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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. On 26 February 2008 the applicant sustained injuries to his neck and right shoulder in the course of his employment as a process worker. He resumed work on suitable duties, until he was terminated by his former employer on a date in June 2010. He was continuously in receipt of weekly payments of workers compensation until the insurer made a work capacity decision earlier this year. Accordingly the applicant was an existing recipient of weekly payments immediately prior to 1 October 2012.

2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 21 April 2016. The Decision informed the applicant that his weekly payments would cease on 28 July 2016.

3. Despite being dated 21 April 2016, the decision was not actually posted to the applicant by the Insurer until 29 April 2016. The applicant has produced the date-stamped envelope to confirm this. Further, the applicant did not receive the late-posted decision until 3 May 2016. In the circumstances, it is clear that inadequate notice was originally given to the applicant, thus occasioning a breach of section 54(2)(a) of the 1987 Act.

4. The applicant sought internal review by the Insurer and the Internal Review Decision was dated 29 June 2016. The Internal Review Decision confirmed the original Work Capacity Decision, with one significant change: the notice originally given in the decision dated 21 April 2016 was extended by one month, from 28 July 2016 to 28 August 2016. Given that the rest of the decision was in identical terms, it is

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effectively an extension of the original notice period from an inadequate time to an adequate time. Had the decision been varied in any way, it would not be possible to so style the extension of time.

5. The applicant sought Merit Review from the Authority by way of application received 28 July 2016. The Authority delivered its Findings and Recommendations dated 30 August 2016. The Authority made a finding which was not open to it to make, namely that the applicant is not a worker with "high needs," before going on to make "no recommendation." Since only recommendations made by the Authority are binding on the parties to the dispute,[1] it is hard to see what status this document has in the circumstances where the merit reviewer has clearly stated: "I make no recommendation" (at paragraph 56) following an earlier "finding" which the Authority has no power to make.

6. The applicant then made an application to this Office for procedural review received on 5 September 2016. I am satisfied that the application has been made within time and in the proper form.

7. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *Work Capacity Guidelines* (Guidelines).

Submissions by the applicant

8. Section 44BB (1) (c) of the Workers Compensation Act 1987 (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."*

9. In addition to making an application for procedural review the applicant has made the following submission:

    - The work capacity decision dated 21.4.16 posted on 29.4.16 states my weekly payments will cease on 28.7.16. I have not received 3 months' notice.

Submissions by the Insurer

[1] See section 44BB(3)(g) of the 1987 Act.

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10. The Insurer made the following submissions in response to the application:

> In response to [the applicant's] submission relating to the notice period, I refer to the following paragraphs from my Statement of Reasons dated 28/6/2016[2]:
>
> *"48. Whilst I have confirmed that the work capacity decision dated 21/4/2016 as being correct, I have considered [the applicant's] submission regarding the delay in receiving the work capacity decision.*
>
> *49. In his submission, [the applicant] advised that he did not receive the work capacity decision until 3/5/2016. In the absence of any information to the contrary, I accept that this is correct.*
>
> *50. Despite there being no technical or legislative requirement to extend the notice period provided to [the applicant], in the circumstances I am of the opinion that extension of the relevant notice period is appropriate.*
>
> *51. Noting the delay [the applicant] experienced in receiving the work capacity decision notice 21/4/2016, and to allow sufficient time for the delivery of this decision, the notice period will be extended to 28/8/2016".*
>
> I believe the steps taken to provide [the applicant] with an extension in the notice period has gone above what is technically required.

Decision

11. In the course of merit review, the applicant stated that he had no objection to the work capacity decision, with only two exceptions: first, he noted that he had received inadequate notice; and, secondly, he

[2] That is, the Internal Review Decision.

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claimed to be a worker with "high needs," and thus exempt from the work capacity assessment process.

12. Since the first issue (inadequate notice) is a matter for procedural review, it was of no moment in the course of merit review. Interestingly, the merit reviewer did decide to look at the question of whether or not the applicant was a "high needs" worker, despite this clearly not being a matter susceptible of review under section 44BB. Even if it were so reviewable, it is a procedural question, not going anywhere near the merits of the case.

13. The merit reviewer says that the "high needs" issue is a "work capacity decision" by virtue of section 43(1)(f) of the 1987 Act. This view was rebutted by the Court of Appeal in *Sabanayagam v St George Bank Ltd*.[3] In that decision the Court held that section 43(1)(f) does not confer on an insurer any powers that it does not already have. Since an insurer does not have the power to determine that a worker is not a "high worker"[4] it is equally not open to the Authority to "review" any such decision.

14. The "high needs" issue is determinable only upon an assessment of Whole Person Impairment (WPI). Section 65(3) of the 1987 Act gives exclusive jurisdiction over the assessment of WPI to an Approved Medical Specialist (AMS), appointed by the Workers Compensation Commission (WCC). In the absence of a Medical Assessment Certificate (MAC) issued by an AMS, the issue cannot be determined.

15. The exception allowed for in section 32A(c) is for the benefit of workers only. It allows an Insurer to be "satisfied" that a worker who has yet to be assessed might be likely to be over the relevant threshold, so that the worker does not have to wait for the WCC/AMS process to be finalised before receiving the benefit of the section. But it cannot be construed the other way, that is as a licence for insurers to make adverse determinations about the WPI of workers in the absence of a MAC produced by an AMS.

[3] [2016] NSWCA 145

[4] The definition in section 32A only says that an insurer may be "satisfied that the degree of permanent impairment is likely to be more than 20%." Nowhere does it say that an insurer can decide to the contrary, nor does it say that a merit reviewer of the Authority [or any other body] can so decide. The "satisfaction" or otherwise of a merit reviewer is irrelevant.

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16. A dispute about WPI is defined in section 319 of the 1998 Act as a "medical dispute." Section 319 is in Part 7 of Chapter 7 of the 1998 Act. The relevance of this to present purposes is immediately evident with a quick recap of section 43(2)(b) of the 1987 Act, thus:

> (2) The following decisions are not work capacity decisions:
> ……
> (b) a decision that can be the subject of a medical dispute under Part 7 of Chapter 7 of the 1998 Act.

17. It must follow that a "high needs" decision, which is a decision based on an assessment of WPI, is not a work capacity decision and cannot be reviewed under section 44BB. If it were so reviewable, it could only be subject to procedural review, not merit review.

18. The only remaining issue in dispute between these parties appears to be the notice given under section 54(2)(a) of the 1987 Act in the original work capacity decision.

19. However, given that the Insurer accepts the applicant's statements about when he received the original decision (which on its face had given adequate notice), the Insurer has taken the proactive step of already extending the notice period. The applicant has therefore had the benefit of an extended period of weekly payments, exceeding the requirements of section 54(2)(a).

20. I accept the submission of the Insurer that the applicant has suffered no detriment as a result of the late posting of the original decision. The decision itself had allowed for the correct period of notice, however administrative delay had caused the letter to be sent so late that the notice period was no longer correct by the time the applicant received it. This is not the fault of the original decision-maker, and it was corrected in the course of internal review.

Finding

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

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RECOMMENDATION

22. The application for procedural review is dismissed.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
05 October 2016