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RECOMMENDATION FOLLOWING AN APPLICATION FOR REVIEW OF THE INSURER'S WORK CAPACITY DECISION PURSUANT TO SECTION 44(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 21 August 2015. The decision informed the applicant that his weekly payments of compensation would cease from 29 November 2015. The applicant sought internal review and the Internal Review Decision was dated 16 October 2015. That decision confirmed the original Work Capacity Decision.
2. The applicant applied to the Authority for Merit Review on 12 November 2015 and they delivered findings and recommendations dated 11 December 2015. The Authority made a finding that the applicant satisfied the special requirements of Section 38(3) of the Workers Compensation Act 1987 (1987 Act) and that his ongoing entitlements to weekly compensation are to be calculated in accordance with Section 38(7) of the 1987 Act.
3. The applicant then made application to this office dated 12 January 2016. Taking into consideration the public holidays over the Christmas /New Year period I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. The applicant had previously sought procedural review of a Work Capacity Decision dated 5 September 2013. The applicant was successful and the Work Capacity Decision was set aside by an earlier recommendation of this office¹.

¹ Reported and numbered as 22514



5. The facts and circumstances concerning the background of this claim are set out in the aforementioned recommendation and need not be repeated.
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 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.*” The applicant has applied for a procedural review.
8. The applicant has submitted that he is ‘*not happy*’ with the outcome of the Merit Review. He attempted to contact the Merit Review Officer to discuss how they worked out he was earning \$800 per week when he was earning \$200 per week.
9. Unfortunately, I am not able to review the Findings and Recommendations on Merit Review by the Authority. Section 44BB(1)(c) of the 1987 Act clearly states that a worker may refer a work capacity decision of an insurer for review to the Independent Review Officer “*as a review only of the insurer’s procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer in making the decision.*”
10. Therefore, the submissions of the applicant are not relevant to procedural review.

Submissions by the Insurer

11. The Insurer has submitted by way of email dated 13 January 2016 that the applicant has submitted concerns with regards to the Merit Review Service procedures and decision, accordingly they are unable to comment. However, the insurer submitted that it had followed procedures correctly.



The Decision

12. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
13. Guideline 5.3.2 requires the Insurer to advise the date when the Work Capacity 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 29 November 2015.
14. 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 12 months after his entitlement to weekly payments ceases. The Insurer has adequately explained the legislation which was in force at the time of making the work capacity decision.
15. The Insurer is also required to inform the applicant of the relevant entitlement periods. The Insurer advised the applicant that he has received 667 weeks of compensation payments. Therefore any ongoing entitlements of the applicant are subject to Section 38 of the 1987 Act. In particular the applicant must satisfy the special conditions contained in Section 38(3) of the 1987 Act. The special conditions are set out at pages 3 and 4 of the Work Capacity Decision.
16. Most importantly the Insurer noted that the applicant must have returned to work for not less than 15 hours per week and earning at least \$176 per week (indexed amount).
17. At the time of the Work Capacity Decision the applicant was working as a Skipper of a fishing trawler on modified duties. A workplace assessment dated 24 January 2008 and a further one on 28 April 2015 confirmed that the applicant was able to perform the modified duties.



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18. The most recent WorkCover Certificate of Capacity from the nominated treating doctor dated 17 July 2015 certified the applicant had the capacity to perform suitable employment for 4 hours per day, four days per week.
19. The Insurer made a Work Capacity Decision pursuant to Section 43(1)(a) and (b) that the applicant could perform suitable employment as a Fishing Trawler Skipper for 16 hours per week. I note that the applicant had been employed in this suitable employment for several years.
20. The Insurer then examined the earning income statements of the applicant which revealed him to be earning \$138.46 per week. The Insurer determined that the applicant was not earning at least \$176 per week in accordance with Section 38(3)(b) and therefore he had not complied with the special requirements. The applicant was not entitled to ongoing payments of weekly compensation.
21. In making the Work Capacity Decision dated 21 August 2015 the Insurer has displayed a careful consideration of the requirements of the Guidelines and legislation.

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.

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
9 February 2016