



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 5 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(3)(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 5 January 2016. The Decision informed the applicant that her weekly payments of compensation would cease on 13 April 2016. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 13 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 22 June 2016. The Authority made a finding that the applicant does 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 24 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 has been in receipt of weekly payments of compensation for an incapacity for work resulting from a post viral fatigue injury deemed to have occurred on 3 May 2013. At the time of the Work Capacity Decision the applicant had returned to part time employment.
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 the following submissions:
 - The school working week includes hours worked at home preparing lessons and other materials – as an example when reporting the hours the applicant could work the doctor would record 20 hours if he considered the applicant could work 30 hours because 10 hours would be preparatory work at home. However, on 11 September 2013 the applicant was informed by the rehabilitation consultant that the reporting had to change and all work hours needed to be included on the certificate regardless of the nature of the work;
 - The Internal Review performed by the Insurer took in excess of two and a half months – the applicant lodged the application on 25 January 2016 and received a reply on 14 April 2016.
8. Pursuant to Section 44BB of the 1987 Act I am only able to review the Insurer’s procedures in making the Work Capacity Decision.

Submissions by the Insurer

9. The Insurer has provided submissions in response to the application dated 26 July 2015. The Insurer submits that the applicant has capacity



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to work for 26 hours per week (the assessment from the Internal Review Decision). The Insurer concedes that the Internal Review Decision was not completed within 30 days.

Decision

10. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
11. Section 38(4) of the 1987 Act requires an Insurer to ensure that a work capacity assessment of the worker is concluded during the last 52 weeks of the second entitlement period. The Insurer completed a work capacity assessment on 4 January 2016 in accordance with the legislation.
12. It is important to note that the legislation does not require a Work Capacity Decision to be made at that time. In this case the Insurer made a Work Capacity Decision on 5 January 2016 and notified the applicant by way of letter dated the same day.
13. At the time the Work Capacity Decision was made the Insurer had paid the applicant 117 weeks of compensation payments. This places the applicant within the second entitlement period.
14. The Insurer made a Work Capacity Decision in accordance with Section 43(1)(a) of the 1987 Act that the applicant had current work capacity of 32 hours per week. At that time the applicant was working 21.5 hours per week. The Insurer advised the applicant that as she was not assessed as being incapable of undertaking further additional employment that would increase her current weekly earnings her payments were being terminated for failing to comply with Section 38(3)(c) of the 1987 Act.
15. The Insurer has assessed the applicant's ongoing entitlements in accordance with Section 38 of the 1987 Act which are the special provisions for workers who are *after the second entitlement period* (130 weeks). The Insurer supports its decision on the basis that at the time that the Work Capacity Decision comes into effect (3 months and four



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days later) the 130 weeks has expired and the applicant is after the second entitlement period.

16. The error in this reasoning is that at the time of the Work Capacity Decision the applicant is not required to comply with the special provisions of Section 38 therefore, her payments cannot be terminated on that basis. At the time of the Work Capacity Assessment the applicant's entitlement to weekly payments of compensation was subject to Section 37 of the 1987 Act. A Work Capacity Decision takes into account the applicant's *current* capacity for work not capacity into the future. This Insurer in assessing the applicant's entitlement under the incorrect section of the legislation has committed a procedural error.
17. Guideline 5.3.2 requires the Insurer to state the impact the decision has on the applicant's entitlement to ongoing medical and related treatment expenses. The Insurer has informed the applicant that as a result of Section 59A(2) of the 1987 Act her entitlement to medical and related treatment expenses will cease 12 months from the date her payments ceased. This is incorrect. The relevant section was amended effectively from 4 December 2015 and accordingly the applicant would be entitled to medical and related treatment expenses for two years from the date of cessation of her weekly payments.
18. 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 5 January 2016.

The Stay

19. 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.
20. 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.



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21. 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 application for review under section 44BB (unless the application for review is outside the “within 30 days” time limit).
22. 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.
23. 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

24. 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.



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RECOMMENDATION

25. The Work Capacity Decision by the Insurer dated 5 January 2016 is set aside.
26. 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*.
27. Pursuant to Section 44BB(3)(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