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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 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 22 March 2016. The Decision informed the applicant that her weekly payments of compensation would cease on 7 July 2016. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 3 May 2016 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application received 30 May 2016. The Authority delivered its Findings and Recommendations dated 23 June 2016. The Authority made a finding the applicant has a current work capacity but she does not satisfy the special requirements of Section 38(3) of the *Workers Compensation Act 1987* (1987 Act) for continuation of weekly payments of compensation.



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3. The applicant then made an application to this office for procedural review dated 5 July 2016. I am satisfied that the application has been made within time and in the proper form.
4. On 18 December 2000 the applicant suffered injury to her back in the course of her employment as a nurse. The applicant initially continued with her duties but ultimately increased pain caused her to cease work. The applicant's employment was terminated on 11 June 2002 and she underwent a lumbar discectomy on 23 May 2007. The applicant also suffers from a pulmonary embolism and her heart condition has prevented her from undergoing further surgery. The applicant is not working and was 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 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 applying for procedural review the applicant submitted that the Insurer has not complied with the proper procedural steps and requirements under the Act and in the Guidelines.

Submissions by the Insurer

8. The Insurer made submissions dated 8 July in response to the application. The Insurer submits that it has complied with the requirements as set out in the workers compensation legislation and the work capacity guidelines in making the Work Capacity Decision.

Decision



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9. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
10. 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 21 March 2016 and she was notified of the Work Capacity Decision by letter dated 22 March 2016.
11. 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 on 7 July 2016. This is the appropriate notice period.
12. The Guideline 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 two years after her entitlement to weekly payments ceases. The Insurer has adequately explained the legislation at page 5 of the Decision.
13. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer has informed the applicant that she has received 796 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 Section 38(3) of the 1987 Act at pages 4 and 5 of the Work Capacity Decision.
14. Pursuant to Section 43(1)(a) of the 1987 Act the Insurer has noted that the applicant has been certified with capacity of 2 hours per day 3 days per week as per the Certificate of Capacity dated 9 February 2016 from the nominated treating doctor. The Insurer determined that the applicant had current work capacity in accordance with that Certificate.



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15. The Insurer determined, pursuant to Section 43(1)(b), the roles of cashier and car park attendant to be suitable employment. The Insurer relied upon a vocational assessment report dated 5 February 2016. The nominated treating doctor provided signed approval for these duties on 28 January 2016.
16. Finally, in respect of Section 43(1)(c) of the 1987 Act the Insurer determined that the applicant could earn \$102 per week in suitable employment (being the amount she would earn as a cashier operator earning \$17 per hour). The Insurer relied upon earning capacity and vocational assessment report referred to above.
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.
18. At page 5 of the Work Capacity Decision the Insurer made a determination that the applicant had failed to comply with Section 38(3)(b) and (c) of the 1987 Act. The Insurer explained that the applicant had not returned to work for a period not less than 15 hours per week and was not earning \$176 per week. Further she had not been assessed as likely to be unable to undertake further additional employment that would increase your weekly earnings.
19. The Work Capacity Decision of the Insurer dated 22 March 2016 has displayed a careful consideration of the requirements of the Guidelines and legislation in force at the time.

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.



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22. 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.

23. 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
27 July 2016