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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 work capacity decision dated 23 June 2016 is set aside.

b. The Insurer should make a new decision based on a correct work history, with a full explanation of the effect of section 59A(2) on a worker who may require a total knee replacement.

c. The new decision should delete any reference to an ability by an Insurer to 'assess' whole person impairment.

Introduction and background

1. The applicant suffered injury to his previously asymptomatic left knee on 12 October 2012 in the course of his employment as a process worker. As a result of the injury, he is unable to return to his pre-injury employment. He worked in a sedentary role from May 2016, with his employment being terminated by letter dated 19 July 2016 stating that his performance "has not been meeting organisational expectations."

2. It is common ground that the applicant will eventually require total knee replacement surgery. As at August 2016 he had received in excess of 170 weekly payments of compensation.

3. He now seeks procedural review of a Work Capacity Decision made by the Insurer on 23 June 2016. The Decision informed the applicant that his weekly payments of compensation would cease on 3 October 2016. This decision was maintained following internal review.

4. The applicant sought Merit Review from the Authority by way of application received 29 September 2016. The Authority delivered its Findings and Recommendations dated 26 October 2016. The Authority made findings the applicant: (i) has the ability to return to work in

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"suitable employment"; (ii) has current work capacity; and (iii) does not satisfy the special requirements in section 38(3). 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."[1]

5. An application was made to this Office for procedural review received via email on 27 September 2016. I am satisfied that the application was made within time an 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 says only that he is "requesting review of my work capacity decision."

Submissions by the Insurer

8. The Insurer provided a short summary of the history of the claim and repeated the conclusion that the applicant does not comply with the requirements of section 38(3).

Decision

9. Since the work capacity decision was made on 23 June 2016 the relevant *Work Capacity Guidelines* in force at the time were those dated 8 October 2013. Guideline 5.3.2 required the Insurer to advise the applicant of the full effect of the decision on his rights.

10. The Insurer advised the applicant that a work capacity assessment was completed on 23 June 2016.

11. The applicant was found fit to work for 40 hours per week.

[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.

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12. The applicant was advised that he had received 166 weeks of payments, taking him past the second entitlement period. The entitlement periods were explained and the effect of section 38 was also set out and explained.

13. In the course of setting out section 38 and seeking to explain the effect of section 38(3)(b) and 38(3)(c) (which was never properly done) the Insurer inserted the following sentence twice:

> "(note: this criteria[2] does not apply if you have been assessed by [name of Insurer] or an Approved Medical Specialist to have permanent impairment[3] greater than 20%)"

First, section 65(3) gives exclusive jurisdiction to assess Whole Permanent Impairment to Approved Medical Specialists (AMS).

Secondly, while there is an exception to that rule in the definitions of "highest needs worker" and "high needs worker" in section 32A, that exception only arises in circumstances where an assessment by an AMS is pending and has not been made because the AMS believes that the worker has not yet reached maximum medical improvement. In those circumstances, the insurer may only "be satisfied" that the degree of permanent impairment "is likely to be more than 20%."

Thirdly, there is no suggestion that an "assessment" may be made by either an Insurer "or" an AMS. It is only an AMS which may make an assessment.

14. On page 1 of the decision, and repeated on page 3, the Insurer states that the applicant is not currently working. As at 23 June 2016, this was incorrect. Between May 2016 and July 2016 the applicant did work for more than 15 hours per week and at the time of the decision being made he complied with section 38(3)(b).

15. Since the work history set out was incorrect, it is understandable why the applicant was not given a more complete explanation of the effect of

[2] 38(3)(b) - more correctly, "criterion."
[3] More properly, Whole Person Impairment.

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section 38(3)(c). That section allows the Insurer to agree that if a worker is back at work for at least 15 hours per week earning a minimal amount, the he might not be able to work any longer hours or in a different, higher paying, job and therefore the Insurer can continue to make payments after the 130th week. But in the absence of such agreement by the Insurer, the entitlement does not arise.

16. It is clear to me that this latter point is the reason for termination of payments, but the applicant would not be aware of the special significance of section 38(3)(c) and would be entitled to believe that the decision made was based on a mistake of fact, namely that he was not working as at 23 June 2016 and therefore in breach of section 38(3)(b). His submissions to the merit review service bear this out.

17. The applicant was advised that due to being "likely to have less than 10% whole person impairment"[4] he would continue to be able to receive medical treatment for a further two years after the cessation of his weekly payments. Section 59A(2) and (3) were clearly explained.

18. What might not have been as clearly explained was something which arises in this specific case. Doctors for both the Insurer and the worker agree that a total knee replacement is going to be necessary. If the applicant has a total knee replacement, then the AMA Guides suggest he will have a resulting 15% WPI. In that circumstance his rights under section 59A(2) would extend to five years, not two.

19. The applicant has currently told doctors he is in no rush to have the operation, a situation which may change if he is fully apprised of the section 59A situation. The applicant should seek his own advice on this issue.

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

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

22. There appear to be several procedural errors committed by the Insurer in this case. Together, the failure to explain the full effect of section

[4] Wrongly described as "permanent impairment."

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59A(2), the miss-application of section 38(3)(b) and the twice stated false assertion that an insurer can assess whole person impairment constitute such a collection of errors as to breach Guideline 5.3.2, rendering the decision invalidly made.

Finding

23. The work capacity decision breaches the *Work Capacity Guidelines* and was invalidly made.

RECOMMENDATION

24. The work capacity decision dated 23 June 2016 is set aside.

25. The Insurer should make a new decision based on a correct work history, with a full explanation of the effect of section 59A(2) on a worker who may require a total knee replacement.

26. The new decision should delete any reference to an ability by an Insurer to 'assess' whole person impairment.

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