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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.

b. Such weekly payments as the applicant is receiving by virtue of the stay are to continue until receipt of this decision.

Introduction and background

1. The factual background to this matter was set out in WIRO recommendation 23014 (# 230 of 2014) and need not be repeated.

2. The applicant seeks procedural review of a work capacity decision made by the insurer on 18 November 2016. The Insurer advised the applicant that her weekly payments would cease from 24 February 2017 because she does not comply with the requirements of section 38(3)(b) and (c).

3. Internal review by the Insurer resulted in no substantive change to the decision.

4. The applicant applied to the Authority for Merit Review, received on 8 February 2017, and they delivered findings and recommendations dated 21 March 2017. The Authority made findings that the applicant: (i) is able to return to work is suitable employment as a Telemarketer; (ii) has current work capacity; and (iii) does not satisfy the special provisions under Section 38(3) of the *Workers Compensation Act* 1987.

5. The applicant then made an application to this office, received on 5 April 2017. I am satisfied that the applicant has made the application for procedural review in the proper form and within time. It follows that the statutory stay of the original work capacity decision will be in place until receipt by the parties of this recommendation.

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6. 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

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 the following submissions:

- The reason she is not working 15 hours per week is because she requested to cut her hours to 12 hours per week from 16 hours per week in August 2015 due to family reasons.

- Since August 2015 she has been working 12 hours per week but some weeks she does 16 hours per week.

- She requested that her hours be increased to 16 hours per week in writing on 7 November 2016, but [the employer] are not offering her more than 12 hours per week and she is "currently pursuing this issue."

- She disputes that she is fit for the work identified by both the insurer and the merit reviewer. This issue has no relevance for procedural review.

- The employer has asserted that she is "unable to return to pre-injury employment." She alleges that this is "incorrect." (If so, this would be music to the ears of the Insurer; however, it is likely that the applicant has misconstrued the argument and means to say that she was a casual working 16 hours per week when injured but was made permanent while working part-time 12 hours per week. I believe she is saying that her "inability" to work for 16 hours per week is caused by a dispute with the employer, rather than by her physical condition.)

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- She does not believe that the employer has complied with all the legislative requirements when making the decision, but does not specify alleged breaches.

Submissions by the Insurer

9. The Insurer replied to these submissions as follows:

> We wish to make the following submissions in response to [the applicant's] submissions:
>
> - We consider that we have followed the procedural aspects in making the work capacity decision.

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The Decision

10. In the work capacity decision letter to the applicant the Insurer advised that payments would cease on 24 February 2017. The notice period is correct.

11. The insurer took the applicant through section 43(1)(a)-(f), showing how (a) her work capacity could be (b) used in the role of a Telemarketer to (c) earn $550 for 25 hours work per week and that (d) her PIAWE was $1,01.40 and her current earnings are $263.15 per week. As a result of her injuries (d) she is unable to return to pre-injury employment but can perform suitable duties as certified by her nominated treating doctor (NTD).

12. She was further advised that there is no current assessment of any whole person impairment (WPI).

13. The Insurer has referenced and explained Section 59A(2) and (3) of the 1987 Act. The Insurer has provided an adequate explanation of the legislation which was in place at the time the decision was made.

14. The Insurer is also required to inform the applicant of the relevant entitlement periods. The Insurer advised the applicant that she has received 347 weeks of compensation payments and her ongoing

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entitlements are subject to the special requirements contained in Section 38(3) of the 1987 Act. The special requirements of that section are set out at page 5 of the decision.

15. The Insurer also informed the applicant that as she was in receipt of weekly payments immediately before 1 October 2012 she was considered to be an *existing recipient* and her pre-injury average weekly earnings were subject to the transitional provisions of Clause 8 Division 2 Pat 19H of Schedule 6 of the 1987 Act.

16. The Insurer advised the applicant that she had not complied with the special requirements set out in Section 38(3)(b) & (c) and as a result her ongoing entitlements would have to cease, because she was in the period following the end of the second entitlement period. This was fully explained.

17. For the sake of completeness the Insurer set out and explained that the applicant was an existing recipient immediately prior to 1 October 2012, set out and explained the concept of an "existing claim" and even referred to the transitional amount and how it impacts the calculation of PIAWE.

18. The Insurer spent three pages setting out medical information and explaining how the reports of the various doctors impact on the applicant's claim. There was a comprehensive outline of all reports relied upon.

19. The decision of the insurer dated 18 November 2016 displayed a careful consideration of the requirements of the Guidelines and legislation.

Finding

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

RECOMMENDATION

21. The application for procedural review is dismissed.

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22. Such weekly payments as the applicant is receiving by virtue of the stay are to continue until receipt of this decision.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
4 May 2017