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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 8 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 8 March 2016. The Decision informed the applicant that his weekly payments of compensation would cease on 15 June 2016. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 21 April 2016 and confirmed the Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application dated 23 May 2016. The Authority delivered its Findings and Recommendations dated 22 June 2016. The Authority made a finding that the applicant 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 22 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 previously sought a review of a Work Capacity Decision dated 21 November 2014. The applicant was successful and the Work Capacity Decision was set aside by an earlier recommendation of this office.¹
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.
8. The applicant has made lengthy submissions as to him being unable to obtain any suitable employment as a result of his injury, the unfair and unjust way that he has been treated by the Insurer and the workers compensation system and difficulties in the current labour market in the Illawarra area.
9. The submissions by the applicant are not relevant to procedural review. I am unable to consider neither the applicant’s personal or financial position nor, the status of the labour market. I am only able to review the procedures of the Insurer in making the Work Capacity Decision.

Submissions by the Insurer

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

¹ Reported and numbered as 6515



Decision

11. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
12. Section 43(1)(a) of the 1987 Act allows the Insurer to make a Work Capacity Decision about *“a worker’s current capacity”* and Section 43(1)(b) allows the Insurer to make a decision about *“what constitutes suitable employment for a worker.”* The Insurer has noted both of these points at page 1 of the Decision.
13. At page 3 of the Work Capacity Decision the Insurer has determined that a delivery driver has been identified as suitable employment for the applicant.
14. In accordance with Guideline 5.3.2 the insurer has explained the relevant entitlement periods and informed the applicant that as he has received 350 weeks of compensation payments any ongoing entitlement is subject to Section 38 of the 1987 Act. At page 4 of the Decision the Insurer has identified and explained the special conditions of Section 38(3) of the 1987 Act.
15. At page 10 of the Work Capacity Decision the Insurer has informed the applicant that he has *“been assessed as having current work capacity”* and that as he is not *“currently working at least 15 hours per week and are not earning at least \$176 per week Therefore you are not meeting the requirement of section 38(3)(b) of the 1987 Act.”* (sic)
16. However, the Insurer has failed to make a determination as to the applicant’s current work capacity. At page 9 of the Work Capacity Decision the Insurer has stated:

“...is able to return to work but preferably in a graduated fashion and he could be able to secure work commencing with 6 hours as a Courier Driver with light deliveries and I will allow Dr [name withheld] to determine his weight restriction..”

and:



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“There is no psychiatric reason why [the applicant] cannot do alternate work duties, commencing up to 20 hours per week for four weeks, and then returning to full duties.”

17. Despite referring to the aforementioned medical evidence the Insurer has failed to make a determination pursuant to Section 43(1)(a) as to the applicant’s current work capacity.
18. For the purposes of a Work Capacity Decision it is not sufficient to just inform the applicant that he has a *“current work capacity”*. A Decision must be made as to his capacity, hence the term *work capacity decision*.
19. The applicant is also entitled to know the basis upon which payments have been declined and what he is required to do under Section 38 for his entitlement to resume. Based upon the information in the Work Capacity Decision the applicant is not able to ascertain what he is required to do to comply with the Work Capacity Decision in order to be entitled to compensation payments once again.
20. I do note that this issue was rectified in the Internal Review Decision where the Insurer made the determination that the applicant has capacity to perform suitable duties for 6 hours per day, 4 days per week in accordance with a certificate of capacity from the nominated treating doctor dated 9 March 2016. However, this is not sufficient to validate the Work Capacity Decision. I note that the certificate of capacity post-dates the Work Capacity Decision.
21. 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 8 March 2016.

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,



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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 8 March 2016 is set aside.
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
5 August 2016