



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 25 August 2015. The Decision informed the applicant that his weekly payments of compensation would cease on 3 December 2015. The applicant sought internal review by the Insurer by application dated 31 March 2016 and the Internal Review Decision was dated 27 April 2016. The Internal Review Decision essentially confirmed the Work Capacity Decision and the cessation of the applicant's weekly payments albeit the applicant's earning capacity was reduced from \$1000 per week to \$800 per week.
2. The applicant sought Merit Review from the Authority by way of application received 27 May 2016. The Authority delivered its Findings and Recommendations dated 29 June 2016. The Authority made a finding the applicant has a current work capacity but he 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 17 July 2016 but received 28 July 2016. I am satisfied that the application has been made within time and in the proper form.
4. On 25 August 2004 the applicant suffered injury when he was struck in the back by a forklift driven by a co-worker. The applicant was employed as a chicken catcher. Following his injury the applicant has not returned to work and at the time of the Work Capacity Decision he 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 making an application for procedural review the applicant has made the following submissions:
 - He did not receive a letter or correspondence advising of the Work Capacity Decision before the Decision was made.
 - He did not receive the Work Capacity Decision until January 2016 after his weekly payments had ceased. The decision was incorrectly addressed to “Dartbrok” instead of “Dartbrook” Road. As a result the applicant was unable to apply for the Internal Review within the 30 day period.
 - As he did not receive the Work Capacity Decision at the appropriate time he was unable to make alternate arrangements to support himself and was denied procedural fairness.
 - He submits that ‘canvassing’ the respondent being in contravention of the Capacity Guidelines.
 - The Internal Reviewer did not comment upon the report of Dr K.



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- A further Certificate of Capacity was issued by the nominated treating doctor dated 10 May 2016 certifying the applicant as having no current work capacity.
 - The Medical Assessment Certificate assessing the applicant as having 12% WPI was not considered.
 - The Insurer's assessment of what was suitable employment did not take into consideration the reality of returning to work for an individual not of Australian descent and the realistic likelihood of an employer taking on an individual who is incapacitated and may well deteriorate in the future.
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 able to review the Internal Review Decision or the Merit Review Findings and Recommendations from the Authority. I am not allowed to take into consideration the applicant's personal circumstance or the availability of employment.
9. The applicant's submissions are addressed as follows:
- A Fair Notice letter dated 14 July 2015 was sent to the applicant. On 25 August 2015 the applicant was contacted by telephone and informed of the Work Capacity Decision. A letter was sent dated the same date. I am satisfied that the Insurer has provided adequate Fair Notice in accordance with Guideline 5.2.
 - The applicant has submitted that he did not receive the Decision until January 2016 and by that time his weekly payments of compensation had ceased. He submitted that the address on the letter was incorrect. The Insurer conceded the spelling error however, it was noted that they had not received any returned mail for the applicant. The Insurer confirmed that on 25 August 2015 the applicant was contacted by telephone and informed of the Work Capacity Decision and advised his weekly payments would cease in December 2015. I am satisfied that the Insurer provided the appropriate notice to the Applicant in respect of the Work Capacity Decision. I am not satisfied that the spelling error by the Insurer in the address was sufficient to set aside the Work Capacity Decision. I note that the Insurer did not have any returned mail for the applicant and that the Insurer had notified

the applicant of the Decision by telephone. The applicant was on notice that he should have been receiving correspondence from the Insurer. The Insurer has complied with the Guidelines insofar as providing notice to the applicant of the Work Capacity Decision.

- The Insurer complied with the Guidelines in relation to providing the applicant with notice of the Work Capacity Decision and did not deny the applicant procedural fairness in the review process. The applicant has been able to proceed to internal review, merit review and now procedural review.
- The basis of this submission is not clear. The applicant states “canvassing the respondent being in contravention of the Capacity Guidelines both in the Work Capacity Decision and the Internal Review Decision.” Firstly, I am unable to consider the Internal Review Decision. Secondly, I note that at no time has the Insurer recorded in the Decision that it contacted the respondent (who would be the pre-injury employer in this case) at any time.
- The next submission related to non-consideration of a medical report submitted for internal review. I am unable to consider the Internal Review Decision from the Insurer. This submission is not relevant to procedural review.
- It is submitted that the Internal Review Decision is materially deficient for the failure to consider the Medical Assessment Certificate assessing the applicant to have 12% WPI. Again, I am unable to consider the Internal Review Decision and this submission is not relevant to procedural review.
- It is submitted that when determining suitable employment the Insurer did not take into consideration the circumstances of the applicant. I note that Section 32A of the 1987 Act defines “suitable employment” as follows:

“suitable employment” , in relation to a worker, means employment in work for which the worker is currently suited:

(a) having regard to:



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(i) the nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and

(ii) the worker's age, education, skills and work experience, and

(iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and

(iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and

(v) such other matters as the Workers Compensation Guidelines may specify, and

(b) regardless of:

(i) whether the work or the employment is available, and

(ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and

(iii) the nature of the worker's pre-injury employment, and

(iv) the worker's place of residence.

The Insurer is not required to take into consideration the issues raised by the applicant in his submissions. The Insurer has taken into consideration the capacity of the applicant and the nature of the duties which the nominated treating doctor considers the applicant can perform. The Insurer has not breached the legislation or Guidelines in determining "suitable employment."

Submissions by the Insurer

10. The Insurer made the following submissions dated 2 August 2016 in response to the application:



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- Fair notice was complied with by sending the applicant a letter dated 14 July 2015 advising of the work capacity assessment and telephoning the applicant on 25 August 2015 to advise of the Work Capacity Decision. The Decision was also confirmed in writing by letter dated the same day.
- The applicant has been provided with procedural fairness.
- The applicant has been able to go through the appropriate appeal process of Internal Review and Merit Review.
- The Insurer has not contravened the Guidelines.
- The Insurer has not applied the incorrect criteria in applying Section 32A of the 1987 Act.
- The Insurer addresses the Certificate of Capacity referred to in Internal Review. This submission is not relevant to procedural review.
- The Insurer addresses the Medical Assessment Certificate referred to in Internal Review. This submission is not relevant to procedural review.
- The Insurer supports the work capacity decision and rejects the incorrect criteria submission and relies upon the vocational assessment reports.

Decision

11. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
12. 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 30 June 2015 and he was notified of the Work Capacity Decision by letter dated 25 August 2015
13. I note that the applicant has submitted that he did not receive the Work Capacity Decision letter until January 2016. He submits that this was due to a typographical error in the address on the correspondence (Dartbrok Road instead of Dartbrook Road). I note that in addition to the letter the Insurer also telephoned the applicant to advise of the Work Capacity Decision. The Insurer did not receive any returned mail for the applicant. The applicant was on notice that the Insurer had sent a letter



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explaining the Work Capacity Decision. I am satisfied that the Insurer discharged its obligations to notify the applicant of the Work Capacity Decision.

14. 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 3 December 2015. This is the appropriate notice period.
15. The Guideline also 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 one year after his entitlement to weekly payments ceases. The Insurer has adequately explained the legislation as it was at that time. I do note that in the Internal Review Decision the Insurer has informed the applicant that due to legislative amendments which took effect on 4 December 2015 (after the date of the Work Capacity Decision) his entitlement to medical expenses ceases 5 years from the date of cessation of his weekly payments.
16. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer has informed the applicant that he has received 423 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 3 of the Work Capacity Decision.
17. Pursuant to Section 43(1)(a) of the 1987 Act the Insurer has noted that the applicant has been certified with capacity for "full hours" as per the Certificate of Capacity from the nominated treating doctor. The Insurer determined that the applicant had current work capacity in accordance with that assessment.
18. The Insurer determined, pursuant to Section 43(1)(b), the roles of process worker/assembler, office all-rounder, ticket collector and sales



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assistant to be suitable employment. The Insurer relied upon a vocational assessment report dated 19 February 2015. The nominated treating doctor certified these roles as suitable employment on 24 February 2015.

19. Finally, in respect of Section 43(1)(c) of the 1987 Act the Insurer determined that the applicant could earn \$1000 per week in suitable employment (being the amount he would earn as a process worker/assembler). The Insurer relied upon the aforementioned vocational assessment report.

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.

21. At page 8 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 at least \$173 per week; and was assessed as able to undertake employment that would increase his current weekly earnings. Therefore, the applicant was not entitled to ongoing payments of weekly compensation.

22. The Work Capacity Decision of the Insurer dated 25 August 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation in force at the time.

Finding

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

RECOMMENDATION

24. The application for procedural review is dismissed.



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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 receipt by the applicant of this recommendation.

26. 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
8 August 2016