



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 29 January 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 29 January 2016. The Decision informed the applicant that his weekly payments of compensation would cease from 11 May 2016. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 24 March 2016.
2. The applicant sought Merit Review from the Authority and the Authority delivered its Findings and Recommendations dated 16 May 2016. The Authority made a finding that the applicant has current work capacity and is able to earn \$582.96 per week. The Insurer is to calculate the rate of weekly payments of compensation payable to the applicant under Section 37 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 10 June 2016. I am satisfied that the application has been made within time and in the proper form.



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4. On 3 February 2015 the applicant sustained injury to his right shoulder and thoracic spine in the course of his employment as a labourer and storeman. 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:
 - He cannot perform duties for the capacity assessed in the Decision;
 - He does not have the qualifications to perform the suitable duties as assessed by the Insurer;
 - His experience is in warehouse operations and machine operating.
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 15 June 2016 in response to the applicant’s application. The Insurer has submitted that:
 - They have relied upon a Vocational Assessment report dated 13 August 2015 in respect of the assessment for suitable employment;



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- The applicant's nominated treating doctor has not assessed him to have a sitting tolerance of 30 minutes as suggested by the applicant; and
- The applicant has work experience in machine operating, using computers and data entry.

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.
11. At page 1 of the Work Capacity Decision the Insurer has stated *"You are deemed to have capacity to work 40 hours per week."*
12. Later in the Decision the Insurer refers to a Certificate of Capacity from the nominated treating doctor dated 13 January 2016 which certifies the applicant with capacity for 8 hours per day, 3 days per week. The Insurer then refers to the applicant attending an Independent Medical Consultation Assessment (IMC) on 6 October 2016 (sic) wherein the applicant was assessed to have capacity to work for 8 hours / 5 days per week.
13. I am aware that Section 44BB of the 1987 Act only allows me to review the Insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the Insurer in making the decision. However, in keeping with the Guidelines the Insurer must provide a brief reason for the decision it has made.
14. On this occasion the Insurer has determined that the applicant has capacity to work 40 hours per week as evidenced by the statement on page 1 of the Decision. However, the Insurer has failed to provide **any** reasons for preferring the assessment from the IMC over the more recent assessment from the nominated treating doctor. In failing to provide any reasoning the Insurer has not complied with the Guidelines.



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15. Guideline 5.1 states that when making a Work Capacity Decision the Insurer's approach should evaluate all available and relevant material and relevant considerations. Guideline 5.3.2 expands on this principle by stating the Insurer must outline the evidence considered in making the decision, noting the author, the date and any key information. All evidence considered should be referred to, regardless of whether or not it supports the decision.
16. At page 6 of the Work Capacity Decision the Insurer lists the 3 documents it considered as evidence in making the Work Capacity Decision. However, in the Internal Review Decision the Insurer has listed 28 documents which were relied upon as evidence in the Review. All of these documents were available at the time of the original Work Capacity Decision.
17. The applicant would be entitled to believe that not all documents which were available were considered at the time of making the Work Capacity Decision. This view would also be supported by the fact that the Internal Review Decision reduces the applicant's capacity to work to 24 hours per week and reduces the applicant's ability to earn from \$950 per week to \$600 per week. This is a significant issue as clearly the Insurer came to a different decision upon consideration of the further documents (which were all available at the time of the making of the original decision).
18. I note the comment of Davies J in *Simpson*¹ that "*Every failure to follow the Guidelines could not result in the setting aside of the insurer's decision.*" However, on this occasion the Insurer made a different Decision upon Internal Review after it had considered the evidence as required by the Guidelines. So this is an instance where failure to follow the Guidelines in making the original Work Capacity Decision should result in setting aside that Decision.
19. 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 29 January 2016.

Finding

¹ *The Trustees of the Sisters of Nazareth v Simpson* [2015] NSWSC 1730



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20. 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

21. The Work Capacity Decision by the Insurer dated 29 January 2016 is set aside.

22. 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*.

23. 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
5 July 2016