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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 1 March 2016. The Decision informed the applicant that his weekly payments of compensation would cease on 16 June 2016. The applicant sought internal review by application dated 8 March 2016 and the Internal Review Decision was dated 29 March 2016 which essentially confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 7 April 2016. The Authority delivered its Findings and Recommendations dated 29 April 2016.
3. The Authority made findings that the applicant has current work capacity and does not satisfy the special requirements of Section 38(3) of the *Workers Compensation Act 1987* (1987 Act) to be entitled to ongoing payments of weekly compensation.
4. The applicant then made an application to this office for procedural review dated 6 March 2016. I am satisfied that the application has been made within time and in the proper form.
5. The applicant previously sought a review of a work capacity decision dated 2 October 2013. The applicant was successful and the work capacity decision was set aside by an earlier recommendation of this office.<sup>1</sup>

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<sup>1</sup> Reported and numbered as 13114



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6. The facts and circumstances concerning the background of this claim are set out in the aforementioned recommendation and need not be repeated. At the time of the Work Capacity Decision which is the subject of this review the applicant was not working and was in receipt of weekly payments of compensation.
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 he is actively job seeking but has been unable to obtain employment.
10. Unfortunately I am unable to consider the personal circumstances of the applicant in this review. I am only able to review the procedures of the applicant in making the Work Capacity Decision.

### **Submissions by the Insurer**

11. The Insurer has made submissions in response to this application that the applicant’s submissions do not relate to procedural review.

### **Decision**

12. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
13. 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 27 January 2016 and the applicant was notified of the Work Capacity Decision by letter dated 1 March 2016.



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14. 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. The applicant was advised that his payments would cease on 16 June 2016. This is in excess of the appropriate notice period.
15. 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 2 years after his entitlement to weekly payments ceases. The Insurer has adequately explained the legislation at page 2 of the Work Capacity Decision.
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 342 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 set out the special requirements of Section 38(3) of the 1987 Act at page 4 of the Work Capacity Decision.
17. Pursuant to Section 43 of the 1987 Act the Insurer made the following Work Capacity Decisions:
  - S43(1)(a): the applicant has a certificate of capacity certifying him to work 5 hours per day, 5 days per week and this has been the certification by the nominated treating doctor on an ongoing basis from 28 January 2015;
  - S43(1)(b): the roles of draftsman, welder and forklift operator have been identified as suitable employment. The Insurer relied upon a vocational / labour market report dated 22 January 2016. The suitable employment roles were also approved by the nominated treating doctor.
18. The Insurer has based the above decisions upon evidence which was available to them at the time of making the Work Capacity Decision. In



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making the above decisions the Insurer has displayed an adequate understanding and knowledge of Section 43 of the 1987 Act.

19. The Insurer advised the applicant that as he had not returned to work for at least 15 hours per week and was not earning at least \$176.00 per week he had not met the requirements of Section 38(3)(b) of the 1987 Act.
20. Further, as the applicant had been assessed as having capacity to undertake additional employment that would increase his current weekly earnings he had not complied with Section 38(3)(c) of the 1987 Act.
21. Therefore the applicant was informed he was not entitled to ongoing payments of weekly compensation.
22. The procedural errors identified in the earlier recommendation were not repeated by the Insurer on this occasion.
23. The Work Capacity Decision of the Insurer dated 1 March 2016 has displayed a careful consideration of the requirements of the Guidelines and legislation.

### **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  
14 June 2016