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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.**
- b. Such weekly payments as the applicant is receiving by virtue of the stay pursuant to Section 44BC of the *Workers Compensation Act 1987* are to 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 June 2015. The Decision informed the applicant that his weekly payments of compensation would cease on 4 October 2015. The applicant sought internal review by the Insurer on 19 November 2015. The Internal Review Decision was dated 18 December 2015 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 22 December 2015. The Authority delivered its Findings and Recommendations dated 18 February 2016. The Authority made a finding the applicant has current work capacity and made a recommendation that the Insurer is to determine the applicant's entitlement to weekly payments of compensation in accordance with Section 38 of the 1987 Act.



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3. The applicant then made an application to this office for procedural review dated 8 March 2016. I am satisfied that the application has been made within time and in the proper form.
4. On 17 February 2012 the applicant sustained an injury to his back when he lifted a tyre in the course of his employment as a mechanic. The applicant remains employed by the pre-injury employer and is working up to 12 hours per week as a mechanic assistant. At the time of the Work Capacity Decision the applicant was in receipt of weekly payments 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 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 made submissions by email dated 8 March 2016 in response to the application for procedural review. The Insurer submitted that they did not consider there to be any procedural error and noted that the work capacity decision was drafted prior to the amendments in December 2015 taking effect.

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 2



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January 2015 and was completed on 26 June 2015. The applicant was notified of the Work Capacity Decision by letter dated 26 June 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 cease on 4 October 2015. This is the appropriate notice period.
11. 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 one year after his entitlement to weekly payments ceases. The Insurer has adequately explained the legislation in force at the time.
12. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer has informed the applicant that he has received more than 130 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 explained the special requirements of Section 38(3) of the 1987 Act at page 3 of the Work Capacity Decision.
13. Pursuant to Section 43(1)(a) of the 1987 Act the Insurer has noted that the applicant has been certified with capacity of 3 hours per day, 4 days per week as per the Certificate of Capacity dated 27 April 2015. The Insurer determined, pursuant to Section 43(1)(b), the role of mechanic assistant to be suitable employment. The Insurer observed that the applicant had been performing the duties of a mechanic assistant for varying hours with the pre-injury employer. Finally, pursuant to Section 43(1)(c) the Insurer noted that the rate of pay for a mechanic assistant was \$20 per hour and the applicant has the capacity to earn \$240.00 per week.



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14. 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.
15. At page 6 of the Work Capacity Decision the Insurer has explained to the applicant that it is agreed he has a current work capacity however as he has not returned to work for at least 15 hours per week he has not satisfied the special requirement in Section 38(3) of the 1987 Act. Furthermore, the applicant is only averaging earnings of \$147.00 per week based upon his pay slips and Section 38(3) requires him to be earning at least \$173.00 per week. Therefore he is not entitled to any ongoing weekly payments of compensation.
16. The Work Capacity Decision of the Insurer dated 26 June 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation as was in force at the time the Work Capacity Decision was drafted.

Finding

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

RECOMMENDATION

18. The application for procedural review is dismissed.
19. Such weekly payments as the applicant is receiving by virtue of the stay pursuant to Section 44BC of the *Workers Compensation Act* 1987 are to continue until receipt by the applicant of this recommendation.
20. Pursuant to Section 44BB(3)(h) of the *Workers Compensation Act* 1987 these recommendations are binding upon the Insurer and the Authority.

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

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