



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 be paid from the date of cessation and continue until receipt by the applicant of this recommendation.**
- c. **Pursuant to Section 44BB(3)(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 26 August 2015. The Decision informed the applicant that his weekly payments of compensation would cease on 3 December 2015. The applicant sought internal review by the Insurer on 21 September 2015. The Internal Review Decision was dated 23 October 2015 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application dated 22 November 2015. The Authority delivered its Findings and Recommendations dated 23 December 2015. The Authority made a recommendation that in accordance with Section 37 of the *Workers Compensation Act 1987* (1987 Act) the applicant is entitled to weekly payments of compensation calculated in the amount of nil.
3. The applicant then made an application to this office for procedural review by way of application dated 22 January 2016. I am satisfied that the application has been made within time and in the proper form.



Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

4. On 10 September 2014 the applicant suffered injury to his left hand by cutting his fingers with a circular saw during the course of his employment as a wardrobe fitter. The applicant's employment was subsequently terminated. Since that time the applicant has been unable to obtain employment and at the time of the Work Capacity Decision 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 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.
7. In addition to making the application for review the applicant has made four primary submissions:
 - The work capacity decision was not made by the applicant's case manager;
 - The Internal Review Decision was not issued within the 30 day time frame;
 - The applicant's weekly payments were not indexed since the date of his accident to the date of cessation; and
 - The failure of the applicant's return to work plan was the Insurer and their lack of 'care' for the applicant's situation.
8. In response to the applicant's first submission it is not a requirement that the case manager make the Work Capacity Decision. The only requirement in the Guidelines is that the Internal Review be performed by someone other than the person who made the original Work Capacity Decision. The Insurer has followed the correct procedure.
9. In respect of the applicant's second submission I do note that Guideline 7.1.7 calls for the Insurer to perform a review within 30 days of receiving the application. In this instance the applicant's application for Internal



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Review was dated 21 September 2015 and the Internal Review Decision was dated 23 October 2015. That is a period of 32 days.

10. Guideline 7.1.5 holds that if the Insurer fails or declines to perform the Internal Review within the 30 day timeframe the applicant may then apply for Merit Review to the Authority. In this case the applicant did apply to the Authority for Merit Review upon receipt of the Internal Review Decision. That was the only remedy available to the applicant in any event. The applicant has not been prejudiced by the two delay of the Insurer and the Insurer has not breached the Guidelines to the effect of being a procedural error.
11. The applicant has submitted that his weekly payments of compensation were not indexed from the date of injury. I am only able to review the processes of the Insurer in making the Work Capacity Decision. I am unable to review the day to day management of the applicant's claim file by the Insurer. This is not an issue relevant to procedural review.
12. In response to the failure of the applicant's *'job plan'* 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 Insurer in making the Work Capacity Decision. The applicant's submission is not relevant to this procedural review.

Submissions by the Insurer

13. The Insurer has not made submissions in response to this application.

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 commenced on 31 July 2015 and was completed on 26 August 2015. The applicant was notified of the Work Capacity Decision by letter dated 26 August 2015.



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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 76(1)(b) of the *Interpretations Act 1987*. As a result the applicant was advised that his payments would cease from 3 December 2015. 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 '*What happens during the three month 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 41 weeks of compensation payments. Therefore any ongoing entitlement to weekly payments of compensation is subject to Section 37 of the 1987 Act.
20. Pursuant to Section 43 of the 1987 Act the Insurer has determined that the applicant has the current capacity to work 20 hours per week (4 hours per day, 5 days per week) based upon the certificate of capacity from the nominated treating doctor. It was noted that this is equivalent to the applicant's pre-injury hours and this has been his certified capacity since 28 November 2014.
21. The Insurer determined, pursuant to the same section, the role of bookkeeper to be suitable employment. The Insurer based this decision



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upon an earning capacity assessment report dated 19 March 2015. 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 \$600.00 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 that the applicant has not returned to work. The Insurer explained the calculation of the applicant's ongoing entitlement using Section 37 at page 3 of the Work Capacity Decision. The applicant's ongoing entitlement was calculated to be nil.

24. The Work Capacity Decision of the Insurer dated 26 August 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation.

Finding

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

The Stay

26. The applicant advised by way of email dated 18 February 2016 that the Insurer had ceased his weekly payments of compensation as at 4 December 2015. This was during the review process.

27. Section 44BC of the 1987 Act entitles a worker, during the course of a Section 44BB review, to receipt of the same compensation payments to which he was entitled 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 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 “*within 30 days*” time limit).
30. Section 44BC of the 1987 Act 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 whilst 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 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 be paid from the date of cessation and continue until receipt by the applicant of this recommendation.



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34. Pursuant to Section 44BB(3)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.

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