WorkCover independent review office

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RECOMMENDATION FOLLOWING AN APPLICATION FOR REVIEW OF THE INSURER'S WORK CAPACITY DECISION PURSUANT TO SECTION 44(1)(c) OF THE *WORKERS COMPENSATION ACT* 1987*.*

SUMMARY:

a. The application for procedural review of a work capacity decision is dismissed.

Introduction and background

1. The applicant sustained injury in the course of her then employment as a cleaner in 1998. Since 2000 she has worked in retail on reduced hours. The Insurer accepted liability and weekly payments continued and she was therefore an existing recipient of weekly payments immediately prior to 1 October 2012.

2. The applicant seeks procedural review of a work capacity decision made by the Insurer on 12 September 2014. The insurer informed the applicant that her weekly payments of compensation would be continuing but at an altered maximum rate of $458.32 as of 22 December 2014. The applicant sought internal review and the Internal Review Decision was dated 9 December 2014 and received by the applicant on 19 December 2014. It confirmed the earlier decision. She then sought Merit Review on or about 22 December 2014 and the Authority issued the Merit Review recommendation on 4 February 2015.

3. The Merit Review made a recommendation that accorded 100% with the decision of the insurer, to the exact cent. Merit review found that the weekly entitlement was to a maximum of $458.32 and that the entitlement should be calculated by the Insurer "on a week-to-week basis" in accordance with section 38(7).[1]

4. The applicant made application to this office on 26 February 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

[1] There is no requirement under that section for weekly payments to be calculated with such frequency. Since section 38(8) allows for a reassessment "at any time," it is hard to see the basis for the recommendation.

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Submissions by the applicant

5. Section 44(1)(c) of the Workers Compensation Act 1987 ("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."* The applicant's submissions in this case are misguided and counter-productive. Essentially she asserts that her ability to continue working 16 hours per week is doubtful. Therefore, it is argued, her payments should be increased.

6. The applicant has legal representation. It is clear that she has not been advised that if she ceases working "not less than 15 hours per week" she will lose any entitlement to weekly payments of compensation due to the operation of section 38(3)(b). The submissions made ostensibly in her interests are anything but helpful. They also proceed under the grave misapprehension that procedural review is a process which can scrutinize the recommendations of the Authority's Merit Review Service. Every issue raised in the application goes to the merits of the case and is therefore irrelevant to the current process, by virtue of falling well outside what is contemplated in section 44(1)(c) (extracted, *supra*).

Submissions by the Insurer

7. The Insurer made the following submission in response:

   - The Insurer notes that the submissions made by [the applicant] are merits based and therefore we make no submissions in terms of procedure.

The Decision

8. The decision of the Insurer correctly referenced the legislation, set out the process by which ongoing payments would be calculated and gave the correct period of notice for reduction of payments under section 54(2)(a).

9. The applicant seeks to take issue with the medical evidence relied upon but this was dealt with in the course of merit review and raises issues which cannot concern the procedural review process.

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10. As stated at paragraphs 5 and 6 *supra*, the submissions of the applicant are largely self-defeating. If it comes to pass that the applicant reduces her hours below 15 hours per week, she will lose all entitlement to ongoing payments. Despite this, the possibility of such a reduction in hours seems to be the *basis* of the application for review.

11. The submissions by the applicant cannot found any criticism of the procedures adopted by the Insurer.

FINDING

12. Under the legislation the Insurer can make an assessment of the applicant's work capacity and then a decision about that work capacity, but they must comply with the legislation, the Regulation and the Guidelines in order to produce a procedurally correct result. In the current matter the Insurer has successfully complied with the legislative requirements and the work capacity decision was validly made.

RECOMMENDATION

13. The application for procedural review of a work capacity decision is dismissed.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
02 April 2015