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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.**
- b. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 28 July 2015.**
- c. The payments are to be back-dated from 28 July 2015 in accordance with clause 30 Schedule 8 to the *Workers Compensation Regulation 2010*.**
- d. Such payments are to continue until the receipt of this recommendation.**

**Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 16 April 2015. The decision informed the applicant that his weekly payments of compensation would cease on 28 July 2015. The applicant sought internal review on 2 June 2015 and the Internal Review Decision was dated 23 June 2015. That decision confirmed the original work capacity decision.
2. The applicant applied to the Authority for Merit Review on 21 July 2015 and they delivered findings and recommendations dated 19 August 2015. The Authority made a finding that the applicant did not meet the special requirements under Section 38 of the *Workers Compensation Act 1987* ("the 1987 Act") to be entitled to payments of weekly compensation.
3. The applicant then made application to this office dated 20 August 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.



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4. The applicant suffered injury to his back during the course of his employment as a coach captain/bus driver. The accepted date of injury is 4 May 2012. The applicant was unable to return to his pre-injury employment. At the time of the work capacity decision the applicant was self-employed as a tutor and in receipt of weekly payments of compensation.
5. 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**

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.*” The applicant has applied for a procedural review.
7. The applicant has requested a procedural review and has made the following submissions:
  - He is unable to seek employment as a result of his injury;
  - He has no income;
  - He is unable to work 4 hours as per medical certificate;
  - He is left with ongoing pain and financial hardship;
  - He is keen to work and has an injury and it is unfair that he cannot be compensated unless he works a minimum of 15 hours – he cannot meet this requirement because of his injury.
8. As stated above I am only able to review the procedures undertaken by the insurer in making the work capacity decision. I am unable to have any regard to either the applicant’s financial position or his difficulty in obtaining employment. I am also unable to review any discretion used by the insurer in determining suitable duties or the applicant’s capacity to work.
9. I have reviewed the applicant’s submissions and they are not relevant to procedural review.



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### **Submissions by the Insurer**

10. The Insurer submitted by email dated 20 August 2015 that the applicant's submissions relate to the merits of the decision rather than procedure. The insurer made no further submissions.

### **The Decision**

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

12. Guideline 5.3.2 requires the insurer to advise the applicant of the date of the work capacity assessment. The insurer informed the applicant that a work capacity assessment was completed on 15 April 2015. The applicant was informed of the work capacity decision by letter dated 16 April 2015. The insurer has complied with the Guideline.

13. The same Guideline requires the insurer to explain the relevant entitlement periods. The insurer has informed the applicant that he has received 156 weeks of compensation payments and as a result his ongoing entitlements will be subject to the provisions of Section 38 of the 1987 Act. The special provisions of that section are set out at page 4 of the work capacity decision. The insurer has complied with the Guideline.

14. In accordance with Section 32A and Section 43(1)(b) of the 1987 Act the insurer has determined that the role of tutor is suitable employment. It was noted that at that time the applicant was performing these duties and the nominated treating doctor provided signed approval dated September 2014. In making this decision the insurer has complied with the legislation and the Guidelines.

15. In accordance with Section 43(a) of the 1987 Act the insurer has determined that the applicant has the capacity to work 20 hours per week. This was in accordance with the work capacity certificate from the nominated treating doctor dated 30 March 2015 which advised that the applicant has the capacity to work 4 hours per day 5 days per week. The insurer has complied with the legislation and Guidelines.



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16. The insurer reviewed the preceding 12 weeks of the applicant's payslips/earnings and it was noted he worked between 4 and 14 hours per week. In accordance with the definition set out in Section 40(1) of the 1987 Act the insurer correctly determined that the applicant was not working at least 15 hours per week.
17. The insurer informed the applicant that they had determined that he had the capacity to work 20 hours per week in accordance with the nominated treating doctor's certificate of capacity and an analysis of his payslips determined that he was working between 4 and 14 hours per week.
18. The insurer then determined that the applicant did not satisfy the special provisions of Section 38(3)(b) and (c) in that he had not returned to work for at least 15 hours per week and he was not assessed by the insurer as to be incapable of undertaking further additional employment that would increase his current weekly earnings. The insurer has complied with the Guidelines and the legislation in making this decision.
19. Guideline 5.3.2 also 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 having regard to Section 76(1)(b) of the *Interpretation Act 1987*. In this decision the Insurer has referenced and explained both sections of each piece of legislation. As a result the applicant was advised that his payments would cease from 28 July 2015. This is the required notice period. The Insurer has complied with the legislation and the Guidelines.
20. Pursuant to Guideline 5.3.2 the insurer is to advise the applicant of the impact the decision has on his entitlement to medical and related treatment expenses. The Insurer has referenced Section 59A(2) 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 particularised the date of 28 July 2016. The insurer has also referenced and explained Section 59A(3) of the 1987 Act. The insurer has complied with the legislation in force at the time, and the Guidelines.



21. The decision of the insurer dated 16 April 2015 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.

### **The Stay**

23. Clause 30 Schedule 8 of the *Workers Compensation Regulation 2010* operates to stay the decision that is the subject of the review and prevents the taking of action by an insurer based on the decision while the decision is stayed.

24. The work capacity decision was dated 16 April 2015 and the applicant applied for internal review 2 June 2015. The applicant has not made the application for internal review within the 30 day period so the stay does not operate for this review.

25. The internal review decision from the insurer was dated 23 June 2015 and the applicant applied for Merit Review on 21 July 2015. This is within the 30 day period for the stay to apply to this review.

26. The findings and recommendations from Merit Review were dated 19 August 2015 and the applicant applied for procedural review on 20 August 2015. This is within the 30 day period for the stay to also operate for this review period.

27. Therefore the stay in this particular case operates from the date that the applicant applied for Merit Review which was 21 July 2015. As the applicant's weekly payments of compensation did not cease in accordance with the work capacity decision until 28 July 2015 the stay will operate from that date.

## **RECOMMENDATION**



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28. The application for procedural review is dismissed.
29. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 28 July 2015.
30. The payments are to be back-dated from 28 July 2015 in accordance with clause 30 Schedule 8 to the Workers Compensation Regulation 2010.
31. Such payments are to continue until the receipt of this recommendation.

Tracey Emanuel  
Delegate of the Workers Compensation  
Independent Review Officer  
23 September 2015