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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 27 October 2015. The Decision informed the applicant that her weekly payments of compensation would cease on 5 February 2016. The applicant sought internal review by the Insurer on 24 November 2015. The Internal Review Decision was dated 14 January 2016 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 18 January 2016. The Authority delivered its Findings and Recommendations dated 19 February 2016. The Authority made a finding that the applicant's pre-injury average weekly earnings (PIAWE) after 52 weeks were \$670.45 per week. The Authority made a recommendation that the applicant is entitled to weekly payments of compensation under Section 37(3) of the *Workers Compensation Act 1987* (1987 Act) at the rate of \$0.00 per week from 5 February 2016.



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3. 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.
4. On 21 September 2014 the applicant suffered injury in the course of her employment as a kitchen hand. As at the time the Work Capacity Decision was made the applicant had not returned to work and was in receipt of weekly payments of 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.
7. The applicant submits that despite Merit Review increasing her PIAWE she remained underpaid by the Insurer. This is not an issue which is relevant to procedural review. I can only point out that the recommendations and findings of the Authority are binding upon the Insurer pursuant to Section 44BB(3)(g) of the 1987 Act.
8. Further submissions are made by the applicant that the Insurer has failed to identify suitable employment or approve renewal of the applicant’s RSA or pre-injury duties. These submissions are not relevant to procedural review. I am only allowed to review the procedures undertaken by the Insurer in making the Work Capacity Decision and advising the applicant of same.

Submissions by the Insurer

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

Decision



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10. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
11. 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 3 September 2015 and was completed on 27 October 2015. The applicant was notified of the Work Capacity Decision by letter dated the same date.
12. 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 on 5 February 2016. This is the appropriate notice period.
13. 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.
14. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer has informed the applicant that she has received 56 weeks of compensation payments. Therefore any ongoing entitlement to weekly payments of compensation is subject to Section 37 of the 1987 Act.
15. Pursuant to Section 43(1)(a) and (b) of the 1987 Act the Insurer has noted that the applicant has been certified with capacity of 35 hours week as per the Certificate of Capacity dated 22 September 2015 from the nominated treating doctor. Accordingly, the Insurer determined that the applicant had the capacity to work 35 hours per week. The Insurer decided, pursuant to the same section, the roles of food services assistant, cashier and pathology courier driver were suitable employment.



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16. In accordance with Section 43(1)(c) of the 1987 Act the Insurer made a decision that the applicant was able to earn \$769.55 in suitable employment. That decision was based upon the vocational assessment report dated 30 September 2015 which noted that the applicant could earn \$769.55 per week working as a cashier.
17. In making these determinations pursuant to Section 43 of the 1987 Act the Insurer has displayed a satisfactory understanding of the relevant Guidelines and legislation.
18. The Insurer at pages 7 and 8 of the Work Capacity Decision has adequately explained Section 37(3) of the 1987 Act and the calculation used to determine the applicant's ongoing entitlement to weekly payments of compensation which is calculated to nil per week.
19. The Work Capacity Decision of the Insurer dated 27 October 2015 has displayed a careful consideration of the requirements of the Guidelines and relevant legislation.

Finding

20. There are no 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.
22. 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.
23. Pursuant to Section 44BB(3)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.



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

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