



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. The factual background to this application is set out in WIRO recommendation 13516 (#135 of 2016) and requires no repetition.
2. On 21 December 2016 the Insurer made a work capacity decision, advising the applicant that her payments would cease [by virtue of section 38(3)] on 7 April 2017.
3. Following internal review on 17 February 2017, the insurer upheld the decision to cease payments, extending the notice period to 24 May 2017. In the course of the original decision the applicant's ability to earn in suitable employment was assessed at \$410 per week whereas following internal review this had increased to \$440 per week. Nothing turns on this, since the applicant had not returned to work and the PIAWE of \$1,014.40 was fixed by statute as the "transitional rate" applicable to all claimants in receipt of weekly payments immediately prior to 1 October 2012.
4. The applicant sought Merit Review from the Authority by way of application received on 20 March 2017. The Authority delivered its Findings and Recommendations dated 19 April 2017. The Authority made findings that the applicant: (i) is able to return to work in "suitable employment" as defined in section 32A as a Process Worker/Packer; (ii) has current work capacity; and (iii) does not comply with section 38(3). Despite making these findings, the merit reviewer saw no reason to make a recommendation of any kind.



5. An application was made to this Office for procedural review received on 12 May 2017. I am satisfied that the application was made within time and in the correct form.

Submissions by the applicant

6. 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.”*
7. In summary form, the applicant makes these submissions:
 - (i) The insurer gave inadequate notice;
 - (ii) There was no “fair notice” phone call to the applicant;
 - (iii) The insurer gave inaccurate information about the effect of section 59A; and
 - (iv) The insurer gave misleading information about entitlement periods, entitlement to receive ongoing payments and the stay which operates by virtue of section 44BC.
8. The Insurer gave adequate notice under section 54(2)(a), which requires notice of three months. Even allowing for postal delivery, the insurer was compliant with the legislation. The insurer even extended the notice period following internal review, which is not required by the legislation or guidelines.
9. The applicant herself submits that she has difficulty communicating in English. Despite this, she had a telephone conversation with the insurer in February when requesting internal review. The Insurer had given fair notice by letter prior to the original decision. While the guidelines say that a phone conversation is desirable, it is not mandatory, and is certainly not required when the applicant herself admits she does not communicate well in English when speaking.
10. The submission about section 59A refers to section 59A(6), which is clearly irrelevant in the present case.



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11. The submissions relating to entitlement periods, ongoing payments and the stay are misconceived. The entitlement periods were fully explained. The applicant was advised that she could not continue to receive payments after the second entitlement period due to failure to return to work, which means she had not complied with section 38(3). It is irrelevant that she had already received payments after the expiration of 130 weeks. Section 38(2) requires work capacity to be assessed prior to cessation of payments, and this is what has occurred in this instance.
12. Given that the applicant has had the benefit of the stay for the duration of section 44BB review, any submission about the inadequacy of the insurer's description or explanation of the stay is irrelevant. For the sake of completeness I find that the description was correct.

Submissions by Insurer

13. The Insurer made no submissions.

Finding

14. The Insurer has corrected the errors which attended an earlier decision concerning this applicant and in this instance has made no errors of a procedural nature. The decision was validly made

RECOMMENDATION

15. The application is dismissed.

A handwritten signature in blue ink, appearing to read "Wayne Cooper".

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
09 June 2017