



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 2 October 2015. The Decision informed the applicant that his weekly payments of compensation would be reduced to \$380.96 on 9 January 2016. The applicant sought internal review by the Insurer on 28 October 2015. The Internal Review Decision was dated 27 November 2015 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 17 December 2015. The Authority delivered its Findings and Recommendations dated 20 January 2016. The Authority made findings that the applicant has current work capacity and is able to earn \$414.00 per week in suitable employment. The Authority recommended that the Insurer calculate the applicant's entitlement to weekly payments of compensation under Section 38(7) in accordance with their finding.
3. The applicant then made an application to this office for procedural review dated 16 February 2016. I am satisfied that the application has been made within time and in the proper form.
4. On 4 July 2008 the applicant suffered injury to his lumbar spine in the course of his employment as a boilermaker. At the time of the Work Capacity Decision the applicant was working as a console operator and 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 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.

Submissions by the Insurer

7. The Insurer has not made submissions in response to the application for procedural review.

Decision

8. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
9. 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 7 September 2015 and was completed on 2 October 2015. The applicant was notified of the Work Capacity Decision by letter dated 2 October 2015.
10. 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 be reduced on 9 January 2016. This is the appropriate notice period.
11. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer has informed the applicant that he has received 373 weeks of compensation payments. Therefore any ongoing



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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 page 4 of the Work Capacity Decision.

12. Pursuant to Section 43 of the 1987 Act the Insurer has noted that the applicant has been certified with a capacity of 5 hours per day, 3 days per week as per the Certificate of Capacity dated 7 August 2015 from the nominated treating doctor. The Insurer determined, pursuant to the same section, the roles of service station attendant, sales assistant and checkout operator to be suitable employment. The Insurer noted that the applicant had been performing the duties of a console operator since September 2013. The Insurer also considered the vocational assessment report dated 2 April 2015.
13. The Insurer then determined in accordance with Section 43(1)(c) that the applicant had the capacity to earn \$414.00 per week. This decision was based upon the hourly earnings of a sales assistant.
14. I note that the applicant is presently earning \$180.00 per week for 15 hours as a console operator. The Insurer has made a Work Capacity Decision that the applicant has a higher earning capacity than he is exhibiting in his present employment. This is a decision that the Insurer has made using its discretion and judgment. I am unable to review decisions of this nature made by the Insurer as expressed in Section 44BB(1)(c) of the 1987 Act.
15. In making these determinations pursuant to Sections 43 and 38 of the 1987 Act the Insurer has displayed an adequate understanding of the relevant Guidelines and legislation.
16. The Insurer informed the applicant that he was required to comply with Section 38(3)(b) and (c) in order to be entitled to ongoing weekly payments of compensation. The Insurer noted that as the applicant was working at least 15 hours per week *and* earning at least \$176.00 per week he had fulfilled the special requirements of Section 38(3)(b) of the 1987 Act.
17. The Insurer then determined the applicant's ongoing entitlements to weekly payments of compensation pursuant to Section 38(7) of the 1987



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Act. The Insurer calculated the applicant was entitled to continuing payments in the sum of \$380.96 per week.

18. The Work Capacity Decision of the Insurer dated 2 October 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation.

Finding

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

RECOMMENDATION

20. The application for procedural review is dismissed.

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

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