



**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 15 March 2016. The Decision informed the applicant that his weekly payments would cease on 29 June 2016. The applicant sought internal review and the Internal Review Decision was dated 6 May 2016 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 17 May 2016. The Authority delivered its Findings and Recommendations dated 16 June 2016. The Authority made a finding that the applicant was not a worker with "high needs" as defined under Section 32A of the *Workers Compensation Act* 1987 (1987 Act). The Authority did not make any recommendations.
3. The applicant then applied to this office for procedural review by way of application dated 26 June 2016. I am satisfied that the application has been made within time and in the proper form.



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4. The applicant previously sought review of a work capacity decision dated 14 September 2014 which was the subject of an earlier recommendation of this office.<sup>1</sup>
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. In addition to applying for procedural review the applicant has submitted that the Insurer has not complied with the Guidelines for the evaluation of his whole person impairment (WPI).
9. At page 5 of the Work Capacity Decision the Insurer has advised the applicant that he has been assessed as having less than 10% WPI based upon a Workers Compensation Certificate of Determination – Consent Orders dated 28 April 2006 noting the applicant suffered 7% WPI.
10. The Insurer is not required to obtain a further assessment of the applicant’s WPI if there is sufficient evidence on the file to make a conclusion as they have done in the circumstances. This does not prevent the applicant from obtaining further evidence in respect of his WPI. However, for the purposes of this Work Capacity Decision the Insurer has not breached the Guidelines.

#### **Submissions by the Insurer**

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<sup>1</sup> Reported and numbered as 3416



11. The Insurer has not made any submissions in response to the application for procedural review.

### **Decision**

12. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
13. The procedural error identified in the earlier recommendation was not repeated by the Insurer on this occasion.
14. 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 7 March 2016 and he was notified of the Work Capacity Decision by letter dated 15 March 2016.
15. 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 29 June 2016. This is the appropriate notice period.
16. 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 5 and 6 of the Decision.
17. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer has informed the applicant that he has received 241 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 4 and 5 of the Work Capacity Decision.

18. Pursuant to Section 43(1)(a) of the 1987 Act the Insurer has noted that the applicant has been certified with capacity of “full hours per day, full days per week” as per the Certificate of Capacity from the nominated treating doctor dated 11 February 2016. The Insurer determined this to be 40 hours per week. The Insurer determined, pursuant to Section 43(1)(b), the roles of risk management officer, customer service assistant, administrative assistant and community and web manager to be suitable employment. It was noted that this had also been approved by the nominated treating doctor.
19. Finally the Insurer determined that pursuant to Section 43(1)(c) of the 1987 Act the applicant was able to earn \$15.00 per hour which would total \$600.00 per week in suitable employment as a community and web manager.
20. 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 vocational assessment / labour market analysis reports dated 25 August and 25 November 2015 and Certificates of Capacity from the nominated treating doctor with the most recent dated 11 February 2016.
21. At page 5 of the Work Capacity Decision the Insurer has explained to the applicant that he has returned to work for at least 15 hours per week however he is not earning at least \$176 per week and therefore 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.

### **Finding**

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



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## RECOMMENDATION

23. The application for procedural review is dismissed.
24. 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.
25. Pursuant to Section 44BB(3)(h) of the Workers Compensation Act 1987 these recommendations are binding upon the Insurer and the Authority.

A handwritten signature in black ink that reads "Tracey Emanuel".

Tracey Emanuel  
Delegate of the Workers Compensation  
Independent Review Officer  
26 July 2016