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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. Such weekly payments as the applicant is receiving by virtue of the stay are to continue until receipt of this decision.**

Introduction and background

1. The Insurer made a work capacity decision dated 29 July 2015 which informed the applicant that his weekly payments of compensation would cease on 6 November 2015. The applicant sought internal review on 12 August 2015 and the Internal Review Decision was dated 8 September 2015. That decision confirmed the work capacity decision.
2. The applicant applied to the Authority for Merit Review on 25 September 2015 and they delivered findings and recommendations dated 20 October 2015. The Authority made a finding that the applicant did not satisfy the special provisions under Section 38 of the *Workers Compensation Act 1987* (1987 Act) in order to be entitled to ongoing weekly payments of compensation.
3. The applicant then made application to this office dated 15 November 2015. 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 September 2013. The applicant was successful and the work capacity decision was set aside by an earlier recommendation of this office¹.

¹ Reported and numbered as 7414



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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 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 requesting the procedural review the applicant has made the following submission:

“The Insurer has again gone straight to a decision as previously stated in WIRO recommendation of 3-6-14 paragraph 9. My condition has not changed since this time. I do not have the job skills to perform the jobs the Insurer says. I am a qualified storeman and the employer where I injured myself does not have duties to accommodate my restrictions as per my doctor’s certificates. Again the job types stated by the Insurer were made by an independent assessor and not the Insurer. My restrictions are 2kg right arm 5kg combined both arms. Paragraph 10 of the WIRO recommendation of 3-6-14 it seems the same has been done again. I believe that the Insurer has again followed to fail procedures as set out in paragraph 22 of the WIRO recommendation dated 3-6-14. The person who made the decision [name withheld] no longer works for the Insurer.”

9. I am unable to review any discretion or judgment exercised by the Insurer in making decisions in respect of suitable duties and capacity to work. I am unable to have regard for the applicant’s personal circumstance and the availability of suitable duties. I am only able to review the procedures implemented by the Insurer in making the work capacity decision.



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Submissions by the Insurer

10. The Insurer made the following submissions dated 23 October 2015 in reply to the applicant's submissions:

- In accordance with Section 44A(1) of the 1987 Act the Insurer can make a work capacity assessment at any time;
- That the applicant has the transferable skills to be a customer service/inquiry clerk and stock clerk;
- Acknowledges that the applicant has capacity to lift up to 2kg with the right arm and up to 5kgs using both arms;
- In accordance with section 38(8) of the 1987 Act the worker's entitlement to compensation under this section may be reassessed at any time;
- The proper Guidelines and procedures were followed.

The Decision

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

12. The applicant has made a submission that *"the Insurer has again gone straight to a decision as previously stated in WIRO recommendation of 3-6-14 paragraph 9."*

13. Paragraph 9 of the previous decision refers to the Insurer failing to advise the applicant as to when the work capacity assessment was undertaken. In the present work capacity decision the Insurer informed the applicant that a work capacity assessment was completed on 28 July 2015. Furthermore, in its submissions the Insurer confirmed that a fair notice call and letter advising of the work capacity assessment was completed on 25 June 2015. In this instance the Insurer has complied with the Guidelines and legislation.

14. The next submission from the applicant is that *"I do not have the job skills to perform the jobs the Insurer says."* As previously stated, Section 44(1)(c) of the 1987 Act limits me to reviewing only the Insurer's procedures in making the work capacity decision and prevents me from



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reviewing any judgment or discretion exercised by the Insurer in making the decision.

15. Section 43(1)(b) allows the Insurer to make a work capacity decision about what constitutes suitable employment for the applicant. In accordance with this section and the definition set out in Section 32A the Insurer determined a customer service/inquiry clerk and stock clerk to be 'suitable employment.' In making this decision the Insurer relied upon a work capability assessment dated 14 June 2013, an injury management and labour analysis report dated 17 July 2015 and a facsimile response confirming the vocational options from the nominated treating doctor dated 9 December 2014.

16. Guideline 4 outlines some of the evidence which may be used when making a work capacity decision. This includes injury management consultant reports, rehabilitation provider reports, vocational assessment reports and certificates of capacity. The Insurer has complied with the Guidelines and legislation in making the decision as to what constitutes suitable employment for the applicant.

17. The applicant makes a further submission "*I am a qualified storeman and the employer where I injured myself does not have duties to accommodate my restrictions as per my doctor's certificates.*"

18. I refer to Section 32A of the 1987 Act which states that when assessing what constitutes 'suitable employment' one is not to have regard for:

- *Whether the employment is available, and*
- *Whether the work or employment is of a type or nature that is generally available in the employment market, and*
- *The nature of the worker's pre-injury employment, and*
- *The worker's place of residence.*

19. Therefore, the applicant's submission is not relevant as it is not a consideration that his pre-injury employer does not have duties which accommodate his present restrictions. The Insurer has not made an error by failing to consider the aforementioned issues when making a decision as to what constitutes suitable employment.



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20. The applicant has submitted *“Again the job types stated by the Insurer were made by an independent assessor not the insurer.”* This submission is incorrect. The Insurer has obtained evidence such as that outlined in Guideline 4 to assist in making the work capacity assessment and decision. The Insurer has used that information upon which to base its decision and in doing so the Insurer has complied with the Guidelines and legislation.
21. The applicant has submitted that his restrictions are *“2 kg right arm 5 kg combined both arms.”* These restrictions are acknowledged by the Insurer and were taken into consideration during the decision making process.
22. The applicant has made a submission that the person who made the work capacity decision is no longer employed by the Insurer. This is not a relevant consideration for procedural review.
23. The applicant has made a general submission that the Insurer *‘has again failed to follow procedures as set out in paragraph 22 of WIRO recommendation dated 3-6-14.’* That paragraph was a finding in respect of the Insurer’s failure to follow procedure in respect of the previous work capacity decision dated 5 September 2013.
24. In the work capacity decision which is the subject of this review the Insurer has displayed an adequate comprehension of the Guidelines and legislation. The Insurer informed the applicant that he had received 499 weeks of compensation payments and his ongoing entitlement would be subject to the provisions of Section 38(3) of the 1987 Act. Those special provisions were adequately explained by the Insurer on page 3 of the decision.
25. At page 6 of the work capacity decision the Insurer provides the applicant with a clear line of reasoning as to why he is not entitled to continuing weekly payments of compensation.
26. The Insurer has informed the applicant the decision will take effect from 6 November 2015 and has correctly referred to both Section 54(2)(a) of the 1987 Act and Section 76(1)(b) of the *Interpretations Act 1987*.



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27. Likewise the Insurer has correctly referred to Sections 59A(2) and (3) of the 1987 Act and informed the applicant that his entitlement to medical and related treatment expenses would cease twelve months after his entitlement to weekly payments ceased. The Insurer provided the applicant with the correct explanation of the legislation in force at the time of the decision.

28. The decision of the Insurer dated 29 July 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation.

Finding

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

RECOMMENDATION

30. The application for procedural review is dismissed.

31. Such weekly payments as the applicant is receiving by virtue of the stay are to continue until receipt of this decision.

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
9 December 2015