



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. The applicant's weekly payments are to continue in accordance with the Findings and Recommendations made by the State Insurance Regulatory Authority dated 17 March 2016.**

Introduction and background

1. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 5 September 2013. The Decision informed the applicant that her weekly payments of compensation would cease on 10 December 2013. At that time the applicant had resumed employment with her pre-injury employer.
2. The applicant sought internal review by the Insurer on 18 December 2015. At that time the applicant had ceased working. The Internal Review Decision was dated 15 January 2016 and found that the applicant had current work capacity and an ability to earn \$1127.90 per week. The Internal Review Decision confirmed the continued cessation of the applicant's weekly payments of compensation.
3. The applicant sought Merit Review from the Authority and the Authority delivered its Findings and Recommendations dated 17 March 2016. The Authority made a finding that the applicant has no current work capacity and is likely to continue to have no current work capacity. As a result the applicant satisfies the special requirement for a continuation of weekly payments under Section 38(2) of the *Workers Compensation Act 1987* (1987 Act). The Authority made a recommendation that the applicant is entitled to weekly payments of compensation in the amount of \$794.96 in accordance with Section 38(6) of the 1987 Act.



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4. The applicant then made an application to this office for procedural review dated 6 April 2016. I am satisfied that the application has been made within time and in the proper form.
5. On 14 November 2006 the applicant suffered injury to her right shoulder when she tripped after alighting from her vehicle while attending a patient for a home visit. The applicant underwent surgery on 5 December 2006. In May 2007 the applicant began experiencing pain and symptoms in her left shoulder. The applicant performed duties with her pre-injury employer up until 2 July 2015. In December 2015 the applicant commenced work as a self-employed mental health worker and at the time of the Merit Review worked an average 1 hour per week in that role.
6. The applicant's injury was the subject of a Medical Assessment Certificate dated 27 November 2008 which assessed the applicant to have 23% whole person impairment. The applicant is therefore considered to be a worker with "*high needs*".
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 the Insurer has made an error in determining pre-injury earnings which now impacts upon the most recent decision.

Submissions by the Insurer



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

Decision

11. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.

12. It is noted the Authority made a recommendation that the applicant is entitled to weekly payments in the amount of \$794.96 in accordance with Section 38(6) of the 1987 Act.

13. The applicant has submitted that an error was made in determining her pre-injury earnings.

14. The applicant suffered injury on 14 November 2006. The Insurer has confirmed that the applicant was in receipt of weekly payments of compensation immediately before 1 October 2012. Therefore the applicant is an *“existing recipient.”*

15. As an *“existing recipient”* the applicant’s pre-injury average weekly earnings are determined to be the *“transitional rate”* as contained in Schedule 6 Part 19H Clause 2 of the 1987 Act. At the relevant time the indexed *“transitional rate”* was \$993.70 per week. This is the amount that has been correctly applied by the Authority in calculating the applicant’s ongoing entitlement to weekly compensation payments. This amount is determined by the legislation and no discretion can be exercised by the Insurer.

16. The issue of determining pre-injury average weekly earnings is not relevant to procedural review therefore the Work Capacity Decision of the Insurer dated 5 September 2013 has displayed a careful consideration of the requirements of the Guidelines and relevant legislation.

Finding



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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. The applicant's weekly payments are to continue in accordance with the Findings and Recommendations made by the State Insurance Regulatory Authority dated 17 March 2016.

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

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
9 May 2016