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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.**

Introduction and background

1. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 216 May 2016. The Decision informed the applicant that her weekly payments of compensation would reduce to \$437.52 from 26 August 2016. This decision was maintained following internal review.
2. The applicant sought Merit Review from the Authority by way of application received 20 July 2016. The Authority delivered its Findings and Recommendations dated 12 August 2016. The Authority made a finding the applicant has no current work capacity. Since the applicant was an "existing recipient" immediately prior to 1 October 2012, her PIAWE is fixed by statute. She remains entitled to received 80% of that statutory figure. Accordingly merit review recommended that the Insurer continue to pay the applicant the sum of \$805.52 per week, backdated from 16 May 2016.
3. The applicant then made an application to this office for procedural review dated 24 August 2016. I am satisfied that the application has been made within time and in the proper form.

Submissions by the applicant

4. 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.*"



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5. The sole ground for review identified by the applicant is that she disputes that she has current work capacity as alleged by the Insurer. Given that the Merit Review Service of the Authority found in the applicant's favour on this very question, the submission is clearly correct. It is, however, of no utility for present purposes.

Submissions by the Insurer

6. The Insurer provided a useful summary of the history of the claim and advised as follows at the end:
 - An email was sent to [the applicant] on 16 August 2016 from the Merit Review Service that they reviewed her merit review application and considered that she had no capacity for work in the suitable employment options identified – stating that she had an ongoing weekly entitlement of \$805.52 per week.
 - [The applicant] continues to be paid her weekly compensation entitlements and has been paid [up to date] at the rate of \$805.52 per week in accordance with the merit review findings.

Decision

7. In the circumstances of the present case there is no purpose to be served by conducting a procedural review of the insurer's decision. First, the applicant is currently in receipt of the maximum payable to someone in her position. Secondly, the merit review service has favourably addressed the only concern expressed by the applicant in relation to the original decision.
8. The only comment I would make is that this insurer continues to retain the services of a doctor who styles himself as an "Injury Management Consultant" to provide "reports" of his findings having done no more than perused the insurer's "file" and possibly had a short telephone conversation with the worker's NTD. The worker is never examined, nor is the worker told the precise contents of the "file" seen by the "consultant." The probative value of any such report is obviously nil, and the failure to advise the applicant of which documents and other materials are perused by this person is a clear breach of the rules of natural justice. Any decision based in whole or in part on such a report is



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clearly going to be set aside for those reasons, while there is a live dispute between the parties.

9. In the present case there appears to be no live issue between the parties. While the Injury Management Consultant referred to *supra* had the view that the applicant could perform certain suitable duties for four hours per day, four days per week this was clearly rejected by the merit review service. The finding by merit review is determinative of the issue and the Insurer continues to abide by it.

Finding

10. There being no live issue between the parties, a procedural review is unnecessary in this case. Section 44BB(3)(c) allows for a review to be declined on the grounds of the application being "frivolous or vexatious," but those words are too harsh for present purposes. It is simply the case that the applicant cannot improve her position as a result of procedural review and on that basis the application should be dismissed.

RECOMMENDATION

11. The application for procedural review is dismissed.

A handwritten signature in blue ink, appearing to read "Wayne Cooper".

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
7 September 2016