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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.

Introduction and background

1. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 3 March 2016. The Decision informed the applicant that her weekly payments of compensation would cease on 7 June 2016. The applicant sought internal review by the Insurer and the Insurer sent a letter dated 29 April 2016. The Insurer declined to perform an Internal Review on the basis of Section 52(2)(b) of the *Workers Compensation Act 1987* (1987 Act). This section essentially states that if a worker sustains an injury on or after retiring age then weekly payments of compensation are not to be made for any incapacity occurring more than 12 months after the first occasion of incapacity.
2. In this particular instance the applicant was aged 68 at the date of injury on 24 April 2015. The first date of incapacity was 24 April 2015. Therefore any entitlement the applicant had to weekly payments of compensation ceased on 24 April 2016.
3. The applicant sought Merit Review from the Authority by way of application received 23 May 2016. The Authority delivered its Findings and Recommendations dated 7 July 2016. The Authority made a finding the applicant had a current work capacity between 3 March 2016 and 24 April 2016. In accordance with Section 37(2) of the 1987 Act the applicant's entitlement to weekly payments of compensation was \$194.56 for the period 3 March 2016 to 24 April 2016.



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4. The applicant then made an application to this office for procedural review dated 4 August 2016. I am satisfied that the application has been made within time and in the proper form.
5. On 24 April 2015 the applicant was placing clothes in a box and then placing the box on a pallet. The applicant reported that when lifting the box and twisting to the left, she felt immediate pain in the left shoulder and scapular region.
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 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.
8. In addition to applying for procedural review the applicant has made the following submissions:
 - She suffers pain, stiffness, numb arms, shoulders, back and upper neck pain;
 - The Insurer has failed to approve treatment to her upper back and neck;
 - She is suffering depression;
 - She has worked 3 hours per day/5 days per week since the injury;
 - The Insurer's decision is inhumane and cruel.
9. 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 review. I am not allowed to take into consideration the applicant's



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personal circumstance or the nature of her injury. The submissions are not relevant to procedural review.

Submissions by the Insurer

10. The Insurer has noted that the applicant is not entitled to payments of weekly compensation past 24 April 2016 in accordance with the Workers Compensation Legislation.

Decision

11. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
12. The original Work Capacity Decision dated 3 March 2016 was overturned by the Authority at Merit Review and the applicant's weekly payments were set at the rate of \$194.56 for the period 3 March 2016 to 24 April 2016. Therefore any shortcomings in the original decision are of no consequence.
13. In accordance with Section 52(2)(b) of the 1987 Act the applicant is **not entitled** to weekly compensation payments past 24 April 2016.
14. Therefore performing a procedural review of the Work Capacity Decision is an act of futility as the decision has already been overturned in another forum and pursuant to the legislation the applicant does not have any entitlement to ongoing payments of weekly compensation.

Finding

15. Section 44BB(3)(c) of the Workers Compensation Act 1987 Act empowers this Office to decline to conduct a procedural review in such circumstances. I should emphasize that this is not in any way a reflection upon the applicant and I am not making a finding that the application was either frivolous or vexatious. It is, however, rendered futile in the specific circumstances of this case.

RECOMMENDATION



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16. The application for procedural review is dismissed.

A handwritten signature in black ink that reads "T. Emanuel".

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