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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 29 June 2015. The decision informed the applicant that his weekly payments of compensation would cease on 8 October 2015. The applicant sought internal review and the Internal Review Decision was dated 30 July 2015. That decision confirmed the work capacity decision.
2. The applicant applied to the Authority for Merit Review on 11 August 2015 and they delivered findings and recommendations dated 24 September 2015. The Authority increased the calculation of the applicant's PIAWE and made a finding that the applicant was entitled to ongoing payments of weekly compensation under Section 37(3) of the *Workers Compensation Act 1987* ("the 1987 Act") in the sum of \$21.61 per week.
3. The applicant then made application to this office dated 12 October 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. On 8 November 2011 the applicant sustained a crush injury to his left foot whilst driving a forklift. The applicant underwent surgery in February 2014 and August 2014. Up until that time the applicant had been performing suitable duties for the employer. The applicant's employment was terminated in August 2014. The applicant has been in receipt of weekly payments of compensation since that time. As at the time of the work capacity decision the applicant was not working.



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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:

- The Insurer failed to take into account that the applicant had two surgeries;

I note that the Insurer conceded in its submissions that it had not stated that the applicant had undergone two surgeries. However, I do note that a work capacity decision by an insurer is a decision about a “*worker’s current work capacity*” as set out in Section 43(1)(a) of the 1987 Act. Whilst the Insurer may have omitted the fact that the applicant had undergone two surgeries I do not consider this to be a procedural error. The Insurer made its decision as to the applicant’s “*current work capacity*” based upon medical evidence which was obtained after both bouts of surgery.

- The Insurer failed to notify the applicant it was undertaking a subsequent work capacity decision;

The insurer provided a copy of a fair notice letter dated 4 June 2015 in which the Insurer has advised “*Further to our recent telephone conversation I am writing to confirm that a work capacity assessment is currently in progress for your claim and a work capacity decision will be made following this assessment in accordance with Section 43(1) and 44A of the Workers Compensation Act 1987.*”



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I note that the Insurer has notified the applicant of the work capacity assessment and the proposed work capacity decision.

- The insurer failed to provide a copy of “*this form*” [Application for Procedural Review of a Work Capacity Decision];

The Insurer is not under any obligation to provide a copy of the *Application for Procedural Review of a Work Capacity Decision* form. I do note that the Insurer correctly informed the applicant of his entitlement to seek a procedural review in the letter dated 2 October 2015 advising of the outcome of the Merit Review by the Authority.

Submissions by the Insurer

8. The Insurer has made submissions dated 16 October 2015 in respect of this application. The Insurer conceded that it failed to acknowledge that the applicant had two surgeries. However, the work capacity decision was made based upon the applicant’s ‘*current work capacity*’ and not based upon medical treatment.
9. It is submitted by the Insurer that they attempted to contact the applicant by telephone on 4 June 2015 however this was not successful. A fair notice letter was posted to the applicant.
10. Finally the Insurer submitted that in accordance with Guideline 7.4 there is no requirement for the Insurer to attach the procedural review form following the Outcome and Findings of Merit by the Authority.

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 performed on 4 June 2015. The applicant was informed of the work capacity decision by letter dated 29 June 2015. The insurer has complied with the Guideline.



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13. The same Guideline requires the insurer to explain the relevant entitlement periods. The insurer has informed the applicant that he has received 54 weeks of compensation payments and as a result his ongoing entitlements will be subject to the provisions of Section 37 of the 1987 Act. The insurer has complied with the Guideline.
14. In accordance with Section 32A of the 1987 Act the insurer has determined that the roles of hotel receptionist and receptionist/administration assistant are suitable employment. The insurer has relied upon a vocational assessment report dated 9 April 2015 in addition to the approval of the roles from the nominated treating doctor dated 4 June 2015. The Insurer has complied with the legislation and the Guidelines.
15. In accordance with Section 43(1)(a) of the 1987 Act the insurer has determined that the applicant has the capacity to work 40 hours per week. This was in accordance with the work capacity certificate from the nominated treating doctor dated 1 June 2015. The insurer has complied with the legislation and Guidelines.
16. The Insurer had determined the applicant's pre-injury average weekly earnings in accordance with Sections 44C-44I of the 1987 Act. In accordance with Section 35(1) and 43(1)(c) the Insurer has determined the applicant has the capacity to earn \$880 per week. The Insurer has complied with the Guidelines.
17. In summary the insurer had made a work capacity decision that the applicant is able to perform the suitable duties of a hotel receptionist or receptionist/administration assistant and has the capacity to perform these duties for 40 hours per week and the ability to earn \$880 per week. It was noted at the time of making the work capacity decision that the applicant was not working.
18. At page 3 of the work capacity decision the Insurer noted that as it had determined that the applicant has work capacity and he had not returned to work his ongoing entitlement was calculated under Section 37(3) of the 1987 Act. The Insurer has explained the calculation on the



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abovementioned page and it was noted that the applicant's ongoing entitlement was nil.

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 8 October 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 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. It is noted that subsequent to the work capacity decision the Merit Review recommendation is that the applicant is entitled to ongoing weekly compensation in the sum of \$21.61 per week. Therefore the applicant will remain entitled to medical and related treatment expenses as his entitlement to weekly payments is ongoing. Despite this the actual work capacity decision was still valid as it was correct in the information it was providing to the applicant at the time it was drafted.
22. The decision of the insurer dated 29 June 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation.

Finding

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

RECOMMENDATION



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24. The application for procedural review is dismissed.

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
5 November 2015