



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 23 March 2016. The Decision informed the applicant that his weekly payments of compensation would cease on 1 July 2016. The applicant sought internal review by the Insurer on 13 April 2016. The Internal Review Decision was dated 4 May 2016 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 19 May 2016. The Authority delivered its Findings and Recommendations dated 16 June 2016. The Authority made a finding the applicant has no current work capacity and he satisfies the special requirement of Section 38(2) of the *Workers Compensation Act 1987* (1987 Act) for the continuation of weekly payments of compensation. The Insurer is to calculate the applicant's entitlement to weekly payments in accordance with Section 38(6) of the 1987 Act.
3. Despite succeeding at Merit Review the applicant then made an application to this office for procedural review dated 20 June 2016. I am satisfied that the application has been made within time and in the proper form.
4. The applicant sustained injury to his lumbar spine on 9 July 2002 during the course of his employment as a dish washer. After a period off work the applicant returned to his employment ceasing with that employer in 2004. In subsequent employment as a pizza chef the applicant suffered



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an aggravation to his injury in or about 2005. The applicant has been 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 submissions in respect of his inability to obtain work, his increased back pain and having to support his family. The applicant also made these submissions to the Authority at Merit Review.
8. As this review is a procedural review I am only able to have regard for the procedures undertaken by the Insurer in making the Work Capacity Decision. I am unable to consider the personal circumstance of the applicant. The submissions made by the applicant are not relevant to this review.

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. The original Work Capacity Decision dated 26 March 2016 was overturned by the Authority at Merit Review and the applicant’s weekly payments were reinstated. Therefore any shortcomings in the original decision, for instance, the Insurer’s failure to make a decision in



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accordance with Section 43(1)(c) of the 1987 Act about the amount the applicant is able to earn in suitable employment, is of no consequence.

12. The decision from the Authority at Merit Review has restored the applicant's weekly payments of compensation to the maximum he is able to receive in the present circumstances. Therefore performing a procedural review of the Work Capacity Decision is an act of futility as the decision has already been overturned in another forum.

Finding

13. The Work Capacity Decision has already been overturned by another forum and there is no utility in performing a procedural review. Section 44BB(3)(c) empowers this Office to decline to conduct a procedural review in such circumstances.

RECOMMENDATION

14. 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
19 July 2016