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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 sustained multiple lower leg fractures in the course of his employment as a Car Carrier Driver on 2 April 2014. He underwent surgery which resulted in the insertion of a supportive pin, and some time thereafter had that device removed. For various periods following the date of injury he has been certified as having either "no current work capacity" or limited "current work capacity." The insurer accepted liability for all relevant periods. Despite attempting some work trials, the applicant does not currently work.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 1 August 2016. The Decision informed the applicant that his weekly payments of compensation would cease on 5 November 2016 as a result of the application of the formula in section 37(3).
3. The applicant sought internal review by the Insurer and the original decision was maintained, with two variations – the period of notice was extended to 8 November 2016, and the applicable section was now identified to be section 38(3), since the worker had by then received in excess of 130 weeks of payments. Since he does not work for 15 hours per week and receive a weekly amount equal to the statutory minimum, he clearly does not comply with the special requirements in section 38(3)(b).
4. The applicant sought Merit Review from the Authority by way of application received 14 October 2016. The Authority delivered its Findings and Recommendations dated 16 November 2016.



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5. The Authority made findings that the applicant:
 - (i) has the capacity to perform “some type of employment” for 8 hours per day, 5 days per week;
 - (ii) is able to return to work in “suitable employment” as a Personal Trainer¹;
 - (iii) has a current work capacity; and
 - (iv) does not meet the special requirements for continuation of weekly payments after the second entitlement period pursuant to section 38(3).
6. The applicant then made an application to this office for procedural review received on 23 November 2016. I am satisfied that the application has been made within time and in the proper form.
7. 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

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. In addition to applying for procedural review the applicant has made the following submissions:
 - The work capacity decision of the Insurer is procedurally flawed and is capable of being set aside; and
 - The Insurer has not complied with the relevant legislation and guidelines in making its work capacity assessment.

¹ It does not seem to be a specific finding that the applicant [or anyone *sans* super-human powers] could actually work as a personal trainer for 40 hours per week. Hence the somewhat eccentric reference to “some kind of employment” in the previous finding.



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Submissions by the Insurer

10. The Insurer relies on the reasoning set out in its internal review decision.
11. This submission is sensibly made, in that the grounds on which the internal review decision was based differ from those underpinning the original work capacity decision (see paragraph 3, *supra*).

Decision

12. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.
13. The Insurer contacted the applicant on 30 June 2016 and advised that an assessment was to take place and sought any information he may have which he would like considered in the work capacity decision-making process. The Insurer confirmed the conversation in writing by letter dated 7 July 2016. The applicant was given until 21 July 2016 to forward any new information. This complies with the “fair notice” provision in Guideline 5.2.
14. In the original work capacity decision, section 37(3) was explained, as were the relevant aspects of section 43(1). The effects of section 59A(2) and (3) were explained, as were the entitlement periods for weekly payments. Since at that time the applicant had only received 124 weeks of payments, he remained within the second entitlement period. The calculation of PIAWE was set out in considerable detail and the definition of a worker with “high needs” was also set out. The insurer explained why the applicant is not a worker with “high needs.” Further, since there is no assessment of Whole Person Impairment in this case, section 59A(2) operates to limit the applicant’s entitlement to pre-approved medical and related expenses to a period of two years from the date of cessation of weekly payments.
15. In the course of the internal review decision, which varied the grounds on which payments were to be terminated, the insurer explained that the applicant was in the period following the second entitlement period, since he had by then exceeded 130 weeks of payments, and set out the provisions of section 38(3). The Insurer clearly explained why the applicant was not entitled to further payments by virtue of his failure to



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meet the requirements in section 38(3)(b). The appropriateness of the “suitable employment” identified cannot be in dispute, since the merit reviewer found it appropriate and it is therefore a merit question, not reviewable by this Office.

16. There are no identifiable procedural errors in the work capacity decision of the Insurer.

Finding

17. The work capacity decision was validly made in accordance with the legislation and the Guidelines.

RECOMMENDATION

18. The application for procedural review is dismissed.

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

Wayne Cooper
Delegate of the Workers Compensation Independent Review Officer
20 December 2016