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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.

Introduction and background

1. The factual background to this matter is set out in recommendation 9816 (#98 of 2016) and need not be repeated.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 02 March 2017. The Decision informed the applicant that his weekly payments of compensation would cease, with the last date of receipt of payments being on 09 June 2017. For the sake of clarity it was emphasised that the applicant would receive \$0.00 per week from 10 June 2017 onwards. The decision was said to be based on failure by the applicant to satisfy the requirements of section 38(3), he having received in excess of 130 weeks of payments and not having returned to work for a minimum of 15 hours per week, or at all. This is despite the Insurer finding the applicant capable of working as (alternatively) a Machine Operator, a Product Assembler and/or Clerk – Purchasing and Logistics.
3. The Internal Review Decision was dated 21 April 2017 and confirmed the original Work Capacity Decision.
4. The applicant sought Merit Review from the Authority by way of application dated 19 May 2017. The Authority delivered its Findings and Recommendations dated 19 June 2017. The Authority made a finding that the applicant has no entitlement to weekly payments of compensation because he does not meet the requirements of section 38(3). This finding being consistent with the insurer's determination, no recommendation was thought necessary.



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5. The applicant then made an application to this office for procedural review received on 17 July 2017. I am satisfied that the application has been made within time and in the proper form.
6. 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

7. Section 44(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 a submission that the Insurer misled him by stating that he would “only have an entitlement” to weekly payments after the expiration of 130 weeks if he returns to work for a minimum of 15 hours per week and earns the amount specified on page 12 of the *Benefits Guide*. Given that this is precisely what the *Act* says, it is hard to see how he has been misled.
9. He then emphasizes that he has been cut off from 10 June 2017, although I note he makes no reference to any work performed by himself in the interim, or at any subsequent time.
10. Finally he asks the loaded (and, in the circumstances, completely hypothetical) question: “Have I been misled and a victim of procedural injustice, or am I truly not entitled to payments regardless of whether I find 15 hours of work or more?”
11. On page 5 of the work capacity decision the Insurer had fully set out section 38(3)(a)-(c). It was otherwise explained that merely returning to work for 15 hours per week and earning the required amount could not of itself justify the reinstatement of payments, in the absence of agreement by the Insurer that the worker is “incapable of undertaking further additional employment or work that would increase the worker’s current weekly earnings.” In any event the point is of no relevance since the applicant has not returned to work for 15 hours per week or at all.

Submissions by the Insurer



12. The Insurer purported to acknowledge the applicant's submissions and submitted in reply that it had "adhered to the *Guidelines* and legislation."

Decision

13. The first Work Capacity Decision (the subject of recommendation 9816) was overturned by the Authority at Merit Review on the basis that the applicant had "no work capacity." Since that time further evidence has come to light and now the Authority is persuaded that the applicant has current work capacity and is therefore subject to section 38(3).
14. The decision from the Authority at Merit Review states at paragraph 48 that the applicant has not returned to work and does not satisfy section 38(3). There can be no dispute that this is the case.
15. The explanation of section 38(3) in the work capacity decision and in the internal review decision by the Insurer was adequate in all respects. The applicant was not misled or any way misinformed.
16. The same can be said for the explanation of the review process, the explanation of section 43(1) and the explanation of section 59A.
17. The Insurer took considerable pains to set out and fully explain the medical evidence it relied upon and to fully explain why it thought the applicant is fit for the three types of employment set out at paragraph 2 *supra*.
18. There are no procedural errors in the decision-making process.

Finding

19. The Insurer has made no errors of a procedural nature and the work capacity decision of 2 March 2017 was validly made.

RECOMMENDATION

20. The application for procedural review 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
16 August 2017