



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 24 March 2016. The Decision informed the applicant that his weekly payments would cease on 1 July 2016. The applicant sought internal review and the Internal Review Decision was dated 13 May 2016 and confirmed the original Work Capacity Decision.
2. The applicant sought Merit Review from the Authority who delivered its Findings and Recommendations dated 7 July 2016. The Authority made a finding that the applicant has work capacity but does not satisfy the special requirements of Section 38(3) of the *Workers Compensation Act* 1987 (1987 Act) for the continuation of his weekly payments of compensation.
3. The applicant then applied to this office for procedural review by way of application dated 2 August 2016. I am satisfied that the application has been made within time and in the proper form.



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4. On 24 April 2004 the applicant suffered injury to his lumbar spine when he slipped and fell. The applicant's employment was terminated on 31 March 2009. 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 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 applying for a procedural review the applicant has submitted that he *"needs help"* and cannot find employment.
8. I am unable to take into consideration neither the personal circumstance of the applicant nor the state of the labour market. I am only able to review the processes implemented by the Insurer in making the Work Capacity Decision.

Submissions by the Insurer

9. The Insurer made a submission by way of email dated 5 August 2016 that the Work Capacity Decision was based on the identification of remunerative employment that represents 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 commenced on 2



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March 2016 and was completed on 24 March 2016. The applicant was notified of the Work Capacity Decision by letter dated the same day.

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 his payments would cease on 1 July 2016. This is the appropriate notice period.
13. The applicant was notified of the date his payments would be terminated on page 6 of the Decision. Such important information should be conveyed to the applicant much earlier in the document. This is insufficient to set aside the Work Capacity Decision.
14. 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. The Insurer noted that the applicant has been assessed as having 11% Whole Person Impairment and that his entitlement to medical expenses will cease on 21 July 2021. The Insurer has adequately explained the legislation at pages 6 and 7 of the Decision.
15. The Insurer is also required to advise the applicant of the relevant entitlement periods. The Insurer has informed the applicant that he has received 402 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.
16. The Insurer has noted that the applicant's nominated treating doctor certified him with capacity to work 6 hours per day / 3 days per week by way of Certificate of Capacity dated 15 March 2016. Pursuant to Section 43(1)(a) of the 1987 Act the Insurer determined the applicant has current capacity to work 6 hours per day, 3 days per week.



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17. The Insurer determined, pursuant to Section 43(1)(b), the roles of packer, process worker, and delivery driver to be suitable employment. These employment options were approved by the nominated treating doctor as well as the Independent Medical Examiner, Dr B, in his report dated 17 February 2016.
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 pages 2, 5 and 6 of the Work Capacity Decision the Insurer has explained to the applicant that as he has not returned to work for at least 15 hours per week and is not earning at least \$176 per week he has not complied with Section 38(3)(b) of the 1987 Act. Therefore he is not entitled to ongoing payments of weekly compensation.

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.
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
8 August 2016