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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 24 December 2015. The Decision informed the applicant that his weekly payments of compensation would cease on 8 April 2016. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 11 February 2016 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 11 March 2016. The Authority delivered its Findings and Recommendations dated 8 April 2016. The Authority made a finding the applicant has current work capacity and his entitlement to weekly payments of compensation under Section 38(7) of the *Workers Compensation Act 1987* (1987 Act) is calculated at \$0.00.
3. The applicant then made an application to this office for procedural review dated 4 May 2016. I am satisfied that the application has been made within time and in the proper form.



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4. Over a period of time whilst performing his duties of truck driving and pipe laying the applicant experienced back pain and sciatica. The applicant signed a claim form on 10 December 2009. The accepted date of injury was 30 November 2009. The applicant's employment was terminated on 16 June 2011. The applicant is presently operating his own skip bin business in partnership with his wife. At the time of the Work Capacity Decision the applicant 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:
 - Would like the decision to cease his payments re-considered;
 - Ongoing doctor expenses for as long as he lives; and
 - Other medical expenses which may occur.
8. I am only able to review the processes implemented by the Insurer in making the Work Capacity Decision and notifying the applicant. I am not able to review any judgment or discretion exercised by the Insurer nor can I review any legislated entitlements to which the applicant may or may not be entitled.

Submissions by the Insurer



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9. The Insurer made submissions by email that the applicant has not raised any procedural issues but rather his request for a review goes to the merits of the decision.

Decision

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 19 October 2015. The applicant was notified of the Work Capacity Decision by letter dated 24 December 2015.
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 his payments would cease on 8 April 2016. This is the appropriate notice period.
13. The criticism which I would raise in respect of the notification of the cessation of payments is that the Insurer has not advised the applicant of the date of the cessation until page 8 of the Work Capacity Decision. Such important information should be included earlier in the Decision.
14. 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 at page 9 of the Work Capacity Decision.
15. As the applicant has been assessed as having 11% whole person impairment the Insurer has correctly advised him that his entitlement to medical expenses will cease 5 years after his entitlement to weekly payments ceases. The Insurer has advised that should the circumstances in the applicant's case remain the same his entitlement will cease on 8 April 2021.



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16. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer has informed the applicant that he has received more than 130 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)(b) & (c) of the 1987 Act at page 2 of the Work Capacity Decision.
17. Pursuant to Section 43(1)(a) of the 1987 Act the Insurer has noted that the applicant has been certified with capacity of 8 hours per day 5 days per week as per the Certificate of Capacity from the nominated treating doctor dated 7 December 2015. The Insurer determined, pursuant to Section 43(1)(b), the role of skip bin owner/operator to be suitable employment. This was based upon a functional assessment of the applicant's own business conducted on 9 September 2014.
18. The Insurer made a determination in accordance with Section 43(1)(c) of the 1987 Act that the applicant was able to earn \$900 per week in this suitable employment. This was based upon the applicant's business activity statements. The Insurer advised the applicant that his pre-injury average weekly earnings (PIAWE) were \$993.70 per week being the *transitional* rate. It was noted that the applicant had previously been advised that he was an existing recipient and subject to the transitional rate in a Work Capacity Decision dated 26 September 2013.
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. The Insurer informed the applicant that as he had complied with the special requirements of Section 38(3)(b) & (c) of the 1987 Act his ongoing entitlement is calculated in accordance with Section 38(7)(a) of the 1987 Act. That calculation is explained at page 3 of the Work Capacity Decision. As a result of that calculation and the application of Section 35(2) the applicant's entitlement is calculated to be \$0.00.



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21. The Work Capacity Decision of the Insurer dated 24 December 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation in force at the time.

Finding

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

RECOMMENDATION

23. The application for procedural review is dismissed.

24. 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.

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

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

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