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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 seeks procedural review of a work capacity decision made by the Insurer on 29 September 2015. The decision informed the applicant that her weekly payments of compensation would reduce from \$999.44 to \$312.04 as from 7 January 2015. The applicant sought internal review and the Internal Review Decision was dated 29 October 2015. That decision confirmed the original work capacity decision in all respects.¹
2. The applicant applied to the Authority for Merit Review, received on 24 November 2015 and they delivered findings and recommendations dated 4 January 2016. The Authority made a recommendation that the applicant was entitled to no ongoing weekly payments, or to use the argot commonly applied by the Authority: "... [the applicant's] entitlement to weekly payments of compensation is calculated to be \$0.00."
3. There was a consequent decision by the Insurer dated 6 January 2016 terminating the applicant's entitlements, giving her the correct statutory notice until 13 April 2016. The Insurer had no alternative but to make a decision based on the recommendation of the Authority. That decision cannot be the subject of the present procedural review.²

¹ Despite this, the Merit Review recommendation by SIRA described the internal review as resulting in "essentially the same outcome" (paragraph 13). The outcomes were identical.

² I note that Guideline 5 of the relevant *Work Capacity Guidelines* says that a work capacity decision can be made at any time, and the Insurer may well be mindful that having made the mandatory decision implementing the Authority's recommendation, it is now free to make another decision whenever it thinks appropriate, taking into account any new evidence which might be relevant.



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4. The applicant applied to this Office for procedural review on 2 February 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
5. The applicant sustained a psychological injury while working at a particular school. One of her current work restrictions is that she cannot return to that school. Various doctors have given her certification for 20 hours per week, which the Insurer accepts. Despite this, the Merit Reviewer relied on one [1] certificate dated 13 November 2015 to find that the applicant's current work capacity was 40 hours per week³.
6. The applicant does not currently work, and has not worked since November 2015. This is at odds with the submission she made to SIRA, since at the time of her application for merit review she had returned to work. The applicant says she informed the insurer of her cessation of work, but this was apparently not passed on to SIRA. This might explain, at least in part, the incorrect finding at paragraph 69 of the Merit Review that the applicant has "current weekly earnings" of \$425.00.

Submissions by the applicant

7. 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.*"
8. The applicant has made submissions which are not relevant to procedural review.
9. Understandably the applicant is perplexed at how the Merit Review Service of SIRA could find that she had a capacity to work in employment which does not exist ("Grade 9 Teacher Aide" – there is no such grade), but the findings of the Merit Review Service are not subject to scrutiny by this Office.

³ Since section 44B(3)(b) provides that a certificate of capacity has currency "not exceeding 28 days," it is questionable what relevance this certificate, dated 13 November 2015, could have had on 4 January 2016.



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10. Further, the applicant says that her current certificate of capacity only certifies her to work for 15 hours per week, not the 40 hours found by the Merit Review Service. That is a consideration which goes to the merits of the case and cannot be considered by me. If there is such a certificate, the applicant should send it to the insurer.
11. The applicant also complains that she did not receive all the documents sent by the Insurer to SIRA in the course of Merit Review. As before, I can only review the conduct of the Insurer in making the original work capacity decision.

Submissions by the Insurer

12. The Insurer has not provided any submissions in response to this application for procedural review.

The Decision

13. The relevant Guidelines were dated 4 October 2013 and came into effect on 11 October 2013.
14. Guideline 5.3.2 requires the Insurer to advise the applicant of the date of the work capacity assessment. The Insurer informed the applicant that a work capacity assessment was completed on 29 September 2015 and she was advised of the work capacity decision by letter dated the same day.
15. The same Guideline requires the Insurer to advise the date when the decision takes effect. Section 54(2)(a) of the 1987 Act requires at least three months and four working days notice be given if payments are being reduced or ceased. This notice period takes into account Section 76(1)(b) of the *Interpretations Act 1987*. As a result the applicant was advised that her payments would cease from 7 January 2016. This is the required notice period.
16. Guideline 5.3.2 also requires the Insurer to advise the applicant of the impact the decision has on her entitlement to medical and related treatment expenses. Since the decision only reduced weekly entitlements without ceasing them, there was no impact to explain.



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17. The Insurer is also required to inform the applicant of the relevant entitlement periods. The Insurer advised the applicant that she had received 74 weeks of compensation payments and that ongoing entitlements would be calculated in accordance with Section 37 of the 1987 Act.

18. At the time of the decision the applicant was certified to work only 20 hours per week. This appears to have been accepted by the Insurer.

FAIR NOTICE

19. The decision of the insurer dated 29 September 2015 has displayed a careful consideration of the requirements of the Guidelines and legislation. One of the requirements was the provision of “fair notice” which the Guidelines require an Insurer to give to a worker who may be adversely affected by an imminent work capacity decision. Specifically the worker must be given two weeks notice of any such potential decision, so as to be able to make submissions in response. The Insurer certainly complied with this requirement.

20. There is no evidence in the written reasons from the Merit Review Service that the applicant, who had approached SIRA seeking a favourable outcome, had been given adequate, or any, warning that an adverse outcome was either possible or even likely. Had such warning been given, it is possible that this applicant might have withdrawn her application, thus avoiding an adverse outcome.

21. While it is true that the insurer made a subsequent decision based on the Merit Review and that subsequent decision extended the benefits of the applicant for a further three months, it is equally true that the applicant is now in an adverse position relative to her position following the original work capacity decision. It therefore may be desirable for SIRA to give “fair notice” of potentially adverse outcomes to applicants so as to avoid this situation repeating.

Finding

22. There are no procedural errors identifiable in the decision of the Insurer. The Insurer has complied with the Guidelines and relevant legislation.



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RECOMMENDATION

23. The application for procedural review is dismissed.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
11 March 2016