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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 12 April 2016. The Decision informed the applicant that her weekly payments of compensation would cease on 20 July 2016. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 24 May 2016 and essentially confirmed the original Work Capacity Decision and the cessation of the applicant's weekly payments.
2. The applicant sought Merit Review from the Authority by way of application received 3 June 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. The Authority did not make a recommendation.



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3. The applicant then made an application to this office for procedural review dated 18 July 2016. I am satisfied that the application has been made within time and in the proper form.
4. On 14 November 2003 the applicant suffered injury to her right shoulder in the course of her employment as a cleaner. At the time of the Work Capacity Decision the applicant was not working and was 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 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 has made the following submissions:
 - It is not her fault that she is unable to obtain employment;
 - Her lack of skills, injuries and age affect her ability to obtain employment; and
 - Believes she should remain on weekly payments until she is able to secure employment.
8. I am only able to perform a review of the procedures undertaken by the Insurer in making the Work Capacity Decision which is the subject of this review. I am not allowed to take into consideration the applicant's personal circumstance or the availability of employment. The submissions are not relevant to procedural review.

Submissions by the Insurer



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9. The Insurer made submissions dated 22 July 2016 in response to the application. The Insurer submits that the applicant has the capacity and skills to work in suitable employment.

Decision

10. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
11. 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 17 March 2016 and she was notified of the Work Capacity Decision by letter dated 12 April 2016.
12. 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 20 July 2016. This is the appropriate notice period.
13. The Guideline 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 two years after her entitlement to weekly payments ceases. The Insurer has adequately explained the legislation at pages 4 and 5 of the Decision.
14. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer has informed the applicant that she has received 539 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 page 4 of the Work Capacity Decision.



15. Pursuant to Section 43(1)(a) of the 1987 Act the Insurer has noted that the applicant has been certified with capacity of 4 hours per day / 5 days per week as per the Certificate of Capacity dated 18 January 2016 from the nominated treating doctor. The Insurer determined that the applicant had current work capacity in accordance with that Certificate.
16. The Insurer determined, pursuant to Section 43(1)(b), the roles of packer and retail assistant to be suitable employment. The Insurer relied upon a vocational assessment report dated 16 February 2015. The nominated treating doctor certified these roles as suitable employment on 24 February 2015.
17. Finally, in respect of Section 43(1)(c) of the 1987 Act the Insurer determined that the applicant could earn \$400 per week in suitable employment (being the amount she would earn as a retail assistant earning \$20.00 per hour). The Insurer relied upon the aforementioned vocational assessment report.
18. 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.
19. At page 4 of the Work Capacity Decision the Insurer made a determination that the applicant had failed to comply with Section 38(3)(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 at least \$176 per week. As such the applicant was not entitled to ongoing payments of weekly compensation.
20. The Work Capacity Decision of the Insurer dated 12 April 2016 has displayed a careful consideration of the requirements of the Guidelines and legislation in force at the time.

Finding

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

RECOMMENDATION



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22. The application for procedural review is dismissed.
23. 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.
24. 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 "T. Emanuel".

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
3 August 2016