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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.**

##### **Introduction and background**

1. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 14 September 2015. The Decision informed the applicant that her weekly payments of compensation would cease from 22 December 2015. The applicant sought internal review by the Insurer on 13 October 2015. The Internal Review Decision was dated 6 November 2015 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 7 December 2015. The Authority delivered its Findings and Recommendations dated 14 January 2016. The Authority set aside the Work Capacity Decision and made a finding that the applicant had no current work capacity and that she is entitled to weekly payments of compensation to be calculated in accordance with Section 38(6) of the *Workers Compensation Act 1987* (1987 Act).
3. Despite having succeeded at Merit Review, the applicant then made an application to this office for procedural review dated 12 February 2016. I am satisfied that the application has been made within time and in the proper form.
4. The applicant previously sought a review of a work capacity decision dated 27 November 2013. The applicant was successful and the work capacity decision was set aside by an earlier recommendation of this office.<sup>1</sup>

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<sup>1</sup> Reported and numbered as 8414



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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. The applicant attached three pages of submissions to her application referring to relevant aspects of the 13 page submission made to the Authority (which was also attached to the application). The applicant made 18 specific submissions in this procedural review which have been reviewed and considered.
9. The submissions numbered i, ii, iii, iv, v, vi, vii, viii, ix, x, xi, xii, xiv, xv and xviii are not submissions relevant to this procedural review. They are submissions which go to the merits of the case and were obviously considered by the Authority during the Merit Review process as the Authority invalidated the Insurer’s Work Capacity Decision.
10. In respect of submission number xiii the applicant alleges that she was not provided with the appropriate fair notice. I do note that the Work Capacity Decision records that the applicant emailed the Insurer advising them not to contact her by telephone in relation to her claim. The Internal Review Decision notes that the Insurer sent the applicant a Notice of Impending Work Capacity Decision on 21 August 2015.
11. Guideline 5.2 requires the Insurer to inform the applicant that a review of current work capacity is being undertaken and that a work capacity decision is going to be made. The Guideline states that the notice should be given preferably by telephone or in person. However, given the applicant’s direction to the Insurer on this occasion written notice



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was appropriate. I consider that the Insurer has provided the applicant with the appropriate fair notice.

12. In respect of submission xvi made by the applicant. I have reviewed the previous decision made by WIRO dated 23 June 2014 and I am satisfied that the Insurer has not repeated the errors contained in the original Work Capacity Decision dated 27 November 2013.
13. The applicant has also submitted at xvii that the Insurer has not made the Work Capacity Decision within the time frames prescribed by the legislation. The Insurer did not make a Work Capacity Decision by 31 August 2015 as prescribed by Clause 17 Schedule 8 of the *Workers Compensation Regulation 2010* (the Regulation) however, I note that the Insurer did comply with Clause 17A by paying the applicant weekly payments of compensation equivalent to those of a worker with no capacity until a Work Capacity Decision was made.

#### **Submissions by the Insurer**

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

#### **Decision**

15. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
16. 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 14 September 2015 and the applicant was notified of the Work Capacity Decision by letter dated the same date.
17. 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 her payments would cease from 22 December 2015. This is the appropriate notice period.



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18. The Guideline requires the Insurer to advise the applicant of the impact the decision has on her 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 her entitlement to medical expenses will cease 2 years after her entitlement to weekly payments ceases. The Insurer has adequately explained the legislation.
19. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer has informed the applicant that she has received 294 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 special requirements of Section 38(3) of the 1987 Act at pages 2 and 3 of the Work Capacity Decision.
20. The Work Capacity Decision of the Insurer dated 14 September 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation. It is noted that the Authority made a finding that the applicant has no current capacity which was contrary to the Work Capacity Decision. However, the Authority's findings were based on the merits of the Work Capacity Decision whereas this review is limited to the procedures implemented by the Insurer in making the decision. I am unable to review any discretion or judgment exercised by the Insurer.

### **Finding**

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

### **RECOMMENDATION**

22. The application for procedural review is dismissed.



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A handwritten signature in black ink that reads "T. Emanuel".

Tracey Emanuel  
Delegate of the Workers Compensation  
Independent Review Officer  
8 April 2016