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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 19 November 2015. The Decision informed the applicant that his weekly payments of compensation would cease on 26 February 2016. The applicant sought internal review by the Insurer on 15 December 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 9 February 2016. The Authority delivered its Findings and Recommendations dated 4 March 2016. The Authority made a finding the applicant has current work capacity and does not meet the special requirements in accordance with Section 38(3) of the *Workers Compensation Act 1987* (1987 Act) for continuation of weekly payments of compensation.



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3. The applicant then made an application to this office for procedural review dated 29 March 2016. I am satisfied that the application has been made within time and in the proper form.
4. On 29 October 2003 the applicant sustained injury to his neck whilst in the course of his employment as a supervisor with the pre-injury employer. The applicant returned to work performing suitable duties until his employment was terminated in February 2006. The applicant has been successful in obtaining several work trials since that time however at the time of the Work Capacity Decision he was not working 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. In addition to applying for procedural review the applicant has made the following submissions:
 - The Work Capacity Decision is in breach of the Guidelines;
 - There are numerous errors in the vocational report dated 2 October 2015 both grammatical and factual. I note that there are no particulars provided as to the alleged factual inaccuracies;
 - There was insufficient evidence to make a logical, rational and reasonable Work Capacity Decision;
 - The Insurer did not assess all relevant evidence;
 - The applicant was not afforded the opportunity to counter any of the evidence in the IOH report; and
 - The Insurer proceeded to make a work capacity decision on basically the same information it had at the time of the previous work capacity decision.



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8. The contents of the vocational report and alleged factual and grammatical errors are not issues which can be dealt with at procedural review.
9. I do note that a copy of the vocational report dated 2 October 2015 was provided to the applicant. I also note that applicant was informed in the Work Capacity Decision that he could request a copy of the report if it was not in his possession. The applicant was then able to respond to the report during the internal review and merit review processes. I do note that Merit Review responded to the applicant's submissions.
10. I am only able to review the processes implemented by the Insurer in making the Work Capacity Decision and notifying the applicant.

Submissions by the Insurer

11. The Insurer made submissions by email noting that the applicant was provided with a copy of the vocational report. Any alleged errors did not involve the applicant's actual capacity and skills. It is submitted that any errors made in respect of the applicant's background and family life are not relevant to his capacity.
12. I note that the submissions made by the Insurer are relevant to Merit Review and not procedural review.

Decision

13. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
14. 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 performed on 19 November 2015 and a decision made the same day. The applicant was notified of the Work Capacity Decision by letter dated 19 November 2015.
15. 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



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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 26 February 2016. This is the appropriate notice period.

16. 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.
17. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer has informed the applicant that he has received 629.27 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.
18. Pursuant to Section 43(1)(a) of the 1987 Act the Insurer has noted that the applicant has been certified with capacity of 24 hours per week as per the Certificate of Capacity from the nominated treating doctor. The Insurer determined, pursuant to Section 43(1)(b), the roles of dispatching and receiving clerk, meter reader and safety inspector to be suitable employment. This was based upon a vocational assessment report and the suitable employment was agreed to by the nominated treating doctor in a sign off dated February 2015.
19. 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.
20. I do note that the Insurer has failed to make a determination in accordance with Section 43(1)(c) of the 1987 Act as to the amount the applicant is able to earn in suitable employment. I must consider whether such a failure is sufficient to set aside the work capacity



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decision. I note that at the time of the Work Capacity Decision the applicant was not working. Therefore the applicant had not complied with the special provisions of Section 38(3)(b) of the 1987 Act.

21. In the case of *Simpson*¹, Justice Davies opined that consideration must be given to the effect the 'failure' has on the Insurer's decision. In his judgement Davies J stated "*Every failure to follow the Guidelines could not result in the setting aside of the insurer's decision. Such result would be legally unreasonable.*"

22. In the circumstances of this particular case where the applicant is not working at the time the Decision has been made I do not consider that the failure of the Insurer to make a determination pursuant to Section 43(1)(c) of the 1987 Act is sufficient to set aside the Work Capacity Decision.

23. The Work Capacity Decision of the Insurer dated 19 November 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation in force at the time.

Finding

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

RECOMMENDATION

25. The application for procedural review is dismissed.

26. 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.

27. Pursuant to Section 44BB(3)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.

¹ *The Trustees of the Sisters of Nazareth v Simpson* [2015] NSWSC 1730



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

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