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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 8 February 2016. The Decision informed the applicant that his weekly payments of compensation would cease on 20 May 2016. The applicant sought internal review by the Insurer on 26 February 2016. The Internal Review Decision was dated 17 March 2016 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 31 March 2016. The Authority delivered its Findings and Recommendations dated 29 April 2016. The Authority made a finding the applicant does not meet the special requirements in accordance with Section 38(2) and (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 13 May 2016. I am satisfied that the application has been made within time and in the proper form.
4. On 28 June 2000 the applicant suffered injury to his right knee in the course of his employment as a store person. As at the date of the Work Capacity Decision the applicant was 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 Insurer has failed to comply with Guideline 5.3.2 as they have not provided any evidence upon which to assert the worker’s injury is considered to have resulted in permanent impairment less than 10%;
  - It is incumbent upon the Insurer to formally undertake an assessment of whole person impairment in order to substantiate such contrary submission;
  - The Insurer’s Internal Review Decision does not refer to the applicant’s submissions; and
  - The Insurer has failed to refer to any evidence which overturns a previous Merit Review decision dated 12 May 2014 which concluded the applicant had no work capacity.
8. I am unable to review the Internal Review Decision or any Merit Review by the Authority. I am only able to perform a review of the procedures



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undertaken by the Insurer in making the Work Capacity Decision which is the subject of this review.

9. The applicant submitted that the Insurer's has assertion "*Your injury is considered to have resulted in permanent impairment of 10% or less*" which is at page 2 of the Decision has been made without supporting evidence. Furthermore, it is submitted it is incumbent upon the Insurer to formally undertake an assessment of whole person impairment.
10. The assessment referred to by the applicant effects of his ongoing entitlement to medical and related treatment expenses.
11. Section 59A of the 1987 Act states:

*"(2) The compensation period in respect of an injured worker is:*

*(a) if the injury has resulted in a degree of permanent impairment assessed as provided by section 65 to be 10% or less, **or the degree of permanent impairment has not been assessed as provided by that section, the period of 2 years..** (emphasis added).*

12. It is conceded by the Insurer that the applicant's assessment of permanent impairment has "*not been converted.*" Therefore, in accordance with the terms of the above section, as there has been no assessment in accordance with the provisions of Section 65, the Insurer is entitled to rely upon there being *no assessment* and the cessation of payments of medical expenses after the two year period.
13. If the applicant wants to dispute this decision then a procedural review is not the appropriate means for the dispute to be raised. The Insurer is able to make the determination it has within the limits provided by the 1987 Act.

### **Submissions by the Insurer**

14. The Insurer made submissions by email noting that all evidence relied upon in making the Work Capacity Decision was itemised. The Insurer further submitted that the applicant's permanent impairment has not been converted however they did not consider the applicant satisfied the



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definition of a worker with high needs. Finally, the Insurer submitted that the applicant's submissions were not related to procedural errors.

## **Decision**

15. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
16. 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 1 February 2016 and he was notified of the Work Capacity Decision by letter dated 8 February 2016.
17. 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 20 May 2016. This is in excess of the appropriate notice period.
18. 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 two years after his entitlement to weekly payments ceases. The Insurer has adequately explained the legislation at page 2 of the Decision.
19. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer has informed the applicant that he has received 608 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 4 of the Work Capacity Decision.
20. Pursuant to Section 43(1)(a) of the 1987 Act the Insurer has noted that the applicant has been certified with capacity of 6 hours per day 5 days



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per week as per the Certificate of Capacity. The applicant has maintained that certification since February 2015. The Insurer determined, pursuant to Section 43(1)(b), the role of product assembler to be suitable employment. It was noted that the applicant was able to perform that type of employment from August 2015 on an ongoing basis.

21. 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.
22. A review of the applicant's pay slips over a 12 week period revealed that he was working less than his certified hours of 30 hours per week for the entire period. The Insurer made a determination that the applicant has complied with the special provisions of Section 38(3)(b) but had failed to comply with Section 38(3)(c) of the 1987 Act and as such was not entitled to ongoing payments of weekly compensation. This was explained at page 12 of the Decision.
23. The Work Capacity Decision of the Insurer dated 8 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.
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.



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27. 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  
10 June 2016