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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 decision of the previous insurer dated 30 July 2018 was invalidly made due to procedural error.
b. The insurer is to make a new work capacity decision, incorporating the findings of the Authority.

Introduction and background

1. The applicant sustained a lumbar spinal injury while unloading audio-visual equipment and pushing boxes on wheels over a concrete floor in the course of his employment as a video technician on or about 19 November 2017. The insurer accepted liability and made payments for all relevant periods.

2. Prior to making a work capacity decision the insurer attempted to give the applicant "fair notice." The insurer apparently tried unsuccessfully to contact the applicant via telephone on 2 July, 3 July and 16 July before finally making contact on 17 July 2018. So much is apparent from notes kept on the insurer's own file. The applicant was understandably perplexed upon receipt of a letter dated 2 July 2018 which began with these words: "I refer to our telephone conversation on 2July 2018 and advise that a work capacity assessment will be conducted on your claim."

3. The relevant *Guidelines*, which came into effect on 1 August 2016, do not require an insurer to make telephone contact prior to the making of a work capacity decision; nor, however, do they authorise insurers to refer to fictitious conversations in official correspondence with injured workers.

4. The insurer made a work capacity decision on 30 July 2018, nearly two weeks after initial telephone contact was made. The insurer assessed the applicant's PIAWE at $2,211.54. The insurer further assessed the applicant's "actual earnings after injury" at $1,100.00 per week and his

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capacity to earn in suitable employment as $2,307.69. The applicant was advised that his weekly payments would cease from 10 November 2018.

5. The insurer conducted an internal review and arrived at the same result. This was despite the insurer finding that the applicant had "actual earnings" of $1,400.00 per week, instead of the $1,100.00 found in the course of the original decision. In both cases the Insurer had found that the applicant was capable of earning $2,307.69, which explains the anomaly.

6. The applicant sought merit review by the Authority. The applicant was advised of the outcome of merit review by decision dated 15 November 2018. The Authority made the following findings and recommendation:

   SIRA Findings:

   (i) The role of Film and Video Editor constitutes suitable employment for the applicant;
   (ii) The roles of Conference and Events Manager and Contract, Program and Projects Administrator not constitute suitable employment for the applicant; and
   (iii) The applicant is able to earn $1,566.32 per week in suitable employment.

   SIRA Recommendation:

   The Insurer is to determine [the applicant's] entitlement to weekly payments of compensation in accordance with the above findings, from 30 July 2018 (the date of the work capacity decision), subject to any notice period.

7. A variable which does not arise in every case is that in the same month of the decision by SIRA, icare transferred the claim from one insurer to another. I am unaware as to whether or not the recommendation of SIRA has been implemented by the second insurer. The file they received from the previous insurer did not even include a copy of an independent medical report requested by the applicant, so they may be operating in circumstances which are not ideal.

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8. The applicant made an application to this Office for procedural review received on 29 November 2018. I am satisfied that the application has been made within time and in the proper form.

9. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the relevant Guidelines.

Submissions by the applicant

10. Section 44BB(1)(c) of the Workers Compensation Act 1987 (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."*

11. In addition to making an application for procedural review the applicant has made various submissions, including that he was disadvantaged by the insurer's failure to communicate over the telephone prior to receipt of the Fair Notice letter and prior to receipt of the work capacity decision. The applicant did manage to get a very recent medical report to the insurer in time for internal review, but that seems to have had little effect on the outcome. Whether more notice would have resulted in an earlier report is unknown, although I do note that the insurer gave written notice of the up-coming assessment and consequent decision by letter dated 2 July 2018. Failure to make telephone contact is not fatal to the cause of the insurer, but it might be thought that sending a letter to an injured worker and referring in that letter to a conversation which had not in fact taken place may put the insurer in an awkward position.

Submissions by the Insurer

12. The Insurer with current conduct of this matter provided a helpful chronology, including an extract of a file note cataloguing attempts made by the previous insurer to contact the applicant via telephone.

Decision

13. The submissions made by the applicant emphasize the confusion caused by the conduct of the previous insurer. The work capacity decision made

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on 30 July 2018 does not explain why it is that payments will cease even though the applicant had a PIAWE of more than twice his current earnings. It was never explained that the more relevant figure is the insurer's assessment of the applicant's ability to earn in suitable employment.

14. Further confusion must have arisen when the insurer concluded that the applicant could work as an "events manager," a role he had never tried in his life. Even the merit reviewer struggled to find a role appropriate for the applicant, coming up with this (at paragraph 75):

> [The applicant] does not appear to have experience undertaking a role titled as "film and video editor," however, as noted above he has excellent qualifications and extensive experience in the multimedia industry. In light of this, I am satisfied that he has the potential to earn at least the national average wage for this role ($1,566.32 per week).

Despite the element of uncertainty underlying the finding of the Authority, it does appear to be a more realistic assessment of the applicant's earning capacity.

15. The decision made the previous insurer had other shortcomings, including a complete failure to refer to and explain the various periods of entitlement under ss 36-38. There is a table on the penultimate page which refers in passing to the "Second" period, section 37 and 14-130 weeks, but they nowhere appear in the same (or any) sentence. This is extremely hard to understand and a non-specialist (like the overwhelming majority of injured workers) receiving this document would have no prospect of joining such dots as are present.

Finding

16. There are several procedural errors identifiable in the decision. The Insurer has not complied with the Guidelines and relevant legislation. The breaches committed by the insurer are neither trivial nor inconsequential.

RECOMMENDATION

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17. The decision of the previous insurer dated 30 July 2018 was invalidly made due to procedural error.

18. The insurer is to make a new work capacity decision, incorporating the findings of the Authority.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
21 December 2018