that the correct procedures were in place prior to the Insurer making its decision.

18. At page 8 of the Work Capacity Decision the Insurer provides the following reasoning for its determination as to the applicant's **current** work capacity:

*"[named Insurer] has considered this **current** medical information in making this Work Capacity Decision. It is noted that while Dr L has advised you currently have no capacity for work, this is inconsistent with the **balance of evidence** indicating you have a **current** capacity for some type of employment."*(emphasis added)

19. When the preceding pages of the Decision are reviewed the 'current medical information' referred to by the Insurer consists of reports dating from April 2009 up until 13 February 2014. There is also reference to a report from IME Dr George, psychiatrist, dated 22 December 2014 who did consider that a 'graduated return to work would be a reasonable option.' It is not reported that the doctor makes any specific assessment of the applicant's capacity.

20. The evidence relied upon by the Insurer to make a Work Capacity Decision must be recent and up to date. The use of the word "current" in the phrase "current work capacity" and the legislative obligation for a certificate of capacity to provide assessments for 28 day intervals establishes this requirement.

21. The definition of the word current includes "passing in time, or belonging to the time actually passing: the current month"² and "belonging to the present time; happening or being used or done now."³

22. The Insurer, in the paragraph supporting its decision, has used the word 'current' on two occasions. The mere use of the word 'current' does not justify the decision. The evidence upon which the decision is based must be recent. The Insurer has preferred evidence commenting upon current capacity which is 22 months out of date over the nominated treating doctor's opinion which is dated 2 months prior to the decision

² Macquarie Dictionary

³ Oxford Dictionary



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being made. The evidence used to support the Insurer's decision is not reflective of the applicant's **current** work capacity. The use of such evidence upon which to base a decision is procedurally incorrect.

23. The Insurer should have acquired an up to date medical report / certificate providing an assessment of the applicant's capacity from the authors of the earning capacity assessment. Depending upon the assessment, and if it was reflective of the Decision made by the Insurer, it would have established that proper procedure was followed in making the decision as to '*current work capacity*.'
24. 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 15 December 2015.

The Stay

25. The applicant advised in her submissions that the Insurer had ceased her weekly payments of compensation as at 14 April 2016. This was during the review process.
26. Section 44BC of the 1987 Act operates so as to entitle a worker, during the course of a Section 44BB review, to receipt of the same compensation payments to which she was entitled to immediately prior to the making of the adverse Work Capacity Decision.
27. The entitlement has no time cap or deadline or other limitation on it beyond receipt by the worker of the review decision. This is an entitlement which exists irrespective of the existence or duration of any notice given to the worker under Section 54 of the 1987 Act.
28. Payments which continue under Section 54 are subject to the usual requirements of providing updated work capacity certificates and other compliance with the legislation by the worker. There is no such requirement under Section 44BC. The worker has already fully qualified to receive their ongoing payments as at the date of the work capacity decision. The applicant is automatically entitled to payments again upon application for review under section 44BB (unless the application for review is outside the "within 30 days" time limit).



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29. Section 44BC of the 1987 Act operates so that the Work Capacity Decision is the subject of a stay during the review process. This not only stays the decision, but also prevents the Insurer taking “any action based on the decision whilst it is stayed.” By definition the cessation of payments, which is clearly based on the decision, is such an “action” and may not take place during the relevant period of review.
30. There appears to be a view that if an Insurer has already stopped payments prior to an application for merit or procedural review, then payments need not be resumed during such review, since the Insurer cannot take “any action” during that time, which is erroneously interpreted to include a prohibition on the resumption of weekly payments. Such an analysis begs the question, since it assumes the work capacity decision was correct, and it also completely defeats the purpose of the legislative amendment, which was to ensure that workers are paid for the duration of Section 44BB review. It also follows that the resumption of payments is not an action “based on the decision” (since the decision resulted in a reduction or cessation) and therefore cannot be the subject of prohibition.

Finding

31. 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

32. The Work Capacity Decision by the Insurer dated 15 December 2015 is set aside.
33. 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



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continue until a new decision is made in accordance with Section 43(1) of the Workers Compensation Act 1987.

34. 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 "T. Emanuel".

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
23 May 2016