



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 17 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 17 February 2016. The Decision informed the applicant that her weekly payments of compensation would cease on 24 May 2016. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 14 April 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 11 May 2016. The Authority delivered its Findings and Recommendations dated 8 June 2016. The Authority made a finding that the applicant has current work capacity and 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 6 July 2016. I am satisfied that the application has been made within time and in the proper form.



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4. The applicant sustained a psychological injury during the course of her employment as an operations manager. The agreed date of injury was 8 April 2013. The applicant has been in receipt of weekly payments of compensation.
5. 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

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.
7. In addition to making the application for review the applicant has made a submission that she has returned to work and has been offered the opportunity to increase her hours of work as her manager is currently on maternity leave. As from 4 July 2016 the applicant commenced working 25 hours per week.
8. Furthermore, the applicant submits her payments ceased as at 15 June 2016 which is during the ‘stay’ period.
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. The information provided by the applicant should be sent to the Insurer as new information that should be considered.

Submissions by the Insurer

10. The Insurer has not provided any submissions in response to the application dated 6 July 2016.



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Decision

11. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
12. Guideline 5.3.2 requires the Insurer to outline the evidence considered in making the Work Capacity Decision, noting the author, the date and key information. All evidence considered should be referred to, regardless of whether it supports the decision. The Work Capacity Decision lists 4 documents upon which the Insurer relied to make that Decision. However, in the Internal Review Decision the Insurer relied upon at least 13 documents, 10 of which were available at the time the original Work Capacity Decision was made.
13. From reviewing the Decision it is apparent that the Insurer considered an additional 6 documents during the review process.
14. The applicant would be entitled to conclude from this that the Insurer did not take into consideration all available evidence at the time that it made the original Work Capacity Decision. It is not procedurally correct or fair to consider additional documentation during the review process, which was available at the time of making the original Decision, and which was not disclosed to the applicant. This is in breach of the Guidelines and a procedural error.
15. I do note that during the intervening period from when the Work Capacity Decision was made on 17 February 2016 and the Internal Review Decision dated 14 April 2016 the applicant obtained employment working on average 22.5 hours per week. It is noted in the Internal Review Decision that the applicant had returned to paid employment.
16. Guideline 5.1 notes that a Work Capacity Decision will be made at many points throughout the life of a claim. The Insurer may make a Work Capacity Decision on receipt of new information relating to, but not limited to a change in the applicant's personal circumstance or confirmation the applicant has returned to work.



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17. In this instance the applicant returned to work and this information was used by the Insurer during the internal review process rather than making a new work capacity decision. The nature of the actual work capacity decision changed when the applicant returned to work and the basis upon the declinature being Section 38(3)(b) of the 1987 Act was no longer relevant. The Insurer should have made a new Work Capacity Decision rather than incorporating the change of circumstance in the review process.
18. I do note that I am not able to conduct a procedural review of the Internal Review Decision and I have not based the setting aside of the Work Capacity Decision on my comments in paragraphs 14-17.
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 17 February 2016.

The Stay

20. The applicant advised in her submissions that the Insurer had ceased her weekly payments of compensation as at 15 June 2016. This was during the review process.
21. 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.
22. 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.
23. 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



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application for review under section 44BB (unless the application for review is outside the “within 30 days” time limit).

24. 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.

25. 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

26. 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



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27. The Work Capacity Decision by the Insurer dated 17 February 2016 is set aside.

28. 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*.

29. 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
29 July 2016