



Level 4, 1 Oxford Street, Darlinghurst NSW 2010  
T: 13 9476  
contact@wiro.nsw.gov.au  
www.wiro.nsw.gov.au

## **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 18 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 18 December 2015. The Decision informed the applicant that her weekly payments of compensation would cease on 1 April 2016. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 22 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 16 March 2016. The Authority delivered its Findings and Recommendations dated 12 April 2016. The Authority made a finding that the applicant did not meet the special requirements under Section 38 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 5 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 24 June 2014. The applicant was successful and the Work Capacity Decision was set aside by an earlier recommendation of this office.<sup>1</sup>
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.

#### **Submissions by the Insurer**

8. The Insurer has not provided any submissions in response to the application.

#### **Decision**

9. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
10. Guideline 2.3 requires all decisions made in relation to the applicant’s recovery and work capacity should be timely, informed and evidence based. Guideline 5.3.2 specifies that the Insurer must outline the evidence considered in making the decision, noting the author, the date and key information.

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<sup>1</sup> Reported and numbered as 17515



11. On page 1 the Insurer made 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.

12. A perusal of the Decision reveals that the Insurer has supported this decision with the following statement on page 2:

*“You have been certified for your current capacity of 20 hours per week since 6 July 2015.”*

13. The Insurer has failed to refer to the evidence in support of that Decision. The Insurer has not referred to the source document upon which the Decision was based. The Insurer has not complied with Guideline 5.3.2.

14. Further review of the Decision provides a list of documents relied upon to make the Decision at page 6. A Certificate of Capacity is listed from the nominated treating doctor dated 4 May 2015. That is over 7 months prior to the Decision being made.

15. Section 43(1)(a) of the 1987 Act allows an Insurer to make a decision about a worker’s *current* work capacity.

16. 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.

17. The definition of the word *current* includes “*passing in time, or belonging to the time actually passing: the current month*”<sup>2</sup> and “*belonging to the present time; happening or being used or done now.*”<sup>3</sup>

18. The evidence used to support the Insurer’s Decision is not reflective of the applicant’s **current** work capacity. The use of evidence being over 7 months old upon which to base a decision is procedurally incorrect.

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<sup>2</sup> Macquarie Dictionary

<sup>3</sup> Oxford Dictionary



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19. I refer to the previous Recommendation from WIRO dated 19 November 2015 which set aside the earlier Work Capacity Decision dated 4 June 2014 which is referred to in paragraph 4 above. That Recommendation set out the procedural error contained in that Decision.
20. I note that the Insurer has made the same procedural error in the Work Capacity Decision which is the subject of this review. After making a Decision in respect of the applicant's capacity to work and what constitutes suitable employment the Insurer has again failed to take the added step of quoting an hourly or daily rate of remuneration of such labour and making a decision in accordance with Section 43(1)(c) of the 1987 Act. The reasoning and case law used to set aside that Decision is contained in our earlier Recommendation and shall not be repeated here.
21. The Insurer has failed to use *current* medical evidence upon which to base its decision as to the applicant's *current* work capacity and has repeated the procedural error contained in the previous Work Capacity Decision which was set aside. In these circumstances 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 18 December 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**

23. The Work Capacity Decision by the Insurer dated 18 December 2015 is set aside.



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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  
1 June 2016