



**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 25 February 2016. The Decision informed the applicant that her weekly payments would cease on 3 June 2016. The applicant sought internal review on 4 March 2016 and the Internal Review Decision was dated 1 April 2016 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 8 April 2016. The Authority delivered its Findings and Recommendations dated 22 April 2016. The Authority made a finding that the applicant has current work capacity and does not satisfy the special requirements for continuation of weekly payments after the second entitlement period pursuant to Section 38(3) of the *Workers Compensation Act 1987* (1987 Act).
3. The applicant then applied to this office for procedural review by way of application dated 4 May 2016. I am satisfied that the application has been made within time and in the proper form.
4. The applicant previously sought reviews of a work capacity decisions dated 24 July 2014 and 10 August 2015 and both were the subject of earlier recommendations of this office.<sup>1</sup>
5. The facts and circumstances concerning the background of this claim are set out in the aforementioned recommendations and need not be repeated.

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<sup>1</sup> Reported and numbered as 23714 and 14115 respectively



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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:
  - She received the decision on 5 March 2016 and she should have received it by 3 March 2016;
  - The Insurer has averaged the hours which she works;
  - She works 20 hours per week when she is not sick.
9. In respect of the submission that the decision should have been received on 3 March 2016 and not 5 March 2016 I note that the allowance of four business days for postage is allowed in the notice period in accordance with Section 76(1)(b) of the *Interpretation Act* 1987. As long as it is incorporated in the notice period the Insurer has complied with the legislation and Guidelines.

### **Submissions by the Insurer**

10. In an email dated 6 May 2016 the Insurer indicated they did not wish to make any submissions other than providing copies of the Work Capacity Decision, Internal Review Decision and Merit 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 commenced on 5 February 2016 and was completed on 26 February 2016. 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 cease on 3 June 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 referenced and explained Section 59A (2) and (3) of the 1987 Act and advised the applicant that her entitlement to medical expenses will cease on 3 June 2018 which is two years after her 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 she has received 929 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 entitlement periods as well as the '*special provisions*' under Section 38(3) at pages 3 and 4 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 20 hours per week as per the Certificate of Capacity from the nominated treating doctor dated 5 December 2015. The Insurer determined, pursuant to Sections



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43(1)(b) and 32A, the roles of telemarketer, customer service officer and receptionist were suitable employment. This was based upon a vocational assessment report dated 29 January 2016 and the suitable employment was agreed to by the nominated treating doctor. It was noted that the applicant was presently performing the duties of a telemarketer.

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. Upon review of the applicant's payslips for the period 8 October 2015 to 21 February 2016 it was apparent that the applicant was working not less than 15 hours per week and earning at least \$176.00 per week. The applicant had complied with the special provisions of Section 38(3)(b) of the 1987 Act.
19. The determining issue is whether the applicant is incapable of undertaking further additional employment or work that would increase her current weekly earnings being the provision contained in Section 38(3)(c). The Work Capacity Decision averaged the hours worked by the applicant during the aforementioned period and noted that she was working 16 hours per week. The applicant has been certified with capacity to work 20 hours per week.
20. Based upon this the Insurer determined that the applicant did not satisfy the special requirements of Section 38(3)(c) and she was not entitled to ongoing weekly payments. I note that the applicant had only worked 20 hours per week on 3 occasions during the 23 week period.
21. The applicant has submitted that the hours which she worked were averaged by the Insurer and that she works 20 hours per week when she is not sick. The Insurer did average the hours but even when the applicant's hours are reviewed on a week to week basis she does not regularly work to the capacity certified by the nominated treating doctor or the capacity determined by the Insurer which are both 20 hours per week.



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22. If the applicant's circumstances change and she regularly works to capacity and satisfies Section 38(3)(c) it is open for her to approach the Insurer informing them of the change in her circumstances.

23. The Work Capacity Decision of the Insurer dated 26 February 2016 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.

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

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