



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 29 January 2016. The Decision informed the applicant that his weekly payments of compensation would cease on 7 May 2016. The applicant sought internal review by the Insurer on 23 February 2016. The Internal Review Decision was dated 17 March 2016 and confirmed the original Work Capacity Decision. The Decision extended the date that the applicant's weekly payments would cease to 23 June 2016.
2. The applicant sought Merit Review from the Authority by way of application received 4 April 2016. The Authority delivered its Findings and Recommendations dated 29 April 2016. The Authority made a finding the applicant has current work capacity but does not satisfy the special requirements of Section 38(3) of the *Workers Compensation Act 1987* (1987 Act) for the continuation of weekly payments of compensation.



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3. The applicant then made an application to this office for procedural review dated 27 May 2016. I am satisfied that the application has been made within time and in the proper form.
4. On 1 September 2009 the applicant suffered injury to his lower back in the course of his employment as a teacher. He attempted to return to duties but this was unsuccessful. The applicant is currently not working and has been in receipt of weekly payments of compensation from the Insurer.
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 submission that the Insurer has failed to comply with the Guidelines which required:
 - Timely informed and evidence based decision;
 - Assessment to be tailored to workers circumstances;
 - Consideration of all current material;
 - Evaluation of all available and relevant material and relevant circumstances;
 - Establishment of appropriate injury plan;
 - Seeking/obtaining additional information that is current to issue of capacity; and
 - Robust and transparent decision making process.
8. The applicant also made submissions in respect of the Merit Review. I am unable to review the Internal Review Decision or Merit Review by the Authority. I am only able to perform a review of the procedures undertaken by the Insurer in making the Work Capacity Decision.



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Submissions by the Insurer

9. The Insurer did not make any submissions in response to the application.

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 was completed on 29 January 2016 and he was notified of the Work Capacity Decision by letter dated the same day.
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 7 May 2016. This is the appropriate notice period. It is noted that the Internal Review Decision from the Insurer extended the cessation date to 23 June 2016.
13. 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 pages 1 and 2 of the Decision.
14. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer has informed the applicant that he has received 308 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



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Section 38(3) of the 1987 Act at pages 2, 8 and 9 of the Work Capacity Decision.

15. Pursuant to Section 43(1)(a) of the 1987 Act the Insurer has noted that the applicant has been certified with capacity of 4 hours per day 3 days per week as per the Certificate of Capacity. The applicant has maintained that certification since 3 February 2015 with the most recent certificate dated 15 December 2015. The Insurer determined, pursuant to Section 43(1)(b), the role of administrative assistant to be suitable employment. It was noted that this had also been approved by the nominated treating doctor.
16. Finally the Insurer determined that pursuant to Section 43(1)(c) of the 1987 Act the applicant was able to earn \$24.78 per hour which would total \$297.36 per week in suitable employment as an administrative assistant.
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. The evidence the Insurer considered included a vocational assessment / labour market analysis dated 26 August 2015 and Certificates of Capacity from the nominated treating doctor with the most recent dated 15 December 2015.
18. At page 9 of the Work Capacity Decision the Insurer has explained to the applicant as he has not returned to work for at least 15 hours per week and is not earning at least \$176 per week he has not complied with Section 38(3)(b) of the 1987 Act. Furthermore as he has been assessed as being capable of undertaking additional employment or work that would increase his current weekly earnings he has not complied with Section 38(3)(c) of the 1987 Act. Therefore the applicant is not entitled to ongoing payments of weekly compensation after the second entitlement period.
19. In addressing the applicant's submissions I note that the Insurer has made a timely and evidence based decision. The Insurer completed the work capacity assessment on 29 January 2016 and made a decision on the same date and immediately informed the applicant.



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20. The assessment made by the Insurer is tailored to the applicant's circumstances and takes into consideration his skill set and physical limitations. The Insurer has considered all available and relevant information particularly the Certificates of Capacity of the nominated treating doctor and the vocational assessment. The Insurer has listed all documents considered in making the assessment and Decision at page 3 of the Work Capacity Decision in accordance with Guideline 5.3.2.
21. The applicant's submission in respect of the establishment of an injury management program is not a submission relevant to procedural review.
22. The Insurer was not required to seek additional information as to current capacity as it relied upon a Certificate from the nominated treating doctor dated 15 December 2015 which is dated the month prior to the Decision being made. It is also noted that the applicant's assessment of capacity had remained the same since February 2015.
23. The Insurer has undertaken a robust and transparent decision making process as is evidence by the Work Capacity Decision.
24. The Work Capacity Decision of the Insurer dated 29 January 2016 has displayed a careful consideration of the requirements of the Guidelines and legislation in force at the time.

Finding

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

RECOMMENDATION

26. The application for procedural review is dismissed.
27. 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.
28. Pursuant to Section 44BB(3)(h) of the *Workers Compensation Act 1987* these recommendations are binding upon the Insurer and the Authority.



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24 June 2016