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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 23 June 2016. The Decision informed the applicant that her weekly payments of compensation would cease on 29 September 2016. This decision was maintained following internal review.
2. The applicant sought Merit Review from the Authority by way of application received 27 June 2016. The Authority delivered its "Findings and Recommendations" dated 21 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)(2) because she does not work for at least 15 hours per week.¹ 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."²
3. An application was made to this Office for procedural review received via email on 23 September 2016. I am satisfied that the application has been made within time and in the correct form.
4. The applicant was injured in the course of a motor accident on her way to work on 30 July 2002. As a result the applicant has residual symptoms in her upper torso, left shoulder and spinal disc pathology.

¹ The applicant does not currently work.

² 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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She also has ongoing “anxiety and depression.” As at the present time she has received in excess of 560 weekly payments of compensation.

Submissions by the applicant

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 submission:
 - Not happy with the Merit Review and Insurer review.
7. While no specific grounds seem to be relied upon, I take it that the unhappiness of the applicant also extends to the original work capacity decision.
8. Various documents appearing on the internet purporting to give guidance and assistance to injured workers seeking section 44BB review express themselves in a similar way to the wording used by this applicant. In more than one place workers are advised that they may seek a review of a decision if they are “not happy” with either the decision or the review of it. It was only a matter of time before workers started taking this literally to mean that unhappiness with the outcome of a review was of itself grounds to further review the original decision.
9. Despite no grounds being set out by the applicant, I can still conduct a procedural review on the basis referred to by the Court of Appeal in *Insurance Australia Ltd t/as NRMA v Milton* [2016] NSWCA 156 at paragraphs 9-10. Put shortly, procedural review has more regard to the constituting statute than to submissions of parties to a dispute.

Submissions by the Insurer

10. The Insurer responded to the application thus:
 - As the worker has requested a review of the Work capacity review procedure, [the Insurer] cannot comment on the contents of the Merit review and Insurer’s review decision.



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11. Since the “submission” of the Insurer is a *non-sequitur* based on a false premise, it cannot affect the outcome of this procedural review.

Decision

12. The Insurer advised the applicant that a work capacity assessment was completed on 21 June 2016.

13. The applicant was found fit to work for 30 hours per week. This accords with the certification from the applicant’s own Nominated Treating Doctor [NTD]. That certification had been in place since 7 January 2016.

14. The applicant was advised that she had received 544 weeks of payments as at 12 May 2016, taking her past the second entitlement period. The entitlement periods were explained and the effect of section 38 was also set out and explained.

15. The calculation of PIAWE was fully explained, as was the concept of “suitable employment.” Suitable employment was identified in accordance with reports Vocational/Labour Market analysts, in light of the available medical evidence.

16. The applicant was advised that due to having more than 10% whole person impairment (but not more than 20%) she would continue to be able to receive medical treatment for a further five years after the cessation of her weekly payments. Section 59A(2) and (3) were clearly explained.

17. The medical evidence relied upon in the decision-making process was current and included work capacity certificates from the NTD.

18. The relevant notice period in section 54(2)(a) was given.

19. There appear to be no procedural errors committed by the Insurer in this case.

Finding



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20. The Insurer seems to have complied fully with the legislative requirements and with the Guidelines and accordingly the application should be dismissed.

RECOMMENDATION

21. 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
20 October 2016