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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. The applicant suffered lumbar sacral injury on 31 May 2016 in the course of his employment as a Concreter. He returned to work on a graduated "return to work" program with the original employer, but never resumed full pre-injury duties and in February 2017 he commenced with a new employer in the considerably lighter role of Leading Hand.

2. The insurer accepted liability and made weekly payments for all relevant periods. The applicant left his subsequent employment in about May 2017 and is currently unemployed.

3. The applicant seeks procedural review of a work capacity decision made by the Insurer on 27 March 2017, notified to him in two slightly conflicting letters variously dated 29 and 30 March 2017. While there are two dates, and two documents, the decision was reflected identically in substance in both documents. The applicant was to have his weekly payments reduced to $0.00 in early July 2017.

4. In the document dated 30 March 2017 the Insurer included references on pages 4 and 5 to a couple of reports which it had overlooked in the earlier document, and a paragraph on page 10 was re-written to reflect more up-to-date information. The Insurer posted the first document on 29 March but, having paid a fee to Australia Post to 'stop' delivery of the erroneous document, created another document the next day and posted that, believing the first document to have been withdrawn from the postal system. Despite having been charged a fee for 'stoppage,' the Insurer was surprised to find that both documents were in fact delivered to the applicant, who was himself understandably non-plussed by the

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arrival of the two "decisions," dated one day apart.[1] In the circumstances the Insurer is entitled to rely on the second document dated 30 March 2017 for the purposes of procedural review.

5. The gravamen of the decision dated 30 March 2017 is that the applicant is to lose his entitlement to weekly payments on 6 July 2017. Prior to that time the applicant had been entitled to weekly make-up pay (so described) to a total of $1,779.43. The use of the informal but descriptive phrase "make-up pay" was apposite at the time of the decision, since the applicant was then working and was therefore entitled to a total of 95% of his PIAWE, comprised of a combination of earnings and compensation payments, by virtue of section 37.

6. The Insurer determined that the applicant was capable of working full-time as a Leading Hand, earning $1,400 per week. This was appropriate, since the applicant was at the date of the decision working full-time as a Leading Hand earning $1,400 per week. The Insurer also determined that the applicant was not capable of performing his pre-injury duties. The Insurer advised the applicant that it had "disregarded" the roles of Delivery Driver, Webster Packer (or Light Packer) and Light Courier Driver in light of his current employment and the report of a Vocational Assessor dated 26 October 2016.

7. The applicant sought internal review and on 27 February 2017 the insurer upheld the original decision.

8. An application for merit review was received by the Authority on 12 May 2017 and findings and recommendations were issued on 07 June 2017. The Authority found that the applicant: (i) has a present inability arising from an injury such that he is not able to return to work in his pre-injury employment; (ii) is able to return to work in suitable employment; (iii) has current work capacity; and (iv) is able to earn $999.40 per week in suitable employment.

9. Interestingly, the "suitable employment" identified by the merit reviewer was described as "Webster Packer (or Light Packer)," a job which

[1] If ever there were an open-and-shut case for a refund from Australia Post for a 'stoppage' fee, this might be it.

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neither the applicant nor the Insurer believed to be suitable. The insurer specifically stated in the course of the work capacity decision that it had "disregarded" this very option, in light of (i) the applicant's post-injury work experience as a Leading Hand and (ii) the most recent available Vocational Assessment (report dated 26 October 2016).

10. The merit reviewer recommended that the applicant be entitled to ongoing weekly payments in the amount of $32.07 from 6 July 2017.

11. The applicant sought procedural review by application received by this Office on 08 June 2017. I find that the application was made within time in the correct form.

12. 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

13. 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.*"

14. The applicant made the following submissions:

- New information was included between Fair Notice being given in November 2016 and the decision being made in March 2017;
- Documentation was not forthcoming to the applicant;
- No rehabilitation assistance was provided in the way of job-seeking;
- The applicant has never worked as a Webster Packer and does not know how to obtain such employment; and
- The Insurer issued two decisions 2 days apart with incorrect dates on them.

15. There is no statutory or other prohibition on the obtaining of further information in the 'fair notice' period. In large part, that is what the notice period is for, since it is designed to allow the worker to submit additional information and documents. Further, given the long lead time in this case, the work capacity certificates from the worker would have expired if not updated. There may have been some documents not shown to the

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applicant, but it appears that most of these are part of a series of documents (certificates of capacity, updates from treating doctors and so on) which are consistent with the evidence which existed prior to the Fair Notice period in any event. Given that the Insurer came to a decision consistent with the then current working capacity of the applicant, no prejudice seems to follow.

16. Since the applicant was working at all relevant times leading up to the making of the work capacity decision, it is hard to see the relevance of "job seeking" training.

17. The Insurer appears to agree with the applicant that work as a "Webster Packer" is unsuitable, having specifically advised the applicant that this employment had been "disregarded" in the course of making the decision. This objection by the applicant really refers to the Merit Review rather than the decision by the Insurer. This Office cannot overturn the Merit Review findings and recommendation, even in a case where the outcome is anomalous.

18. While it is true that two slightly differing decisions were issued, the Insurer is entitled to rely on the second decision, for the reasons set out in paragraph 4 *supra*. There is no prejudice to the applicant arising from the Australia Post debacle.

Submissions by the Insurer

19. The Insurer made no submissions beyond setting out the sorry history of its interactions with Australia Post.

The Decision

20. The applicant was told by telephone on 29 November 2016 that an assessment leading to a decision was underway. This was confirmed in a letter dated 30 November 2016. The applicant provided further information to the insurer as a result of these communications.

21. In the notice dated 30 March 2017, the Insurer advised that a work capacity assessment had commenced on 1 November 2017 and was completed on 27 March 2017. I note in passing that during this period

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the applicant changed employers and started working as a Leading Hand in February 2017. The completion of the work capacity assessment was unlikely to be expedited by this change in circumstances.

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

23. 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).

24. The definitions of "current work capacity" and "suitable employment" were fully set out.

25. The method for calculating ongoing entitlements was correctly and fully explained.

26. The calculation of the applicant's ability to earn was done according to the procedures set out in the legislation.

27. Suitable employment was identified, although the merit reviewer disagreed with the suitability of some identified roles. The Insurer had advised that the role of Webster Packer would be disregarded, because the applicant was currently working as a Leading Hand. By the time merit review occurred, the applicant was no longer working as a Leading Hand, which led the merit reviewer to make the following unusual observations:

> 72. I have … not considered the role of Leading Hand, identified by the Insurer in its decisions, as [the applicant] is no longer employed in this role and there is minimal information in relation to the role before me.

28. Given the penchant for the merit review service to interrogate parties for particulars it seems unusually coy in this case to not seek such information as might have assisted the reaching of a just outcome. This is particularly so since the applicant had very recently been working as a

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Leading Hand, evidence some might have thought relevant to the decision-making process.

29. Odd though the merit review outcome may seem, it is not a reflection on the procedures of the Insurer. 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. The circumstance of the applicant leaving his employment as a Leading Hand, which occurred after the decision made by the Insurer, could not have been within contemplation at the time.

30. Section 59A was correctly explained, including both ss 59A(2) and 59A(3). The applicant was properly advised that pre-approved medical expenses might be paid for a further two years after 6 July 2017, since he does not have greater than 10% whole person impairment.

31. The Insurer gave more than the statutorily required period of notice under section 54(2)(a).

Finding

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

RECOMMENDATION

33. The application is dismissed.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
04 July 2017