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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. On 2 February 2016 the applicant suffered injury to her neck, shoulders and both arms after lifting a patient in the course of her employment as an assistant nurse. The applicant has not worked since that date. The insurer accepted liability and made weekly payments for all relevant periods.
2. The applicant seeks procedural review of a work capacity decision made by the Insurer on 07 October 2016. The applicant was advised that her payments would reduce from \$519.28 to Nil per week commencing on 16 January 2017. The decision was made on the basis that the Insurer determined the applicant to be capable of performing suitable employment as a Medical receptionist, or Inquiry Clerk/Customer Service Officer or a community Support Worker 5 hours per day, 5 days per week. Having received 29 weekly payments of compensation, the applicant fell into the second entitlement period, covered by section 37. Applying the relevant formula in section 37(3) (for a worker who has not returned to work), the ongoing entitlement would be \$Nil per week.
3. The applicant sought internal review and on 05 December 2016 the insurer upheld the original decision.
4. An application for merit review was received by the Authority on 04 January 2017 and findings and recommendations were issued on 14 February 2017. The Authority found that the applicant: (i) has current work capacity as defined by section 32A; (ii) is able to earn \$554.14 per week in suitable employment as an Inquiry Clerk/Customer Service



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Officer from 7 October 2016 to 26 January 2017; and (iii) is able to earn \$460.00 per week in suitable employment as an Inquiry Clerk/Customer Service Officer from 27 January 2017 to 27 February 2017.

5. The merit reviewer went on to make the following recommendations, which I repeat verbatim:

6.[The applicant] is entitled to weekly payments of compensation under section 37(3) of the 1987 Act in the amount of \$0.00 from 16 January 2017 to 26 January 2017.

7.[The applicant] is entitled to weekly payments of compensation under section 37(3) of the 1987 Act in the amount of \$59.28 from 27 January 2017 to 27 February 2017.

6. The rationale for this bifurcated recommendation is set out in paragraph 65, which is in the following terms:

65. It follows that as the current certificate of capacity only covers the period to 27 February 2017, [the applicant's] entitlement to weekly payments during the second entitlement period after 27 February 2017 will need to be assessed by the Insurer as new information about her work becomes available.¹

7. I would submit, with respect to the merit reviewer, that this is the correct interpretation of the law, since the limited currency of a certificate of capacity cannot justify any other recommendation. It arises in the present case because the Nominated Treating Doctor (NTD) produced an updated certificate of capacity reducing the hours per week for which the applicant could work from 25 to 20 (5 days reduced to 4 days, at 5 hours per day). All previous certificates from the NTD had said "normal hours," which for this applicant were 5 hours per day, 5 days per week.
8. The applicant sought procedural review by application received by this Office on 24 February 2017. I find that the application was made within time in the correct form.

¹ It might be safely assumed that the clause "as new information about her work becomes available" was supposed to say "as new information about her **work capacity** becomes available."(Emphasis added.)



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9. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the relevant Guidelines. The relevant Guidelines came into effect on 1 August 2016.

Submissions by the applicant

10. 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.*”

11. The applicant made the following submissions:

- She feels helpless and hopeless with such an inadequate income;
- Not enough has been done by the Insurer to rehabilitate her for employment;
- She has applied for 20 jobs but had no replies; and
- She is exhausted and depressed.

12. The submissions of the applicant do not raise issues relevant to procedural review of a work capacity decision.

Submissions by the Insurer

13. The Insurer made no submissions.

The Decision

14. The applicant was told by telephone on 05 August 2016 that an assessment leading to a decision was underway. This was confirmed in a letter of the same date. The applicant was invited to submit any new evidence which might be thought relevant. Nothing was received by the Insurer in response.

15. In the notice dated 07 October 2016, the Insurer advised that a work capacity assessment had commenced on 05 August 2016 and was completed on 07 October 2016.

16. The Insurer set out the relevant legislative provisions with an explanation of how they affected the decision-making process. The



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various entitlement periods were set out, with a clear explanation of why the applicant was then within the second entitlement period. The applicant was taken through section 37.

17. The various reports relied upon in making the decision were set out, followed by an explanation of section 43(1)(a), (b), (c) and (d).
18. The definitions of “current work capacity” and “suitable employment” were fully set out.
19. The method for calculating ongoing entitlements was correctly and fully explained.
20. The calculation of the applicant’s ability to earn was done according to the procedures set out in the legislation.
21. Suitable employment was identified, although the merit reviewer disagreed with the suitability of some identified roles. This does not amount to a procedural error, since it is a question going to the merits of the decision. The Insurer quite properly consulted experts in the field and consulted with prospective employers. All identified suitable employment was certified as suitable by the applicant’s NTD.
22. Section 59A was correctly explained, including both ss 59A(2) and 59A(3).
23. The Insurer gave more than the statutorily required period of notice.

Finding

24. I can identify no errors of a procedural nature in this work capacity decision. The work capacity decision was validly made.

RECOMMENDATION

25. The application is dismissed.



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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
23 March 2017