



**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. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 31 August 2015. The decision informed the applicant that her weekly payments of compensation would cease from 8 December 2015. The applicant sought internal review and the Internal Review Decision was dated 9 November 2015. That decision confirmed the original Work Capacity Decision.
2. The applicant applied to the Authority for Merit Review on 7 December 2015 and they delivered findings and recommendations dated 11 January 2016. The Authority made a finding that the Insurer was to determine the applicant's entitlement to weekly payments of compensation on a week to week basis under Section 38 of the *Workers Compensation Act 1987* (1987 Act) using the finding made by the Authority that the applicant's capacity to earn is \$468.28 per week.
3. The applicant then made application to this office dated 12 January 2016. 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 February 2015. The applicant was successful and the Work Capacity Decision was set aside by an earlier recommendation of this office<sup>1</sup>.

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<sup>1</sup> Reported and numbered as 11615



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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 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 has applied for a procedural review.
8. The applicant’s submissions include:
  - That the Work Capacity Decision is confusing as to which legislation and regulations apply to her case;
  - The work capacity assessment has not taken place in accordance with Section 38(4) of the *Workers Compensation Act 1987*;
9. The remaining submissions of the applicant relate to the Internal Review Decision and the Findings and Recommendations on Merit Review by the Authority. I am not able to review these decisions I am only able to review the procedures undertaken by the Insurer in making the Work Capacity Decision.

### **Submissions by the Insurer**

10. The Insurer has made submissions dated 19 January 2016 in response to this application. The Insurer has submitted that a number of the applicant’s submissions are in regards to the ‘*grounds and merits*’ of the Internal Review and Merit Review Decisions.

### **The Decision**

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



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12. The applicant submitted that she was confused as to which legislation applied to her case which allowed the Insurer to make a Work Capacity decision.

13. Clause 5.1 of the Guidelines states *that “for a worker who is an existing recipient of weekly payments, a work capacity decision is to be made as soon as practicable after the first work capacity assessment of the worker is conducted by the insurer.”*

14. The applicant suffered injury in or about 14 July 2000. The applicant has been in receipt of weekly payments since that time. There is no issue that the applicant is an *‘existing recipient.’* The definition of an *‘existing recipient’* is contained in Schedule 6 Part 19H Division 1 Clause 1 of the 1987 Act:

*“existing recipient of weekly payments” means an injured worker who is in receipt of weekly payments of compensation immediately before the commencement of the weekly payments amendments.’*

15. Schedule 6 Part 19H Division 1 Clause 8(1) and (2) of the 1987 Act states:

*(1) A work capacity assessment of an existing recipient of weekly payments is to be conducted as provided by this clause for the purposes of facilitating the application of the weekly payments amendments to the worker.*

*(2) The insurer who is liable to make weekly payments of compensation to an existing recipient of weekly payments must conduct a work capacity assessment of the worker no later than 12 months (or such longer period as may be prescribed by the regulations) after the commencement of the weekly payments amendments.*

16. Schedule 8 Part 1 Clause 17 advises a period of 35 months (expiring at the end of **31 August 2015**) was allowed for the making of a Work Capacity Decision of an existing recipient.



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17. The Work Capacity Decision dated 31 August 2015 has been made within the timeframes provided by the Guidelines and legislation.
18. As at the time the Work Capacity Decision was made the applicant had received 814 weeks of compensation payments. The Insurer correctly informed the applicant that compensation payments are no longer payable under Section 37 of the 1987 Act. As the applicant has received sufficient weekly payments to place her after the '*second entitlement period*' her ongoing entitlements must be assessed under Section 38 of the 1987 Act.
19. The Insurer has set out the special requirements of Section 38(3) of the 1987 Act at page 2 of the Work Capacity Decision. At pages 2 & 3 of the decision the Insurer has correctly informed the applicant that she has complied with those provisions and is entitled to ongoing payments of weekly compensation. Any ongoing entitlement was subject to the provisions of Section 38(7) of the 1987 Act.
20. The Insurer made decisions pursuant to Section 43(1) of the 1987 Act that the applicant had the capacity to work 20 hours per week in the suitable employment of a pre-admissions clerk earning \$591.60 per week. As previously stated I am unable to review any discretion exercised by the Insurer and I can only review the procedures used in making the decision. The Insurer relied upon the nominated treating doctor's certificate of capacity and an earning capacity assessment. The Insurer has complied with the appropriate procedural Guidelines.
21. I do note that the Authority at Merit Review determined that the applicant had the capacity to work 20 hours per week in the suitable employment of a store assistant (employment the applicant is presently performing) and has the capacity to earn \$468.28 (the applicant's present earnings). The Authority reduced the applicant's capacity to earn by \$123.32 per week from the Work Capacity Decision made by the Insurer. The Authority made the recommendation that the Insurer calculate the applicant's ongoing entitlements using these findings.
22. The Applicant has been assessed as having 27% Whole Person Impairment. In accordance with Guideline 5.3.2 the Insurer has correctly informed the applicant that she remains entitled to ongoing reasonable medical and related treatment expenses until she attains



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retirement age by virtue of Schedule 8 Part 2 Clause 28(1)(a) of the *Workers Compensation Regulation 2010*.

23. In making the Work Capacity Decision dated 31 August 2015 the Insurer has displayed a careful consideration of the requirements of the Guidelines and legislation.

### **Finding**

24. There are no procedural errors identifiable in the decision. The Insurer has complied with the Guidelines and relevant legislation.

### **RECOMMENDATION**

25. The application for procedural review is dismissed.

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