



**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 2 February 2016 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 2 February 2016. The Decision informed the applicant that his weekly payments of compensation would cease from 10 May 2016. The applicant sought internal review by the Insurer on 19 February 2016 and the Internal Review Decision was dated 18 March 2016 which essentially confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority and the Authority delivered its Findings and Recommendations dated 4 May 2016. The Authority made a finding that the applicant has current work capacity and he does not meet the special requirements set out in Section 38(3) of the *Workers Compensation Act 1987* (1987 Act).
3. The applicant made an application to this office for procedural review by way of application dated 24 May 2016. I am satisfied that the application has been made within time and in the proper form.



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4. On 5 September 2002 the applicant sustained injury to his lower back and upper limbs whilst in the course of his employment as a process worker. The applicant initially returned to the employer on light duties but suffered an aggravation within two weeks. 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 the following submissions:
  - He has not returned to work for at least 15 hours per week and has not earned \$176 per week;
  - He has attempted to find suitable employment;
  - He does not agree that he could perform the suitable employment assessed in the Work Capacity Decision.
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.

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

8. The Insurer has provided submissions dated 26 May 2016 in response to the applicant’s application. The Insurer has submitted that:
  - The applicant has been paid weekly payments of compensation for 601 weeks and therefore any ongoing entitlement is subject to Section 38(3) of the 1987 Act;



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- The applicant has been assessed as having a current work capacity and has not returned to suitable employment; and
- The Work Capacity Decision has been upheld at internal review and Merit Review.

## 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 impact of the decision on the worker in terms of their entitlement to weekly payments, entitlement to medical and related treatment expenses and return to work obligations.
11. The Insurer has informed the applicant that his entitlement to weekly payments ceased on 10 May 2016. The Insurer then informed the applicant of the following information:

*“Following this your entitlement to medical and related expenses will continue for a further 12 months in accordance with section 59A(2) of the WC Act.”*

12. Upon review of the 1987 Act Section 59A(2) states:

*(1) Compensation is not payable to an injured worker under this Division in respect of any treatment, service or assistance given or provided after the expiry of the compensation period in respect of the injured worker.*

*(2) The compensation period in respect of an injured worker is:*

*(a) if the injury has resulted in a degree of permanent impairment assessed as provided by section 65 to be 10% or less, or the degree of permanent impairment has not been assessed as provided by that section, **the period of 2 years commencing on:***



*(i) the day on which the claim for compensation in respect of the injury was first made (if weekly payments of compensation are not or have not been paid or payable to the worker), or*

*(ii) the day on which weekly payments of compensation cease to be payable to the worker (if weekly payments of compensation are or have been paid or payable to the worker), or*

*(b) if the injury has resulted in a degree of permanent impairment assessed as provided by section 65 to be more than 10% but not more than 20%, the period of 5 years commencing on:*

*(i) the day on which the claim for compensation in respect of the injury was first made (if weekly payments of compensation are not or have not been paid or payable to the worker), or*

*(ii) the day on which weekly payments of compensation cease to be payable to the worker (if weekly payments of compensation are or have been paid or payable to the worker).*

13. The Insurer has not indicated in the Work Capacity Decision as to whether the applicant has had a permanent impairment assessment. In any event the applicant would be entitled to medical and related treatment expenses for a minimum of 2 years regardless of any permanent impairment assessment.

14. The information provided by the Insurer to the applicant as to the impact the cessation of his weekly payments of compensation has on his entitlement to medical and related treatment expenses is incorrect and amounts to a procedural error.

15. In the *Trustees of the Sisters of Nazareth v Simpson*<sup>1</sup> it was stated by Davies J that “every failure to follow the Guidelines could not result in the setting aside of the insurer’s decision. Such result would be legally unreasonable.”

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<sup>1</sup> [2015] NSWSC 1730



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16. However, on this occasion the failure by the Insurer to properly advise the applicant of his entitlements is a significant error and could lead to the applicant not pursuing compensation for medical expenses which he was legally entitled to receive.
17. In addition to the above I do note that at page 1 of the Work Capacity Decision the Insurer has informed the applicant that he has the ability to earn \$580 gross per week based on a 20 hour week. Then at page 3 of the Decision, under the heading "*c. Your ability to earn*" the applicant is informed that under section 43(1)(c) of the 1987 Act he can earn \$400 per week. And then in the same section of the Decision the applicant is advised that he has the capacity to work 20 hours per week, the ability to earn \$20 per hour totalling \$580 gross per week.
18. The above is just perplexing to the applicant and clearly has not been properly calculated or reviewed by the Insurer.
19. Furthermore, on the covering letter annexed to the Decision in the second paragraph the Insurer has informed the applicant "*I am now issuing the notice to advise you that you have been assessed as having an ability to work in suitable employment for 20 per week.*" The Insurer has failed to specify what "*20 per week*" actually means. The error is repeated three paragraphs later on the same page.
20. Also at page 3 of the Work Capacity Decision the applicant is informed that he received 491 weeks of compensation payments. In the Internal Review Decision the applicant is informed that he has received 591 weeks of compensation payments. As each Decision is only dated 6.4 weeks apart this is another basic error by the Insurer.
21. I note that Section 44BB of the 1987 Act only allows me to review the Work Capacity Decision but I am compelled to point out the basic errors in the Internal Review Decision. On page 2 of the document titled "*We have reviewed our decision*" the Insurer has informed the applicant that he has been assessed "*as having a capacity to earn \$35.00 per week in suitable employment.*" Yet at page 4 under the title "*d. Your ability to earn*" the applicant is assessed as having the ability to earn "\$350.00" per week. Another basic and unacceptable error committed by the Insurer.



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22. However, the real issue with the Insurer's assessment of the applicant's capacity to earn in the Internal Review Decision is the method of calculation. The Insurer determined the role of Light Packer to be suitable duties and the earnings for three separate employers were \$340 per week, \$400.00 per week and \$340 per week for a 20 hour week. The Insurer assessed the applicant's ability to earn under Section 43(1)(c) of the 1987 Act as \$350.00 per week. This does not correspond to any of the earnings specified by the Insurer in the Decision. Clearly based on the Insurer's own evidence the applicant is unable to earn the amount of \$350 per week in the suitable employment specified as it is a hybrid of the three amounts nominated.
23. The Work Capacity Decision by the Insurer contains basic errors which clearly indicate that the document has not been properly drafted or checked by the author or the reviewer. This is not acceptable and these errors render the Decision invalid.
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 2 February 2016.

### **Finding**

25. 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**

26. The Work Capacity Decision by the Insurer dated 2 February 2016 is set aside.
27. 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*.

28. 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  
22 June 2016