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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 7 June 2016. The Decision informed the applicant that his weekly payments of compensation would cease on 16 September 2016. The applicant sought internal review and the Internal Review Decision was dated 8 July 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 on 28 July 2016. The Authority delivered its Findings and Recommendations dated 29 August 2016. The Authority made findings that: the applicant has current work capacity; the applicant is able to return to work in suitable employment; the applicant does not satisfy the special requirements in section 38 for the continuation of weekly payments beyond 130 weeks; and the "finding" was also purportedly made that the applicant is not a worker with "high needs." While the Authority might note that there is no evidence that the applicant has 'high needs' based on the dearth of findings to that effect by any approved medical specialist, it is not a "finding" open to the



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Authority to make in its own right. The Authority did not make any recommendations in this matter, thereby causing considerable doubt to be cast over the purpose of the merit review.

3. The applicant then made an application to this office for procedural review received on 15 September 2016. I am satisfied that the application has been made within time and in the proper form.
4. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *Work Capacity Guidelines* (Guidelines).

Submissions by the applicant

5. 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 made submissions which are accurately and fairly set out within the submissions in reply from the Insurer.

Submissions by the Insurer

6. The Insurer made the following submissions in response to the application:

1. **The Worker believes that the work capacity decision is based on incorrect reports of work capacity;**

The Insurer submits that all documents relied upon have been accurate reflections of [the worker’s] capacity.

[The worker’s] pre-injury hours were 15 hours per week as he has a restriction to not work in excess of 15 hours per week due to his Centrelink disability pension requirements. [The worker] continues to be certified with a capacity for some type of employment.

2. **The Worker submits that he is a worker with “high needs” and believes injuries to his back, knees, ankle, neck, right wrist, hands, and arms should be related to the incident of 16 August 2016. The Worker submits that he disagrees with the “assessment of 5%” as he believes it is unfair.**

The MAC issued 6 August 2012 referred the following body parts ‘cervical spine, right upper extremity (right wrist), right lower extremity (right ankle), and scarring. An assessment of 5% WPI was reached.



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An election to discontinue proceedings was filed with the Workers Compensation Commission dated 20 August 2012. No further claims for lump sum compensation have been made.

3. The Worker submits that the Insurer is “only focusing on right wrist and ignoring other injuries.”

As noted above, other injuries have clearly been considered during the life of [the worker's] claim. [The worker] continues to be certified by his nominated treating doctor with a capacity for employment.

The Insurer submits that this falls outside of the scope of a procedural view of a work capacity decision.

4. The Worker submits that when he went to work is was not able to work for 5 hours, but believes he was given no choice but to continue in a work trial to keep his weekly payments going.

All available reports on the file note that [the worker] successfully completed the work trial with [named employer]. The employer noted a good working relationship with [the worker] throughout the work trial however was unable to offer ongoing employment as he required someone who could do both the Packer role and some office administration.

In light of this information a section 53 application was made to offer [the worker] a computer skills course. This course has been completed and [the worker] continues to job seek in identified suitable employment options.

5. The Worker submits that the reports of [named provider] are incorrect and are based on incorrect information.

As stated above, the Insurer submits that all documents relied upon have been accurate reflections of [the worker's] capacity. There is no information before me that would suggest that the reports of [named provider] are 'incorrect' or 'based on incorrect information.'

6. The Worker submits the following “*approved the form for me so I could applied in writing no earlier than 52 weeks before the end of the second entitlement period for continuation of weekly payment after the second entitlement period. The Insurer did not inform me and never sent me any application for this.*”

As outlined in work capacity decision, the internal review decision, and the merit review decision; [the worker's] claim for compensation was made before 1 October 2012 and the second entitlement period expired before the weekly payment amendments first applied to his claim, section 38(3)(a) of the 1987 Act does not apply due to the Workers Compensation Regulation 2016 Schedule 8 Part 1 Clause 16(1).

Decision

7. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.



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8. 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 3 June 2016 and he was notified of the Work Capacity Decision by letter dated 7 June 2016.
9. 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 advised that his payments would cease on 16 September 2016. This is the appropriate notice period.
10. The Guideline also requires the Insurer to advise the applicant of the impact the decision has on his 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 his entitlement to medical expenses will cease on 16 September 2018 as he has been assessed by an Approved Medical Specialist as having a permanent impairment of less than 10%. The Insurer has adequately explained this at page 2 of the Decision.
11. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer informed the applicant that he has received 300 weeks of compensation payments. Therefore any ongoing entitlement to weekly payments of compensation is subject to Section 38 of the 1987 Act. The Insurer clearly explained the special requirements of Section 38(3)(b) and (c) of the 1987 Act at pages 4 and 5 of the Work Capacity Decision.
12. Pursuant to Section 43(1)(a) of the 1987 Act the Insurer has noted that the applicant has been certified with capacity for 5 hours per day, 3 days per week in the Certificate of Capacity from the nominated treating doctor. The Insurer determined that the applicant had current work capacity in accordance with that assessment.
13. The Insurer determined, pursuant to Section 43(1)(b), the roles of process worker, packer and assembler to be suitable employment. The



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Insurer based its determination upon a vocational assessment report and the approval from the nominated treating doctor.

14. 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.
15. It is clear that the applicant currently does not meet the requirements set out in section 38(3)(b).
16. The submissions of the applicant raise issues which go primarily to the merits of the case, and therefore cannot be re-determined in procedural review. I accept the submissions in reply by the Insurer, which are consistent with the merit review outcome.
17. The Work Capacity Decision of the Insurer has displayed a careful consideration of the requirements of the Guidelines and legislation in force at the time.

Finding

18. There are no procedural errors identifiable in the decision.

RECOMMENDATION

19. The application for procedural review is dismissed.
20. 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.
21. Pursuant to Section 44BB(3)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.



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A handwritten signature in blue ink, which appears to read "Wayne Cooper". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
14 October 2016