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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 injured her left shoulder in the course of her employment as a Kitchen Hand in July 2009. She returned to work on suitable duties for a time, but ultimately her employment was terminated. She has not worked since leaving that employment and has received weekly payments from the Insurer for well in excess of 350 weeks.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 24 June 2016. The Decision informed the applicant that her weekly payments of compensation would cease on 5 October 2016. This decision was maintained following internal review.
3. The applicant sought Merit Review from the Authority by way of application received 12 August 2016. The Authority delivered its Findings and Recommendations dated 9 September 2016. The Authority made findings that the applicant: (i) has current work capacity, (ii) can work as a School Crossing Supervisor and (c) does not satisfy the special requirements in section 38(3)(2) because she does not currently 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
4. An application was made to this Office for procedural review ostensibly dated 19 September 2016, but received via email on 04 October 2016. I

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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am satisfied that the application was made within time and in the correct form.

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 submission that the work capacity decision of the insurer is “not correct, not fair and not humane.” She has work capacity for only 2 hours per day, 3 days per week. Work trials arranged by the Insurer were not appropriate for her limitations, particularly since they involved repetitive work. She doubts she can work to the extent assessed by rehabilitation providers. She is willing to continue to search for work and to undergo training with the assistance of the Insurer, as long as the work and or training are “in accordance with [her] capabilities.”
7. All of these submissions go to the merits of the decision. Procedural review does not exist for the purpose of re-running merit review. I can only conduct a procedural review of the work capacity decision made by the Insurer.

Submissions by the Insurer

8. The Insurer provided a useful summary of the history of the claim and the evidence relied upon to make the decision.
9. Neither the applicant nor the insurer made submissions relevant to procedural review.

Decision

10. The Insurer advised the applicant by letter dated 27 May 2016 that a work capacity assessment had commenced and that it may lead to a decision resulting in a consequent reduction in payments. The applicant was advised to forward any “additional information” she would like to



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have considered within 21 days of the date of the letter. This fully complies with the “fair notice” requirement in Guideline 5.2.

11. In the notice of the work capacity decision issued on 24 June 2016 the applicant was advised that she had been found fit to work for 6 per week. This accords with the certification from the applicant’s own Nominated Treating Doctor [NTD]. It also accords with the applicant’s self-assessment.
12. The applicant was advised that she had received 348 weeks of payments [as at 16 June 2016]. This clearly places the applicant in the period following the second entitlement period, which ends after 130 weeks. The entitlement periods were explained and the effect of section 38 was also set out and explained.
13. The applicant was advised that due to having less than 10% whole person impairment³ she would continue to be able to receive medical treatment for a further two years after the cessation of weekly payments. Section 59A(2) and (3) were clearly explained.
14. The medical evidence relied upon in the decision-making process was current and included work capacity certificates from the NTD.
15. The relevant notice period in section 54(2)(a) was given.
16. Relying on reports from external providers the Insurer found that the applicant could work as a “Customer Service/Sales Representative” in a Jewellery Store.⁴
17. The merit reviewer did not accept this and found instead that the applicant could work as a School Crossing Supervisor. This was a finding open to the merit reviewer to make. It is odd that the merit reviewer chose to not make a recommendation based upon it.
18. Given that the applicant does not currently work and she is in the post-130 weeks period, the calculation of PIAWE, otherwise affected by the

³ There is an AMS assessment of 6% WPI from November 2011 on file.

⁴ Presumably they meant by this that the applicant could work in a Jewellery Shop in Australia or a Jewellery Store in America.



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change of suitable employment from working in a Jewellery "Store" to working as a Crossing Guard, is not relevant.

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

Finding

20. The Insurer has 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 includes a long horizontal stroke extending to the right.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
2 November 2016