



**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 23 September 2015. The Decision informed the applicant that his weekly payments of compensation would cease on 4 January 2016. The applicant sought internal review and the Internal Review Decision was dated 16 December 2015 which essentially confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 12 January 2016. The Authority delivered its Findings and Recommendations dated 12 February 2016.
3. The Authority made findings that the applicant has current work capacity, is an existing recipient and his entitlement to weekly payments of compensation is after the second entitlement period and must be determined under Section 38 of the *Workers Compensation Act 1987* (1987 Act) as amended on 4 December 2015.



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4. The applicant then made an application to this office for procedural review dated 14 March 2016. I am satisfied that the application has been made within time and in the proper form.
5. The applicant previously sought a review of a work capacity decision dated 19 December 2013. The applicant was successful and the work capacity decision was set aside by an earlier recommendation of this office.<sup>1</sup>
6. The facts and circumstances concerning the background of this claim are set out in the aforementioned recommendation and need not be repeated. It is noted that at the time of the Work Capacity Decision dated 23 September 2015 the applicant was in receipt of weekly payments of compensation and had not returned to any type of employment.
7. 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**

8. 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.
9. The applicant has submitted that he was previously successful in his application for procedural review of an earlier work capacity decision and that he is not capable of working 40 hours per week as his symptoms have not improved.

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

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

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<sup>1</sup> Reported and numbered as 11614



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## 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 was completed on 23 September 2015 and the applicant was notified of the Work Capacity Decision by letter dated the same date.
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 4 January 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 the Work Capacity Decision was made.
15. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer has informed the applicant that he has received 187 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 page 4 of the Work Capacity Decision.
16. Pursuant to Section 43 of the 1987 Act the Insurer made the following Work Capacity Decisions:



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S43(1)(a): the applicant has the capacity to work 40 hours per week pursuant to a Certificate of Capacity from the nominated treating doctor dated 2 September 2015;

S43(1)(b): the role of packer in the food sector such as confectionary, or pharmaceuticals or light processing constitutes suitable employment in accordance with a prior Merit Review finding and recommendation dated 26 May 2014;

Section 43(1)(c); the applicant is able to earn \$798 per week in suitable employment.

17. The Insurer has based the above decisions upon evidence which was available to them at the time of making the Work Capacity Decision. I am only able to review the procedures implemented by the Insurer in making the decision and notifying the applicant. I am unable to review the discretion or judgment exercised by the Insurer in preferring particular medical evidence.
18. At page 7 of the Work Capacity Decision the Insurer has informed the applicant that he has not complied with the special requirements of Section 38(3) of the 1987 Act as he has not returned to work for a period of at least 15 hours per week and he is not earning \$173 per week. Therefore, the applicant is not entitled to ongoing payments of weekly compensation.
19. The procedural errors identified in the earlier recommendation were not repeated by the Insurer on this occasion.
20. The Work Capacity Decision of the Insurer dated 23 September 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation.

### **Finding**

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



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## RECOMMENDATION

22. The application for procedural review is dismissed.
23. 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.
24. 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  
18 April 2016