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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 Work Capacity Decision by the Insurer dated 16 December 2015 is set aside.**
- 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 a new decision is made in accordance with Section 43(1) of the *Workers Compensation Act 1987*.**
- c. Pursuant to Section 44BB(1)(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 16 December 2015. The Decision informed the applicant that his weekly payments of compensation would be reduced from \$1948.80 to the rate of \$404.95 less any earnings or deductions from 16 March 2016. The applicant requested internal review on 15 February 2016 and the Internal Review Decision was dated 16 May 2016. That Decision determined that the applicant's pre-injury average weekly earnings (PIAWE) were \$399.18 per week.
2. The applicant requested a Merit Review from the Authority by way of application dated 18 May 2016. The Authority delivered its Findings and Recommendations dated 22 June 2016. The Authority made a finding that the applicant's PIAWE was \$384.62 per week subject to indexation under Division 6A of Part 3 of the *Workers Compensation Act 1987* (1987 Act).



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3. The applicant then applied to this office for procedural review by way of application dated 20 July 2016. I am satisfied that the application has been made within time and in the proper form.
4. On 29 March 2014 the applicant suffered injury to his lower back whilst in the course of his employment in a company of which he is one of two directors.
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 making the application for review the applicant has made submissions that he was a worker, director and shareholder of his own company. At the time of the incident the applicant was taking an income that was supporting two mortgages and his own living expenses. The injury occurred three months prior to the conclusion of the financial year and the Insurer’s assessment of his earnings included 3 months of income as an injured worker. The applicant wanted his income assessed at the time of his injury and not the end of the financial year.
8. Pursuant to Section 44BB of the 1987 Act I am only able to review the Insurer’s procedures in making the Work Capacity Decision. I am not allowed to take into consideration the personal circumstances of the applicant.

Submissions by the Insurer

9. The Insurer has not provided any submissions in response to the application.



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Decision

10. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
11. *Pre-injury average weekly earnings* are defined in Section 44C of the 1987 Act to be the average of the worker's ordinary earnings during the *relevant period* (excluding any week the worker did not actually work and was not on paid leave).
12. Section 44D of the 1987 Act defines *relevant period* as "*in the case of a worker who has been continuously employed by the same employer for the period 52 weeks immediately before the injury, that period of 52 weeks...*"
13. The Insurer has listed the evidence relied upon in making the Work Capacity Decision at page 3 as "*payment summary for the period 01/07/2013 – 30/06/2014.*" The applicant suffered his injury on 29 March 2014. It would appear that the Insurer has taken into account the three month period where the applicant was injured and not the 52 week period *prior to the date of injury* as required by Sections 44C and 44D of the 1987 Act. The Insurer has incorrectly applied these sections of the legislation when calculating the applicant's PIAWE.
14. Guideline 5.3.2 requires the Insurer advise of the date when the Decision will take effect. The Insurer has correctly explained this section at page 3 of the Decision. The Insurer has noted that when payments of compensation are discontinued or reduced as a result of a work capacity decision of the Insurer, the worker is entitled to not less than 3 months' notice before the decision takes effect. There is also an allowance of 4 working days for service of the notice by post to comply with Guideline 6 of the Work Capacity Guidelines published on 4 October 2013 and Section 76(1)(b) of the *Interpretation Act 1987*.
15. The Insurer, at page 3 of the Decision has informed the applicant of the following:



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"You were previously notified on 06/06/2014 that you pre-injury average weekly earnings were equal to \$1948.80. As a result of receiving further information, you pre-injury average weekly earnings will reduce to \$404.59 from 07/03/2016.

Therefore your weekly payments of compensation will be reduced from a maximum of \$1948.80 (less earnings) to \$405.59 (less earnings) as of 16/03/2016."

16. As the Work Capacity Decision is dated 16 December 2015 the Insurer has failed to provide sufficient notice period for the reduction of the applicant's weekly payments and this is sufficient for the Work Capacity Decision to be set aside.
17. In this instance the non-compliance of the Insurer with the Guidelines and legislation referred to in the preceding paragraphs is sufficient to set aside the Work Capacity Decision dated 16 December 2016.

The Stay

18. Section 44BC of the 1987 Act operates so as to entitle a worker, during the course of a Section 44BB review, to receipt of the same compensation payments to which she was entitled to immediately prior to the making of the adverse Work Capacity Decision.
19. The entitlement has no time cap or deadline or other limitation on it beyond receipt by the worker of the review decision. This is an entitlement which exists irrespective of the existence or duration of any notice given to the worker under Section 54 of the 1987 Act.
20. Payments which continue under Section 54 are subject to the usual requirements of providing updated work capacity certificates and other compliance with the legislation by the worker. There is no such requirement under Section 44BC. The worker has already fully qualified to receive their ongoing payments as at the date of the work capacity decision. The applicant is automatically entitled to payments again upon application for review under section 44BB (unless the application for review is outside the "within 30 days" time limit).



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21. Section 44BC of the 1987 Act operates so that the Work Capacity Decision is the subject of a stay during the review process. This not only stays the decision, but also prevents the Insurer taking “any action based on the decision whilst it is stayed.” By definition the cessation of payments, which is clearly based on the decision, is such an “action” and may not take place during the relevant period of review.
22. There appears to be a view that if an Insurer has already stopped payments prior to an application for merit or procedural review, then payments need not be resumed during such review, since the Insurer cannot take “any action” during that time, which is erroneously interpreted to include a prohibition on the resumption of weekly payments. Such an analysis begs the question, since it assumes the work capacity decision was correct, and it also completely defeats the purpose of the legislative amendment, which was to ensure that workers are paid for the duration of Section 44BB review. It also follows that the resumption of payments is not an action “based on the decision” (since the decision resulted in a reduction or cessation) and therefore cannot be the subject of prohibition.

Finding

23. Under the legislation the Insurer can make an assessment of the applicant’s work capacity and then a decision about that work capacity, but they must comply with the legislation, the Regulation and the Guidelines in order to produce a procedurally correct result. In the current instance there have been breaches of the legislation and the Guidelines which are to be treated as delegated legislation. Accordingly the Work Capacity Decision must be found to be invalid.

RECOMMENDATION

24. The Work Capacity Decision by the Insurer dated 16 December 2015 is set aside.
25. 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 a new decision is made in accordance with Section 43(1) of the *Workers Compensation Act 1987*.



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26. Pursuant to Section 44BB(1)(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
4 August 2016