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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.**
- b. **Such weekly payments as the applicant is entitled to receive by virtue of the stay pursuant to section 44BC of the *Workers Compensation Act 1987* are to continue until receipt by the applicant of this recommendation.**
- c. **Pursuant to Section 44BB(1)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.**

Introduction and background

1. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 6 October 2015. The Decision informed the applicant that his weekly payments of compensation would cease on 14 January 2016. The applicant sought internal review by the Insurer on 12 October 2015. The Internal Review Decision was dated 9 November 2015 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application dated 7 December 2015. The Authority delivered its Findings and Recommendations dated 11 January 2016. The Authority made a finding that the applicant did not satisfy the special requirements under Section 38(3) of the *Workers Compensation Act 1987* (1987 Act) for continuation of weekly payments of compensation.



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3. The Authority made an additional recommendation that the Insurer was to decide if the applicant was a *'worker with high needs'* and to determine the applicant's entitlement to weekly payments in accordance with Section 38 of the 1987 Act.
4. The applicant then made an application to this office for procedural review by way of application dated 18 January 2016. I am satisfied that the application has been made within time and in the proper form.
5. On 2 December 2008 the applicant sustained injuries to his upper back during the course of his employment as a sales assistant. The applicant returned to suitable duties however his employment was terminated in or about November 2011 when those suitable duties were no longer available. The applicant was employed as a sales assistant with a different employer for the period July 2013 to 12 February 2014. At the time the Work Capacity Decision was made the applicant was not working and was in receipt of weekly payments of compensation.
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. In addition to making the application for review the applicant has made several submissions including that he has suffered a major physical injury and a major nervous breakdown. He has had major spinal surgery resulting in work restrictions and 50% body impairment. Despite the applicant making over 1000 job applications he has been unable to obtain suitable employment.
9. I am unable to take into consideration the personal circumstance of the applicant. I am unable to review the merits of the decisions made by the Insurer. I am only able to review the procedures implemented by the



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Insurer in making the Work Capacity Decision. The applicant's submissions are not relevant to this procedural review.

Submissions by the Insurer

10. The Insurer has made submissions dated 25 January 2016 in response to this application.
11. The Insurer has submitted that the applicant's claim has not been the subject of Section 66 assessment and therefore the Insurer is unable to deem him with 50% whole person impairment.
12. In accordance with Section 32A of the 1987 Act the applicant has not been assessed as a worker with '*high needs*' as he has not been assessed or paid any Section 66 whole person impairment entitlement of greater than 20%.
13. Furthermore, the Authority in their findings and recommendations dated 11 January 2016, have not made a determination regarding the outcome of merit as it was recommended that a new decision be made to determine if the applicant is a worker '*with high needs*'. A new Work Capacity Decision was made on 20 January 2016 following the recommendation by the Authority.

Decision

14. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
15. Guideline 5.3.2 requires the Insurer to advise the applicant of the date of the work capacity assessment. On this occasion the Insurer informed the applicant that the work capacity assessment was completed on 2 October 2015 and the applicant was notified of the Work Capacity Decision by letter dated 6 October 2015.
16. The same Guideline 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. This notice period takes into account Section



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76(1)(b) of the *Interpretations Act 1987*. As a result the applicant was advised that his payments would cease from 14 January 2016. This is the appropriate notice period.

17. I do note that the Insurer has advised the applicant of the date of cessation of his weekly payments of compensation at page 4 of the Work Capacity Decision under the heading '*Required notice period.*' It would be preferable if such important information, which clearly impacts greatly upon the applicant, was at the beginning of the decision.
18. The Guideline 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.
19. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer has informed the applicant that he has received 160 weeks of compensation payments. Therefore any ongoing entitlement to weekly payments of compensation is subject to Section 38 of the 1987 Act. The Insurer has set out the provisions of Section 38 at page 3 of the Decision.
20. Pursuant to Section 43 of the 1987 Act the Insurer has determined that the applicant has the current capacity to work 38 hours per week based upon the certificate of capacity dated 11 September 2015 from the nominated treating doctor.
21. The Insurer determined, pursuant to the same section, the roles of customer services officer / inquiry clerk and general sales / retail assistant were suitable employment. The Insurer based this decision upon an earning capacity assessment report. It was noted that the nominated treating doctor provided written approval for these duties. The Insurer also determined that the applicant is able to earn \$903.39 per week in suitable employment.



22. In making these determinations pursuant to Section 43 of the 1987 Act the Insurer has displayed an adequate understanding of the relevant Guidelines and legislation.
23. The Insurer noted at page 2 of the Work Capacity Decision that the applicant has not returned to work for not less than 15 hours per week and was not earning at least \$176.00 per week. The Insurer informed the applicant that as he did not satisfy the provisions of Section 38(3)(b) of the 1987 Act he was not entitled to ongoing payments of weekly compensation.
24. As the Insurer had determined that the applicant had the capacity to work 38 hours per week and earn \$903.39 per week the worker did not satisfy Section 38(3)(c) of the 1987 Act.
25. The Work Capacity Decision of the Insurer dated 6 October 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation.

Finding

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

The Stay

27. Section 44BC of the 1987 Act operates so as to entitle a worker, during the course of a Section 44BB review, to receipt of the same compensation payments to which he/she was entitled to immediately prior to the making of the adverse Work Capacity Decision.
28. The entitlement has no time cap or deadline or other limitation on it beyond receipt by the worker of the review decision. This is an entitlement which exists irrespective of the existence or duration of any notice given to the worker under Section 54 of the 1987 Act.
29. Payments which continue under Section 54 are subject to the usual requirements of providing updated work capacity certificates and other compliance with the legislation by the worker. There is no such



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requirement under Section 44BC. The worker has already fully qualified to receive their ongoing payments as at the date of the work capacity decision. The applicant is automatically entitled to payments again upon application for review under section 44BB (unless the application for review is outside the 30 day time limit).

30. Section 44BC of the *Workers Compensation Act 1987* operates so that the work capacity decision is the subject of a stay during the review process. This not only stays the decision, but also prevents the Insurer taking “any action *based on the decision* while it is stayed.” By definition the cessation of payments, which is clearly based on the decision, is such an “action” and may not take place during the relevant period of review.

31. There appears to be a view afoot that if an insurer has already stopped payments prior to an application for merit or procedural review, then payments need not be resumed during such review, since the insurer cannot take “any action” during that time, which is erroneously interpreted to include a prohibition on the resumption of weekly payments. Such an analysis begs the question, since it assumes that the work capacity decision was correct, and it also completely defeats the purpose of the legislative amendment, which was to ensure that workers are paid for the duration of section 44BB review. It also follows that the resumption of payments is not an action “based on the decision” (since the decision resulted in a reduction or cessation) and therefore cannot be the subject of prohibition.

RECOMMENDATION

32. The application for procedural review is dismissed.

33. Such weekly payments as the applicant is entitled to receive by virtue of the stay pursuant to section 44BC of the *Workers Compensation Act 1987* are to continue until receipt by the applicant of this recommendation.

34. Pursuant to Section 44BB(1)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.



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Tracey Emanuel

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Delegate of the Workers Compensation
Independent Review Officer
18 February 2016