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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 October 2001 as a result of falling on stairs and continues to receive weekly payments. She currently works approximately 9 hours per week.
2. On 15 July 2016 a Work Capacity Decision (WCD) was made by the Insurer. The Decision informed the applicant that her weekly payments of compensation would cease on 21 October 2016. Somewhat anomalously she was also told that her entitlement to ongoing medical expenses would expire two years later, on "24/10/2018." This was anomalous for two reasons: first, the date two years after the cessation of weekly benefits would be 21 October 2018, not 24 October 2018: and secondly, the Insurer was aware at the time that a Whole Person Impairment (WPI) assessment of 20% existed and was in fact accepted by the Insurer, meaning that the correct period for ongoing entitlement to medical and related expenses was five years, not two.
3. The applicant sought internal review, during the course of which the Insurer determined that the original WCD was "invalid," without specifying any reason why. The applicant was advised that the WCD had been withdrawn and that she would continue to receive weekly payments until such time as a new decision could be made and any notice period set out therein expired.
4. For reasons which remain obscure the applicant sought Merit Review from the Authority. Precisely what standing the Authority would have to



review a withdrawn decision is unknown. Despite this, the Authority made a finding that the applicant does not satisfy the definition of a 'worker with high needs' as defined in section 32A. This was said to be on the basis that the WPI assessment of 20% is below the required threshold.¹

5. As correctly noted by the merit reviewer at paragraph 24, the assessment of WPI is not a work capacity decision and is not reviewable as a work capacity decision, which raises the question as to why the reviewer engaged in the exercise in the first place.
6. The Authority did not make any recommendations in this matter, thereby causing considerable doubt to be cast over the purpose of the merit review.
7. The applicant then made an application to this office for procedural review received on 13 September 2016. I am satisfied that the application has been made within time and in the proper form.
8. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *Work Capacity Guidelines* (Guidelines).

Submissions by the applicant

9. 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.*"

10. The applicant says the following:

"I challenge the WPI made by [named doctor]. His figures of 15+3+4% add up to 21%. I believe my WPI is over 20%. Therefore this impacts upon my work capacity assessment."

11. It is clear that no substantive submissions going to the procedures adopted by the insurer were advanced by the applicant. In the event that

¹ The correct threshold is "more than 20%," which is commonly understood to mean "not less than 21%."



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she wishes to challenge the assessment of an Independent Medical Examiner, the Workers Compensation Commission of New South Wales is the correct forum for such a dispute.

Submissions by the Insurer

12. The Insurer made no submissions in response to the application.

Decision

13. As noted previously, the one missing element in the current proceedings is the existence of any work capacity decision to review. Somehow the merit reviewer purported to review the merits of a decision which no longer exists and technically the Act does allow a worker to seek procedural review following merit review, but there has to be something reviewable to be the subject of such scrutiny. In the present case, there is no decision to review.

14. In the event that the applicant wishes to pursue a challenge to the WPI assessment, she should seek independent legal advice about how to proceed.

Finding

15. There exists no work capacity decision to review.

RECOMMENDATION

16. The application for procedural review is dismissed.

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

Wayne Cooper



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Delegate of the Workers Compensation
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