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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 application for procedural review is dismissed.**
- 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 receipt by the applicant of this recommendation.**
- 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 16 March 2016. The Decision informed the applicant that her weekly payments of compensation would cease on 22 June 2016. The applicant sought internal review by the Insurer by application dated 13 May 2016 and the Internal Review Decision was dated 3 June 2016. The Internal Review Decision confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 15 June 2016. The Authority delivered its Findings and Recommendations dated 12 July 2016. The Authority made a finding the applicant has a current work capacity but she does not satisfy the special requirements of Section 38(3) of the *Workers Compensation Act 1987* (1987 Act) for continuation of weekly payments of compensation.
3. The applicant then made an application to this office for procedural review dated 2 August 2016. I am satisfied that the application has been made within time and in the proper form.



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4. On 26 October 2009 the applicant slipped and fell down stairs in the course of her employment as a packer. The applicant suffered a fractured right middle finger and injury to her right knee. The applicant underwent an arthroscopy to her right knee on 27 February 2010. At the time of the Work Capacity Decision the applicant had returned to suitable employment (not with the pre-injury employer) working at least 20 hours per week.
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 44BB (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 an application for procedural review the applicant, though her solicitor, has made the following submissions:
 - The information reviewed and considered in making the Work Capacity Decision was not annexed to the decision.
 - The Work Capacity Decision incorrectly references Section 44(6) and Section 44(1)(a) (b) which were renumbered in amendments to Section 44BB of the 1987 Act.
 - The Insurer failed to explain why work capacity beyond 5 December 2015 was assessed at 30 hours per week.
 - The Decision failed to take into account the applicant's circumstances which changed during the review process.
8. I am only able to perform a review of the procedures undertaken by the Insurer in making the Work Capacity Decision which is the subject of this



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review. I am not able to review the Internal Review Decision or the Merit Review Findings and Recommendations from the Authority.

9. The applicant's submissions are addressed as follows:

- Guideline 5.3.2 requires the Insurer advise that any documents which have not already been provided to the worker can be provided upon request. The Insurer is not obliged to annex all information reviewed to the Decision. The Insurer listed the documents which it considered in making the Decision at page 5 and informed the applicant that she could request copies of any documents not already provided at page 14 of the Decision. The Insurer has complied with the Guideline.
- The same Guideline requires the Insurer to reference the legislation. The Insurer concedes that it incorrectly referenced the legislation although submitted that Section 44(1)(a), 44(1)(b) and 44(1)(c) had been changed to 44BB(1)(a), 44BB(1)(B) and 44BB(c) and that such error does not amount to procedural unfairness. I do note that the applicant has had the benefit of consulting a solicitor who has prepared written submissions on her behalf.

I have to be satisfied that the error in incorrectly citing the legislation amounts to procedural unfairness. In the *Simpson*¹ case Justice Davies stated "*Every failure to follow the Guidelines could not result in the setting aside of the insurer's decision. Such a result would not be legally reasonable.*"

I do not consider that the incorrect referencing of the legislation has amounted to a procedural error as the Insurer has adequately explained the legislation in any event. Also the applicant has had the benefit of advice from a solicitor. The citation error has not impacted upon the outcome of the Decision or the review process.

- The Insurer has accepted the applicant's nominated treating doctor's assessment of capacity of 30 hours per week. At page

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



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13 of the Work Capacity Decision the Insurer has stated *“You remain certified with the capacity for 6 hours per day, 5 days per week with restrictions of light duties as confirmed by [name withheld] in your Certificate of Capacity dated 5 December 2015.”*

This appears to be the most recent assessment of capacity and the applicant, in her submissions, has not referred to a more recent assessment. Therefore it is available to the Insurer to rely upon the Certificate of Capacity from the applicant’s nominated treating doctor. This is not a procedural error.

- It is noted that at the time the Work Capacity Decision was issued the Insurer had declined liability in respect of further surgery to the applicant’s knee. As the result of proceedings in the Workers Compensation Commission the Insurer has subsequently agreed to pay for the surgery albeit *“without admission of liability and on a voluntary basis”* as noted in the Certificate of Determination – Consent Orders dated 12 July 2016.

I am only able to take into consideration the procedures undertaken by the Insurer in making the Work Capacity Decision. I am unable to have consideration for the circumstances of the applicant or the events which take place after the Decision has been made. I do note however that Guideline 4 states that the Insurer may conduct a work capacity assessment at any stage throughout the life of a claim. This can be an ongoing process of assessment.

Further Guideline 5.1 notes that Work Capacity Decisions 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 that relates to the worker’s capacity for employment which may affect the calculation of weekly payments.*

Any evidence which post-dates the Work Capacity Decision which is the subject of this review should be sent to the Insurer for consideration. It cannot form part of this procedural review process.



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Submissions by the Insurer

10. The Insurer made the following submissions dated 8 August 2016 in response to the application:

- The applicant was provided with a Fair Notice letter dated 10 February 2016 attaching the documents to be relied upon in the Work Capacity Assessment.
- The incorrect citing of the legislation does not amount to procedural unfairness.
- The Insurer has followed Guideline 5.3.2 in assessing the applicant as having capacity to work 30 hours per week.
- The proposed right knee arthroscopy was settled between the applicant and the respondent on a voluntary basis which post-dated the Work Capacity Decision.

I note that I have addressed both the applicant and Insurer's submissions above.

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 advise the applicant of the date of the work capacity assessment. On this occasion the Insurer informed the applicant that the work capacity assessment was completed on 15 March 2016 and she was notified of the Work Capacity Decision by letter dated 16 March 2016.

13. The same Guideline requires the Insurer to advise the date when the Decision takes effect. Section 54(2)(a) of the 1987 Act requires at least three months and four working days notice be given if payments are being reduced or ceased. This notice period takes into account Section 76(1)(b) of the *Interpretations Act 1987*. As a result the applicant was



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advised that his payments would cease on 22 June 2016. This is the appropriate notice period.

14. The Guideline also requires the Insurer to advise the applicant of the impact the decision has on her entitlement to medical and related treatment expenses. The Insurer has referenced and explained Section 59A (2) and (3) of the 1987 Act and advised the applicant that her entitlement to medical expenses will cease on 23 June 2021 as she has been assessed as having a permanent impairment of more than 10% but less than 21%. The Insurer has adequately explained this at page 2 of the Decision.
15. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer has informed the applicant that she has received 320 weeks of compensation payments. Therefore any ongoing entitlement to weekly payments of compensation is subject to Section 38 of the 1987 Act. The Insurer has explained the special requirements of Section 38(3)(b) and (c) of the 1987 Act at page 4 of the Work Capacity Decision.
16. Pursuant to Section 43(1)(a) of the 1987 Act the Insurer has noted that the applicant has been certified with capacity for 6 hours per day, 5 days per week in the Certificate of Capacity dated 5 December 2015. The Insurer determined that the applicant had current work capacity in accordance with that assessment.
17. The Insurer determined, pursuant to Section 43(1)(b), the roles of receptionist/administration assistant; sales assistant and car park attendant to be suitable employment. It was noted that as from 2 November 2015 the applicant was working 20 hours per week as an administrative assistant earning \$400 per week.
18. In making these determinations pursuant to Section 43 of the 1987 Act the Insurer has displayed an adequate understanding of the relevant Guidelines and legislation.
19. At page 13 of the Work Capacity Decision the Insurer made a determination that the applicant had complied with Section 38(3)(b) in



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that she was working at least 15 hours per week and earning \$176 per week.

20. However, as the applicant had been assessed as having a capacity to undertake employment for 30 hours per week she was not working to that capacity and therefore had not complied with Section 38(3)(c) of the 1987 Act. Therefore, the applicant was not entitled to ongoing payments of weekly compensation.

21. The Work Capacity Decision of the Insurer dated 16 March 2016 has displayed a careful consideration of the requirements of the Guidelines and legislation in force at the time.

Finding

22. There are no procedural errors identifiable in the decision. The Insurer has complied with the Guidelines and relevant legislation.

RECOMMENDATION

23. The application for procedural review is dismissed.

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 receipt by the applicant of this recommendation.

25. 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
10 August 2016