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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 is dismissed.**

Introduction and background

1. The applicant sustained psychological injury as a result of alleged bullying and harassment in the course of her employment as a Dental Nurse. The notional date of injury is 9 March 2016. Despite this, the applicant did not go off work until 23 May 2016. She is currently working for the same employer for one day per week and for a different employer (but performing identical duties) for around 16 hours per week. The combined total weekly hours are now 25, whereas pre-injury hours were 36.
2. The applicant continued to receive weekly payments of compensation until the Insurer made a work capacity decision on 27 June 2016 and advised the applicant that her weekly payments would cease forthwith. At the time she had received less than 12 weeks of payments, so the three months notice normally required under section 54(2)(a) did not apply.
3. The applicant sought internal review and the insurer upheld the original decision.
4. An application for merit review was received by the Authority on 20 September 2016 and the Authority issued findings and recommendations on 19 October 2016. The Authority found that the applicant "is entitled to weekly of compensation at the rate of \$0.00 under section 36(2) of the 1987 Act."



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5. Having made that finding, the Authority did not make a recommendation to the Insurer. Unstated by the Authority was that, underlying the above finding, the Authority had determined that the applicant had current work capacity and could perform unlimited suitable duties at any dental surgery other than the one where she was exposed to the cause of her injury. Peculiarly, this is the very surgery at which the applicant chooses to work for one day per week on a continuing basis.
6. The applicant sought procedural review of the Insurer's work capacity decision by application received by this Office on 1 November 2016.
7. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines). The relevant Guidelines are dated 8 October 2013.

Submissions by the applicant

8. 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.*"
9. The submissions made by the applicant consist of:
 - a statement to the effect that she is now on medication she never previously needed;
 - a recitation of how she suffered her injury;
 - an assertion that she suffered "a breakdown" as a result of being yelled at on 19 May 2016; and
 - a perhaps less than flattering physical description of the person who allegedly inflicted the injury.
10. The applicant made no reference to anything remotely connected to the procedures adopted by the Insurer in making the work capacity decision.

Submissions by the Insurer



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11. The Insurer provided a comprehensive history of the decision-making process. The Insurer also noted that the applicant did not raise procedural issues in her application.

The Decision

12. Guideline 5.2 requires the insurer to give the worker fair notice of at least two weeks duration that an adverse work capacity decision may be forthcoming. The applicant was told by telephone on 3 June 2016 that an assessment leading to a decision was underway. This was confirmed in a letter of the same date.

13. In the notice dated 27 June 2016, the Insurer set out the relevant legislative provisions with an explanation of how they affected the decision-making process. The applicant was taken through sections 36, and 59A(1)-(3).

14. The various reports relied upon in making the decision were set out, followed by an explanation of section 43(1)(a), (b) and (c).

15. The definitions of "current work capacity" and "suitable employment" were fully set out.

16. The method for calculating ongoing entitlements was correctly and fully explained.

17. The calculation of the applicant's ability to earn was done according to the procedures set out in the legislation.

18. The various entitlement periods were set out, with a clear explanation of why the applicant was then within the first entitlement period.

19. There was no requirement for 3 months Notice to be given under section 54(2)(a) since the applicant had only been paid for 8 weeks at that time.

20. I can identify no errors of a procedural nature in this work capacity decision.

Finding



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21. The work capacity decision was validly made.

RECOMMENDATION

22. The application 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
1 December 2016