



**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.**

**Introduction and background**

1. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 29 October 2015. The Decision informed the applicant that his weekly payments of compensation would cease on 5 February 2016. The applicant sought internal review by the Insurer which confirmed the original Work Capacity Decision on 8 December 2015.
2. The applicant sought Merit Review by the Authority. The application was received on 18 December 2016 and the recommendation was made on 20 January 2016. The recommendation of the Authority was that the insurer should "determine [the applicant's] entitlement to weekly compensation under section 37(3) of the 1987 Act" in accordance with certain findings. One of the findings varied the amount that the applicant was able to earn in suitable employment [E] from \$1,000 per week as assessed by the Insurer to \$800 per week.
3. The applicant then made an application to this office for procedural review by way of application received on 5 February 2016. I am satisfied that the application has been made within time and in the proper form.
4. On 9 December 2013 while in the course of his employment the applicant noticed lower back pain and was later diagnosed with a right-sided paracentral disc protrusion at L5/S1 level with nerve root impingement at S1. After treatment and various attempts to return to work the applicant's employment was terminated in July 2015. At the time of the Work Capacity Decision the applicant was in receipt of weekly payments of compensation.



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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 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.*”

7. In addition to making the application for review the applicant has made one primary submission, which itself has three parts:

- The work capacity decision was based at least in part on an Earning Capacity Assessment [ECA] from an external provider which was riddled with errors:
  - The “contact references” included in the industry analyses were incomplete – when contacted by the applicant who requested the full references ostensibly to “validate the provided industry analysis findings” the external provider refused to provide the information;
  - The suitable employment options suggested “largely contradict” the applicant’s current work capacity and skills set, in addition to which the role of Process Worker is “scarcely available” given the confines of his work capacity; and
  - “The average earning capacity assessment was inaccurate and workings were found to be inaccurate.”

8. It is hard to understand the first sub-submission. It seems analogous to a worker wanting the contact details of an IME who did a report for the Insurer so that he can enter into a course of disputation directly with the IME, rather than addressing the contents of the report itself. An Insurer is entitled to rely upon the report of an external provider and whilst a worker has a right to a copy of the report, the right does not go beyond that.



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9. The two remaining sub-submissions concern matters which were dealt with comprehensively in the course of merit review. Specifically I can refer the applicant to paragraphs 37, 48-51 of the Merit Review recommendations dated 20 January 2016.

### **Submissions by the Insurer**

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

### **Decision**

11. The relevant Guidelines are 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. On this occasion the Insurer informed the applicant that the work capacity assessment commenced on 06 October 2015 and was completed on 28 October 2015. The applicant was notified of the Work Capacity Decision by letter dated 29 October 2015.
13. 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 5 February 2016. This is the appropriate notice period.
14. 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.



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15. Pursuant to Section 43 of the 1987 Act the Insurer has determined that the applicant has the current capacity to work 40 hours per week (8 hours per day, 5 days per week) based upon the certificate of capacity from the nominated treating doctor.
16. The Insurer determined, pursuant to the same section, the role of Process Worker to be suitable employment. The nominated treating doctor of the applicant agreed with this.
17. 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.
18. The Insurer came to a decision which was corrected as to quantum in the course of merit review. As a result the applicant is likely to receive ongoing payments.
19. 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**

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

### **RECOMMENDATION**

21. The application for procedural review is dismissed.

Wayne Cooper  
Delegate of the Workers Compensation  
Independent Review Officer  
21 March 2016