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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. On 4 March 2004 the applicant sustained bilateral shoulder injuries to in the course of his employment as a Fibreglasser. Following right shoulder surgery in 2005 and left shoulder surgeries in 2006 and 2007 he returned to work as a Storeperson with a different employer but ceased that employment following further surgery in 2008. He participated in two work trials in 2008 and 2014 for periods of 4 weeks and six weeks respectively.
2. The applicant does not currently work and receives weekly payments from the Insurer. The applicant was an existing recipient of weekly payments immediately prior to 1 October 2012.
3. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 22 July 2016. The Decision informed the applicant that his weekly payments would cease on 29 October 2016.
4. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 16 August 2016. The Internal Review Decision confirmed the original Work Capacity Decision.
5. The applicant sought Merit Review from the Authority by way of application received 22 August 2016. The Authority delivered its Findings and Recommendations dated 16 September 2016. The Authority made a findings that: (i) the applicant has a present inability arising from an injury such that he is not able to return to his pre-injury employment; (ii) the applicant is able to return to suitable employment;



(iii) the applicant has current work capacity; and (iv) he does not meet the special requirements under section 38(3) for continuation of weekly payments after the second entitlement period. Having made these four findings, the Authority took the opportunity to fail to make any recommendations, thus rendering the exercise “non-binding.”¹

6. The applicant made an application to this Office for procedural review received on 13 October 2016. I am satisfied that the application has been made within time and in the proper form.
7. 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

8. Section 44BB(1)(c) of the *Workers Compensation Act 1987* (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.*”
9. The submission made by the applicant has the virtue of brevity:

- “I believe my insurer may be in breach with my case.”

Submissions by the Insurer

10. The Insurer made no submissions in response to the application.

Decision

11. The Insurer advised the applicant that a work capacity assessment was commenced on 30 June 2016 and concluded on 22 July 2016, the same date on which the work capacity decision was made. The applicant had used the “fair notice” period to request that the Insurer have regard to two specific medical reports.

¹ See section 44BB(3)(e) and (f).



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12. The Insurer decided pursuant to section 43(1)(a) that the applicant could perform work with certain lifting restrictions and a driving limit of two hours.
13. Pursuant to section 43(1)(b) the applicant was found to be capable of performing the work of a Car Park Attendant.
14. The insurer advised that due to the current employment status of the applicant he does not meet the requirements of section 38(3). It follows that payments cannot continue past week 130, in the event that the applicant does not have high or highest needs.
15. There being a single assessment of 12% Whole Person Impairment, there is no evidence to suggest that the applicant has “high” or “highest” needs.
16. The insurer explained section 59A(2) and (3) and advised that medical expenses could continue to be paid until 29 October 2021.
17. The medical and related evidence relied upon to make the decision was fully set out and included a current Certificate of Capacity from the Nominated Treating Doctor dated 22 June 2016 as well as a Functional Capacity Evaluation Report dated 30 May 2016.
18. The notice provisions in section 54(2)(a) were set out, explained and complied with by the Insurer.
19. There are no procedural errors identifiable in the decision. The Insurer has complied with the Guidelines and relevant legislation.

Finding

20. The work capacity decision dated 22 July 2016 was validly made.

RECOMMENDATION

21. The application for procedural review is dismissed.



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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
15 November 2016