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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 work capacity decision dated 20 June 2017 is set aside.**
- b. The insurer should make a new work capacity decision in accordance with the legislation.**

Introduction and background

1. The applicant suffered lumbar spinal injury on or about 16 September 2015 while moving a 200 kg drum in the course of his employment as a Mixer. He returned to work on light duties until early 2017 when he was made redundant. The insurer accepted liability and made weekly payments for all relevant periods.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 14 June 2017 and notified by letter dated 20 June 2017. The Decision informed the applicant that he had an earning capacity of \$1,908.98 per week in suitable employment for forty hours per week as either a Mixer, Process Worker or Product Assembler. Therefore, his weekly payments of compensation would cease, with the last date of receipt of payments being on 26 June 2017.
3. The decision was said to be based on an application of section 36(2). Oddly, the Insurer seemed to be labouring under the misapprehension that the applicant had only received payments for three weeks, despite the Insurer having accepted liability in 2015. This misapprehension brought the Insurer into fatal error, because the applicant was only given the notice appropriate for a worker who has received fewer than 12 weeks of payments. This is a clear breach of section 54(2)(a), which required the Insurer to give at least three months notice.



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4. The Internal Review Decision was dated 1 August 2017 and varied the original Work Capacity Decision. On this occasion the insurer found that the applicant could earn \$923 per week in suitable employment and, in light of his PIAWE of \$1,601.04, applying the tables in section 37(1) he was entitled to an ongoing weekly payment of \$357.83.
5. Interestingly, the following also appeared:

[The applicant] has received 18 weekly payments of compensation to date. Therefore section 37 of the Act applies.

The applicant was told on 20 June 2017 that he had only received three weekly payments. That was clearly untrue. If the insurer was correct to say on 1 August 2017 that the applicant had already received 18 weekly payments, then he had received at least 12 weekly payments as at 20 June 2017. Having received weekly payments for a continuous period of "at least 12 weeks" (to quote from section 54(1)) the applicant was entitled to a notice period of at least three months by virtue of section 54(2)(a).

6. The inadequate notice given to the applicant had already expired prior to his application to the Insurer for internal review, received on 10 July 2017. This had serious consequences for the applicant, since the insurer did not back-date its findings on internal review that there was an ongoing entitlement to weekly payments. There is therefore a period from 26 June to 31 July 2017 for which the applicant was not compensated according to his legal entitlement.
7. The applicant sought Merit Review from the Authority by way of application received on 30 August 2017. The Authority delivered its Findings and Recommendations dated 06 October 2017. The Authority concurred with the findings made by the insurer in the course of internal review, agreeing that the applicant could earn \$923 per week in suitable employment.
8. The applicant made an application to this office for procedural review received on 10 October 2017. I am satisfied that the application has been made within time and in the proper form.



9. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the relevant *Guidelines*.

Decision

10. For the reasons already set out at paragraphs 3, 5 and 6 *supra*, the insurer breached the notice requirements in section 54 when advising the applicant that his payments would cease on 26 June 2017. While it is true to say that this decision was varied in the course of internal review, it has had a serious consequence for the applicant, who received no payment for the period 26 June 2017 to 31 July 2017 inclusive due to the inadequacy of notice.
11. This is more than a mere “technical breach” because of the financial consequences and because it is a breach of the legislation itself. There is a maximum penalty specified in section 54 of “50 penalty units” which might be imposed on insurers for failure to give the correct period of notice.
12. In all the circumstances the work capacity decision advised by letter dated 20 June 2017 must be set aside.

Finding

13. The work capacity decision notified by letter dated 20 June 2017 failed to comply with the notice provisions in section 54 of the 1987 Act.

RECOMMENDATION

14. The work capacity decision dated 20 June 2017 is set aside.
15. The insurer should make a new work capacity decision in accordance with the legislation.



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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
03 November 2017