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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 are to continue until receipt of this decision.**

**Introduction and background**

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 8 January 2016. The decision informed the applicant that his weekly payments of compensation would cease on 15 April 2016. The applicant sought internal review and the Internal Review Decision, dated 4 March 2016, maintained the earlier decision. The Insurer also took the opportunity to decide that it did not regard the applicant as a worker with "high needs."<sup>1</sup>
2. The applicant applied to the Authority for Merit Review on or about 30 March 2016 and they delivered findings and recommendations dated 22 April 2016. The Authority made a finding that the applicant did satisfy the special provisions under Section 38(3) of the Workers Compensation Act 1987 (1987 Act) however, such weekly compensation was calculated to be nil.
3. The applicant then made an application to this office dated 17 May 2016. I am satisfied that the applicant has made the application for procedural review in the proper form and within time. It follows that the statutory stay of the original work capacity decision will be in place until receipt by the parties of this recommendation.

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<sup>1</sup> The "high needs" element is not a "work capacity decision" within section 43(1). It is therefore not reviewable under section 44BB.



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4. On 13 December 2002 the applicant sustained injury to his back and neck as a consequence of moving pallets. Having performed suitable duties for a period until that employment was terminated, the applicant commenced with a different employer in 2005. He remains in that employment.
5. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *Work Capacity Guidelines* (Guidelines).

### **Submissions by the applicant**

6. Section 44BB(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 requesting a procedural review the applicant has made the following submission:
  - The Insurer has not complied with all the legislative requirements nor with the requirements in the Guidelines.
8. No particulars are given of any individual breach or collection of breaches.<sup>2</sup>

### **Submissions by the Insurer**

9. The Insurer has not made any submissions in response to this application.

### **The Decision**

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

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<sup>2</sup> It is possible that, like Milton’s depiction of Pandemonium, “... evil had no real being but was merely *privation boni* [privation of good].”



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11. 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 14 December 2015. He was advised of the work capacity decision by letter dated 8 January 2016.
12. The same Guideline requires the Insurer to advise the date when the work capacity decision will take effect and state the impact the decision has on the worker in terms of his entitlement to weekly payments and medical and related treatment expenses.
13. In the work capacity decision letter to the applicant the Insurer advised at paragraph 4 on page 2 of the decision that payments would cease on 15 April 2016. The notice period is correct.
14. The Insurer has referenced and explained Section 59A of the 1987 Act. The Insurer has provided an adequate explanation of the section and the effect it will have on this applicant.
15. The Insurer is also required to inform the applicant of the relevant entitlement periods. A comprehensive explanation of the entitlement periods was included by the Insurer at paragraph 7.1.
16. The Insurer also informed the applicant that as he was in receipt of weekly payments immediately before 1 October 2012 he was considered to be an *existing recipient* and his pre-injury average weekly earnings were subject to the transitional provisions of Clause 8 Division 2 Part 19H of Schedule 6 of the 1987 Act.
17. It was noted by the Insurer that the applicant had returned to work and was earning \$1,038.46 per week. The applicant had been performing these duties since 2005. Both the suitable duties and work capacity were approved by the nominated treating doctor most recently in the certificate of capacity dated 18 December 2015.
18. The Insurer advised the applicant that he had complied with the special requirements set out in Section 38(3)(b) & (c) and as a result his ongoing entitlements were subject to Section 38(7). The Insurer explained the algorithm used to calculate the applicant's ongoing



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entitlement to weekly compensation at paragraph 7.2 of the decision. The calculation resulted in the applicant being entitled to compensation of \$nil per week.

19. The decision of the insurer dated 8 January 2016 has displayed a careful consideration of the requirements of the Guidelines and legislation.

### **Finding**

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

### **RECOMMENDATION**

21. The application for procedural review is dismissed.

22. Such weekly payments as the applicant is receiving by virtue of the statutory stay are to continue until receipt of this decision.

A handwritten signature in blue ink, appearing to read "Wayne Cooper", with a long horizontal flourish extending to the right.

Wayne Cooper  
Delegate of the Workers Compensation  
Independent Review Officer  
1 July 2016