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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.

Introduction and background

1. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 18 December 2015. The Decision informed the applicant that the Insurer had determined that she had the capacity to earn \$513.03 per week and as a result her weekly payments of compensation would reduce to \$281.93 per week from 25 March 2016. The applicant sought internal review and Internal Review Decision was dated 10 February 2016 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 7 March 2016. The Authority delivered its Findings and Recommendations dated 1 April 2016. The Authority made a finding the applicant is able to earn \$399.00 per week in suitable employment and is entitled to weekly payments of compensation under Section 37(3) of the Workers Compensation Act 1987 (1987 Act). The Authority made a recommendation that the applicant's entitlement to payments of compensation is \$406.52 per week.
3. It is noted that the Authority made a finding that the applicant's capacity to earn was \$114.03 less than the Insurer's determination. This had the effect of increasing the applicant's entitlement to weekly payments of compensation from that initially determined by the Insurer in the Work Capacity Decision. I note that the Authority's recommendation is binding upon the Insurer.



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4. Despite the increase in the applicant's entitlement to weekly payments the applicant then made an application to this office for procedural review dated 19 April 2016. I am satisfied that the application has been made within time and in the proper form.
5. On 29 April 2010 and 23 February 2011 the applicant injured her right shoulder and right elbow in separate incidents in the course of her employment as a baker's assistant. The Insurer managed these injuries under separate claims but made one Work Capacity Decision. At the time of the Work Capacity Decision the applicant was not working and was in receipt of weekly payments of compensation.
6. 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

7. 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.
8. In addition to applying for procedural review the applicant has made the following submissions:
 - Suitable duties were unfairly withdrawn in the twelfth year of permanent employment with the pre-injury employer;
 - The applicant has a limited skill set due to physical restrictions, without a higher education, a language barrier and being aged 60;
 - The Insurer relied upon false information to make the Work Capacity Decision.
9. I am not able to have regard for the applicant's personal circumstance being age or education and employment status. I am unable to review any discretion exercised by the Insurer in making a decision as to suitable employment. I am only able to review the processes



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implemented by the Insurer in making the Work Capacity Decision and notifying the applicant.

Submissions by the Insurer

10. The Insurer made submissions dated 26 April 2016 in response to the application for procedural review. The submissions are in direct response to the applicant's submissions. As a result I note that the submissions made by the Insurer are relevant to Merit Review and not procedural review.

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 18 December 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 her payments would decrease on 25 March 2016. This is the appropriate notice period.
14. 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 correctly informed the applicant that as she remains in receipt of weekly payments of compensation she will continue to be entitled to claim for reasonably necessary medical treatment services or assistance.
15. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer has informed the applicant that she has



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received 60 weeks of compensation payments. Therefore any ongoing entitlement to weekly payments of compensation is subject to Section 37 of the 1987 Act. The Insurer has explained the entitlement periods at page 3 of the Work Capacity Decision.

16. Pursuant to Section 43(1)(a) of the 1987 Act the Insurer has noted that the applicant has been certified with capacity of 21 hours per week as per the Certificate of Capacity from the nominated treating doctor dated 26 November 2015. The Insurer determined, pursuant to Sections 43(1)(b) and 32A, the roles of customer service attendant, cashier and light packer to be suitable employment. This was based upon a vocational assessment report dated 28 July 2015 and the suitable employment was agreed to by the nominated treating doctor in a sign off dated 24 July 2015.

17. 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.

18. I do note that the Insurer made a determination in accordance with Section 43(1)(c) of the 1987 Act that the applicant was able to earn \$513.03 per week. This was based upon a rehabilitation report dated 9 December 2015. I do note that the Authority made a different finding as to the applicant's capacity to earn in their Findings and Recommendations dated 1 April 2016. However, in this procedural review I am unable to review the discretion of the Insurer and I can only review the processes used by the Insurer in making its decision. There was no procedural error in the Insurer making its determination as to capacity to earn.

19. The Work Capacity Decision of the Insurer dated 18 December 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation in force at the time.

Finding

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



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RECOMMENDATION

21. The application for procedural review is dismissed.

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

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