



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 7 March 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 7 March 2016. The Decision informed the applicant that her weekly payments of compensation would cease from 12 June 2016. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 20 April 2016. That review confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 18 May 2016. The Authority delivered its Findings and Recommendations dated 17 June 2016. The Authority made a finding that the applicant has the ability to return to work in "*suitable employment*" as defined in Section 32A of the *Workers Compensation Act 1987* (1987 Act). The Authority did not make a recommendation.
3. The applicant made an application to this office for procedural review by way of application dated 7 July 2016. I am satisfied that the application has been made within time and in the proper form.



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4. On 13 September 2000 the applicant was involved in a motor vehicle accident whilst on her way to work as a claims consultant. She suffered injury to her neck and back. The applicant was off work for six weeks. The applicant resigned from her employment in or about October 2002 *“for personal reasons and because she was tired of constant attempts to upgrade her hours.”* The applicant has been 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 and has made the following submissions:
 - The Insurer has failed to support her;
 - She has not worked for the past 13 years;
 - The Insurer has not taken into consideration recent medical evidence.
7. The first two submissions from the applicant are not related to procedural review. In respect of the third submission I note that the Insurer has considered reports from late 2015 and early 2016 in making its decision.

Submissions by the Insurer

8. The Insurer has submitted that the relevant Guidelines and legislation have been followed in making the Work Capacity Decision.

Decision



9. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
10. Section 32A of the 1987 Act provides a definition as to “*suitable employment*” and Section 43(1)(b) of the 1987 Act allows the Insurer to make a Work Capacity Decision as to what constitutes “*suitable employment*”. In this particular case the Insurer has determined that the roles of receptionist and call centre operator constitute suitable duties for the applicant.
11. In making the above Decision the Insurer has relied upon a vocational assessment report dated 13 October 2015. The Insurer displayed an adequate understanding of the Guidelines and legislation in making this decision.
12. In accordance with Guideline 5.3.2 the Insurer is to explain the relevant entitlement periods. At page 4 of the Decision the Insurer has informed the applicant that she has received 780 weeks of compensation payments and any ongoing entitlement is subject to the provisions of Section 38(3) of the 1987 Act. The Insurer has set out the provisions of Section 38(3) on the same page.
13. Section 43(1)(a) of the 1987 Act allows the Insurer to make a Work Capacity Decision about the applicant’s current work capacity. At page 9 of the Decision the Insurer states “*You remain certified with the capacity for 4 hours, 5 days per week with restrictions on 30 minutes of driving.*” This is based upon the certificate of capacity from the nominated treating doctor.
14. At page 10 of the Work Capacity Decision the Insurer has informed the applicant that “*You are not currently working at least 15 hours per week and are not earning at least \$176 per week, therefore you do not meet requirement of section 38(3)(b) of the 1987 Act.*”
15. The Insurer then informs the applicant further “*You have been assessed as having a capacity to undertake additional employment to your assessed 20 hours per week Therefore (sic) we deem that you are not incapable of undertaking further additional employment or work that can*



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increase your current weekly earnings and do not meet the requirement of section 38(3)(c) of the 1987 Act.”

16. The Insurer has determined that the applicant is not entitled to ongoing payments of weekly compensation on two conflicting grounds. This is a procedural error.
17. The Insurer has assessed the applicant to have capacity for suitable employment in accordance with the nominated treating doctor’s assessment of 4 hours 5 days per week.
18. The Insurer has then advised the applicant that as she has not returned to work for at least 15 hours per week and is not earning \$176 per week she has not complied with Section 38(3)(b) of the 1987 Act.
19. Then the Insurer has advised the applicant that she has capacity to undertake **additional employment** to the assessed 20 hours per week and therefore as she has been deemed not to be incapable of undertaking **further** employment to increase her earnings she has not complied with Section 38(3)(c) of the 1987 Act.
20. Both of these statements cannot stand together in the circumstances of this case. The applicant is entitled to know the basis upon which her payments have been declined and what she is required to do under Section 38 for her entitlement to resume.
21. The Insurer has made a decision that the applicant has capacity to work for 20 hours per week. Therefore they cannot then advise the applicant that she has the capacity to undertake **additional employment** to the 20 hours that they originally determined.
22. I note Davies J’s comments in the *Simpson*¹ case that “*Every failure to follow the Guidelines could not result in the setting aside of the Insurer’s decision.*” The Issue is whether this procedural error is sufficient to set aside the Work Capacity Decision.

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



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23. This is a procedural error which is sufficient to set aside the Work Capacity Decision as the cessation of the applicant's payments has been based upon two conflicting decisions. Furthermore, the applicant is not able to ascertain what she is required to do to comply with the Work Capacity Decision in order to be entitled to compensation payments once again.
24. In these circumstances the error of the Insurer and subsequent non-compliance with the legislation referred to in the preceding paragraphs is sufficient to set aside the Work Capacity Decision dated 7 March 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 7 March 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 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 "Tracey Emanuel".

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
2 August 2016