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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 suffered injury in circumstances described in WIRO recommendation 3015. She was an existing recipient for all relevant purposes. The first work capacity decision having been overturned in the course of procedural review, the Insurer made a new work capacity decision in 2016. The applicant now seeks procedural review of a Work Capacity Decision made by the Insurer on 27 June 2016.
2. The Insurer accepts that the applicant is certified to work for 8 hours per day, 4 days per week. Since the applicant has received more than 130 weeks of payments, she must comply with section 38(3)(b) and (c). There is no dispute that the applicant works for more than 15 hours per week and earns more than the minimum required, thus complying fully with section 38(3)(b). The problem is that she is certified as capable of working for 32 hours per week, but tends to work between 25 and 32 hours, with the average being closer to 25 than it is to 32. The Insurer is therefore not satisfied that the applicant complies with section 38(3)(c). The Decision accordingly informed the applicant that her weekly payments of compensation would cease on 6 October 2016. This decision was maintained following internal review.
3. The applicant sought Merit Review from the Authority by way of application received on 22 August 2016. The Authority delivered its Findings and Recommendations dated 23 September 2016. The Authority also found that the applicant does not satisfy the special requirements in section 38(3)(c). Despite making this finding, the merit



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reviewer saw no reason to make a recommendation of any kind, thus rendering the status of the document issued “non-binding.”¹

4. An application was made to this Office for procedural review received via email on 05 October 2016. I 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 she complies with section 38(3).
7. This submission goes to the merits of the decision. The issue was dealt with by the Authority in the course of merit review. 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 responded to the submission by the applicant by noting that while she occasionally does work 32 hours in a week, it is not every week, and the average hours worked per week is less than 30 and closer to 25.

Decision

9. The applicant was advised that the work capacity assessment was completed on 22 June 2016. This followed a period of “fair notice” in compliance with Guideline 5.2
10. In the notice of the work capacity decision issued on 27 June 2016 the applicant was advised that she had been found fit to work for 32 hours

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.



per week. This accords with the certification from the applicant's own Nominated Treating Doctor [NTD]. There is no dispute that on several occasions the applicant has actually worked 32 hours per week, and on one occasion worked 32.5 hours. Over a period of more than 35 weeks, the applicant worked 32 or 32.5 hours on only six occasions. This was also noted in the course of merit review. For the rest of the time the applicant tended to work 25 hours per week, with variations of an hour or so either way, with one outlier low figure of 12 and the rest being between 23.75 and 31.5.

11. Section 38(3)(c) uniquely confers exclusive jurisdiction on an Insurer to assess whether or not a worker is "*capable of undertaking further additional employment or work that would increase the worker's current weekly earnings.*" There is no objective test, and there is no provision for the "assessment" of the Insurer to be challenged in the course of section 44BB review. It is possible that Judicial Review by the Supreme Court might be an avenue for such challenge, but not otherwise. Since Procedural Review cannot engage in a critique of the discretion or judgement exercised by an insurer, this is an issue beyond the jurisdiction of this Office.
12. The applicant was advised that she had received 150 weeks of payments. 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, there being no current assessment whole person impairment, 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. There appear to be no procedural errors committed by the Insurer in this case.



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Finding

17. The Insurer has complied fully with the legislative requirements and with the guidelines and accordingly the application should be dismissed.

RECOMMENDATION

18. 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
3 November 2016