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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 16 September 2015.**
- c. The payments are to be back-dated from 16 September 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 10 June 2015. The decision informed the applicant that his weekly payments of compensation would cease on 16 September 2015. The applicant sought internal review and the Internal Review Decision was dated 8 July 2015. That decision confirmed the work capacity decision.
2. The applicant applied to the Authority for Merit Review on 15 July 2015 and they delivered findings and recommendations dated 13 August 2015. The Authority made a finding that the applicant did not satisfy the special requirements under Section 38 of the *Workers Compensation Act 1987* ("the 1987 Act") to be entitled to continuing payments of weekly compensation.
3. The applicant then made application to this office dated 27 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. On 23 June 2012 the applicant suffered injury to his left shoulder whilst playing touch football at a work conference. Liability for the injury was accepted by the insurer. The applicant underwent arthroscopic repair of the left shoulder on 9 May 2013. At the time the work capacity decision was made the applicant was not working and was 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:
 - Section 32A is not clearly defined as the applicant was given three different suitable employment options by the insurer; and
 - The insurer did not comply with Guideline 7.1.
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 review the Internal Review Decision by the insurer which is regulated by Guideline 7.1.

Submissions by the Insurer

9. The Insurer has not made any submissions in respect of this application.

The Decision



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10. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
11. 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 9 June 2015. The applicant was informed of the work capacity decision by letter dated 10 June 2015. The insurer has complied with the Guideline.
12. The same Guideline requires the insurer to explain the relevant entitlement periods. The insurer has informed the applicant that he has received 152 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.
13. In accordance with Section 32A of the 1987 Act the insurer has determined that the role of Database Administrator is suitable employment. The insurer has relied upon a Labour Market Analysis report dated 21 January 2015 to make this decision.
14. The applicant has submitted that the determination of suitable employment by the insurer is procedurally incorrect as three options of suitable employment have been nominated throughout the review process. As stated above I can only review the work capacity decision made by the insurer and I cannot review the Internal Review Decision or Merit Review Recommendations and Findings.
15. In the work capacity decision the insurer had nominated Database Administrator as the only option for suitable employment. In making this decision the insurer has complied with the legislation and the Guidelines.
16. In accordance with Section 43(1)(a) of the 1987 Act the insurer has determined that the applicant has the capacity to work 25 hours per week. This was in accordance with the work capacity certificate from the nominated treating doctor dated 14 April 2015. The insurer has complied with the legislation and Guidelines.



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17. Therefore the insurer had made a work capacity decision that the applicant is able to perform the suitable duties of a Database Administrator and has the capacity to perform these duties for 25 hours per week. It was noted at the time of making the work capacity decision that the applicant was not working.
18. The insurer then determined that as the applicant had current work capacity and he had not returned to work for at least 15 hours per week in accordance with the special requirements of Section 38(3) he was not entitled to ongoing payments of weekly compensation. The insurer has complied with the legislation and Guidelines.
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 16 September 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 16 September 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 10 June 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation.

Finding



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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.

RECOMMENDATION

24. The application for procedural review is dismissed.

25. The applicant is to be reinstated to his weekly payments at the rate applicable prior to 16 September 2015.

26. The payments are to be back-dated from 16 September 2015 in accordance with clause 30 Schedule 8 to the *Workers Compensation Regulation 2010*.

27. Such payments are to continue until the receipt of this recommendation.

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
1 October 2015