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RECOMMENDATION FOLLOWING AN APPLICATION FOR REVIEW OF THE INSURER'S WORK CAPACITY DECISION PURSUANT TO SECTION 44(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 18 August 2015. The decision informed the applicant that her weekly payments of compensation would cease from 25 November 2015. The applicant sought internal review on 18 September 2015 and the Internal Review Decision was dated 13 October 2015. That decision confirmed the original work capacity decision.
2. The applicant applied to the Authority for Merit Review on 11 November 2015 and they delivered findings and recommendations dated 14 December 2015. The Authority made a finding that the applicant's entitlement to weekly compensation falls after the second entitlement period and is to be determined in accordance with Section 38 of the *Workers Compensation Act 1987* (1987 Act). The Authority also made a recommendation that the Insurer make a new work capacity decision determining whether the applicant is a worker with '*high needs*'. I am unaware as to whether this work capacity decision has been completed.
3. The applicant then made application to this office dated 15 December 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. The applicant had previously sought procedural review of a work capacity decision dated 29 January 2015. The applicant was successful and the work capacity decision was set aside by an earlier recommendation of this office¹.

¹ Reported and numbered as 11815



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5. The facts and circumstances concerning the background of this claim are set out in the aforementioned recommendation and need not be repeated.
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. The applicant has made submissions which are not relevant to procedural review. I am only able to review the Insurer’s procedures with respect to making the actual work capacity decision. I am unable to review the Internal Review Decision from the Insurer or the Merit Review Decision from the Authority.
9. I note that the applicant has stated that she would like to submit additional documentation however it was *stolen* on the morning she lodged her application for procedural review. I am able to perform the review in the absence of the documentation as I am only able to review the procedures of the Insurer in making the actual work capacity decision.

Submissions by the Insurer

10. The Insurer has not provided any submissions in response to this application for procedural review.

The Decision

11. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.



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12. Guideline 5.3.2 requires the Insurer to advise the applicant of the date of the work capacity assessment. The Insurer informed the applicant that a work capacity assessment was completed on 18 August 2015 and she was advised of the work capacity decision by letter dated the same day.
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 from 25 November 2015. This is the required notice period.
14. Guideline 5.3.2 also 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 25 November 2016 which is 12 months after her entitlement to weekly payments ceases. The Insurer has adequately explained the legislation which was in force at the time of making the work capacity decision.
15. The Insurer is also required to inform the applicant of the relevant entitlement periods. The Insurer advised the applicant that she has received 524 weeks of compensation payments in respect of injuries arising from the 13 October 2000 incident and 339 weeks of compensation payments in respect of injuries arising from the 6 March 2004 incident. Therefore any ongoing entitlements of the applicant are subject to the special requirements contained in Section 38(3) of the 1987 Act. The special requirements of that section are set out at page 2 of the work capacity decision.
16. The Insurer correctly advised the applicant that Section 38(3)(b) requires her to return to work for not less than 15 hours and that she must earn at least \$173 per week (adjusted figure) and that Section 38(3)(c) requires her to be assessed as likely to continue to be indefinitely incapable of undertaking further additional employment that would increase her current weekly earnings.



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17. In accordance with Section 43(1)(a) of the 1987 Act the Insurer has determined that the applicant has the capacity to work 30 hours per week in accordance with the work capacity certificate dated 25 July 2015 from Dr RM.
18. The Insurer has determined pursuant to Section 32A and Section 43(1)(b) of the 1987 Act that the vocation of ticket salesperson is suitable employment. They relied upon a vocational report dated 28 November 2014 and the applicant's previous experience as an usher/ticket collector with the employer.
19. As the applicant has not returned to suitable employment for not less than 15 hours per week and has not been found to be indefinitely incapable of undertaking further additional employment or work she has not satisfied the special requirements of Section 38 of the 1987 Act.
20. The decision of the insurer dated 18 August 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation.

Finding

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

RECOMMENDATION

22. The application for procedural review is dismissed.

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
21 January 2016