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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 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* this recommendation is 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 29 March 2016. The Decision informed the applicant that his weekly payments of compensation would reduce from \$952.00 to Nil on 10 July 2016. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 26 May 2016 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 29 June 2016. The Authority issued its Findings and Recommendations on 2 August 2016. The Authority made a finding that the applicant has current work capacity, but does not meet the requirements of section 38 for weekly benefits to continue beyond 130 weeks.
3. The applicant then applied to this office for procedural review by way of application dated 29 August, received by this Office on 30 August 2016. I am satisfied that the application has been made within time and in the proper form.



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4. On or about 24 December 2013 the applicant suffered injury to his left foot in the course of his employment as a Metal Polisher. His employment was terminated on 27 December 2013 and he has not worked since. He was in receipt of weekly payments from the insurer for all relevant periods until the work capacity decision was made.
5. Section 44A of the *Workers Compensation Act 1987* (1987 Act) provides that a work capacity assessment must be conducted in accordance with the *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.*”
7. In addition to making the application for review the applicant has made the following submissions:
 - He still cannot walk properly;
 - If he tries to walk for long periods of time, he has to subsequently lie on his back for two to three days so that his foot recovers enough for him to stand and walk again;
 - Rehabilitation did not help him, which is contrary to what he was told would happen;
 - He wonders how he can work if he cannot even walk or stand.
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. I am not able to consider the applicant’s personal circumstances or the merits of the claim, which is something for the Authority to do. The applicant’s submissions are therefore not relevant to procedural review.

Submissions by the Insurer

9. The Insurer has made no submissions in reply.

Decision



10. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
11. The Fair Notice requirement in Guideline 5.2, the requirement to clearly explain the reasoning process behind the decision (see Guideline 5.3.2) and the requirement to give proper notice under section 54(2)(a) were all met.
12. The insurer took pains to set out the voluminous evidence relied upon. This included (in the course of internal review) consideration of a report from the worker's nominated treating doctor dated 17 May 2016. The evidence relied upon was current and appropriate.
13. The full effect of the decision was clearly set out, both in a covering letter and the first page of the notice containing the full decision. A correct explanation of the ongoing entitlement to medical expenses under section 59A(2) and (3) was given.
14. On page 5 of the Notice the Insurer clearly set out the steps involved in making the decision, going through each part of section 43(1)(a)-(f) separately and comprehensively. The Insurer also explained the concept of a 'high needs' worker and explained why the applicant did not meet the relevant criteria.
15. The basis for termination of payments as a result of the operation of section 38(3)(b) was comprehensively explained.
16. In this instance I can find no fault with the decision-making procedures of the Insurer; nor can I identify any shortcoming of a procedural nature in the Notice issued to the applicant.

Finding

17. I find that the submissions made by the applicant are irrelevant to the process of procedural review. 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 and the Guidelines in order to produce a procedurally correct result. In the current instance there are no breaches of the legislation or the



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Guidelines, which are to be treated as delegated legislation. Accordingly the Work Capacity Decision must be found to be validly made.

RECOMMENDATION

18. The application is dismissed.
19. 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.
20. Pursuant to Section 44BB(3)(h) of the *Workers Compensation Act 1987* this recommendations is binding upon the Insurer and the Authority.

A handwritten signature in blue ink, appearing to read "Wayne Cooper", with a long horizontal flourish extending to the right.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
29 September 2016