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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 30 June 2016. The Decision informed the applicant that his weekly payments of compensation would cease on 7 October 2016. This decision was maintained following internal review.
2. The applicant sought Merit Review from the Authority, which delivered its Findings and Recommendations dated 13 September 2016. The Authority made findings the applicant has is able to return to work in suitable employment, has current work capacity, and does not satisfy the special requirements in section 38(3). Despite making these findings, the merit reviewer saw no reason to make a recommendation of any kind, thus rendering the status of the document issued "non-binding."¹
3. An application to this Office for procedural review was received via ordinary post on 11 October 2016. I am be satisfied that the application was made within time an on the correct form.
4. The applicant had fractured his arm in May 2013 and again in July 2014, the latter in the course of supposedly remedial physiotherapy for the initial injury. He has not returned to work.

Submissions by the applicant

¹ Section 44BB(3)(g) says that recommendations are binding on the Insurer, whereas there is no similar statement in section 44BB(3)(e) and (f) concerning the findings on which recommendations are based.



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5. 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.”*
6. The applicant makes the following submissions:
 - He has a further Certificate of Capacity dated 17 September 2016 saying he has no current work capacity;
 - He had a further hospitalization and operation in the period 26-30 September 2016; and
 - He now requires a further period of physiotherapy and rehabilitation.

Submissions by the Insurer

7. The Insurer made the following unusual, but not unwelcome, submissions in reply:
 - [The Insurer] agrees with the submissions made by [the applicant];
 - The decision currently under procedural review is no longer active;
 - [The Insurer] has issued a more recent, non-adverse decision, reinstating weekly benefits dated 27 September 2016; and
 - [The Insurer] therefore submits that the current review is not required as the work capacity decision it pertains to is not to be applied to the claimant.

Decision

8. The Insurer in its new decision of 27 September 2016 has found that the applicant has no current work capacity. Weekly payments have been restored. Since the original notice period under section 54(2)(a) was not due to expire until 7 October 2016, the applicant has never been without weekly payments.
9. In the circumstances there appears to be no ongoing dispute between the parties. It follows that there is no utility in conducting a procedural review.



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Finding

10. Section 44BB(3)(c) of the 1987 Act allows a reviewer to decline to conduct a review “because the application for review is frivolous or vexatious.” I would not presume to describe the current application in such prejudicial terms, however I do think that to conduct a review when it is known that there remains no live dispute between the parties would itself be an act of frivolity, and that is sufficient to justify the decision to decline to conduct a review.

RECOMMENDATION

11. The application for procedural review is dismissed.

A handwritten signature in blue ink, which appears to read "Wayne Cooper". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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