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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 or about 14 January 2008 the applicant was assaulted during the course of his employment as a Parking Patrol Officer and sustained Post-Traumatic Stress Disorder, Major Depression and Acute Anxiety. He has never returned to work. The claim was accepted and the applicant was an "existing recipient" for all relevant purposes. A work capacity decision transitioning the applicant to the new payments regime was conducted in 2013.
2. The Insurer made a new work capacity decision on 31 May 2016, advising that the applicant does not meet the requirements of section 38(3)(b) and (c) and that, as a consequence, his payments must cease on and from 14 September 2016. The applicant now seeks procedural review of that Work Capacity Decision.
3. The Insurer accepts that the applicant is certified to work for 10 hours per week. Since the applicant has received more than 130 weeks of payments, he must comply with section 38(3)(b) and (c). The applicant does not currently work in paid employment, although does perform voluntary work for two days per week. The Insurer is therefore not satisfied that the applicant complies with section 38(3)(b). The Decision necessarily informed the applicant that his weekly payments of compensation would cease on 14 September 2016. This decision was maintained following internal review.



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4. The applicant sought Merit Review from the Authority by way of application received on 30 August 2016. The Authority delivered its Findings and Recommendations dated 28 September 2016. The Authority found that the applicant: (i) has capacity for “some kind of employment” for 35 hours per week; (ii) is able to return to work in suitable employment as a Library Assistant; and (iii) does not satisfy the special requirements in section 38(3). The Authority recommended that the applicant is not entitled to ongoing weekly payments after the second entitlement period.
5. 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

6. 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.*”
7. The applicant is in the odd position of having medical certification which so reduces his work capacity that, if it were accepted, he could never qualify for payments after 130 weeks, due to section 38(3)(b). His position is not assisted by the Insurer having decided to make both a work capacity decision and a liability decision, with a section 74 Notice having issued on 17 April 2016.
8. Despite what appears in paragraph 7 *supra*, the applicant has submissions which go to the correct form of the work capacity decision. For instance, he says that the Insurer nominates both \$26.77 and \$429.52 as his potential “ongoing entitlement” if he were to comply with section 38(3). As he rightly says, they cannot both be correct. The difficulty for the applicant is that this submission goes to an issue which can only ever be academic, in light of his current medical certification and his current non-remunerative working situation. The figures themselves are completely irrelevant to the decision-making process of the insurer, which had only to look to section 38(3)(b) to reach the decision in this case.



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9. The issue of the concurrent section 74 Notice was hard for the Insurer to avoid at the time, in light of an errant decision of the Workers Compensation Commission, later corrected on appeal. The Section 74 notice is irrelevant for current purposes.
10. The remaining submissions go to the merits of the decision. The issues were 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

11. The Insurer made no submissions.

Decision

12. The applicant was advised by telephone on 7 April 2016 that a work capacity assessment was imminent and this was confirmed by letter dated 18 April 2016. This provided a period of "fair notice" in compliance with Guideline 5.2.
13. The insurer set out on page one a table of "additional information" provided by the applicant following the provision of fair notice. It was noted that this information was considered in the decision-making process, in addition to information already in the possession of the Insurer.
14. The applicant was advised that he had been found fit to work for 35 hours per week. This accords with his experience during three seemingly successful work trials between September 2014 and September 2015. As a result the Insurer found that the applicant has current work capacity as required by section 43(1)(a). It was also determined that the applicant could earn \$778.75 gross per week as an Administrative Assistant.



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15. The applicant is unable to return to his pre-injury employment without substantial risk of further injury. The Insurer correctly cited section 43(1)(e).
16. The applicant was advised that, as he had received more than 130 weeks of payments, he is in the period following the second entitlement period, which ends at 130 weeks. The entitlement periods were explained and the effect of section 38 was also set out and explained.
17. The transitional rate was explained with reference to section 43(1)(d).
18. The applicant was advised that, there being a current assessment of 6% whole person impairment, made by an AMS and subject of a Certificate of Determination by the Workers Compensation Commission, he is not a worker with "high needs" and will continue to be able to receive pre-approved medical treatment for a further two years after the cessation of weekly payments. Section 59A(2) and (3) were clearly explained.
19. The medical evidence relied upon in the decision-making process was current and included work capacity certificates from the NTD.
20. The relevant notice period in section 54(2)(a) was given.
21. There appear to be no procedural errors committed by the Insurer in this case.

Finding

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

RECOMMENDATION

23. The application for procedural review is dismissed.



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A handwritten signature in blue ink, appearing to read "Wayne Cooper", with a long horizontal flourish extending to the right.

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