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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 injured her thoraco-lumbar spinal region in the course of her employment on 12 August 2016. She has not returned to work.

2. The insurer accepted liability and made weekly payments for all relevant periods.

3. The applicant seeks procedural review of a work capacity decision made by the Insurer on 22 June 2017. The applicant was advised that her weekly payments would "be discontinued from $883.49 to $0.00," with the decision coming into effect on 1 October 2017. A covering letter had the wording within inverted commas quoted *supra*, and on page one of the substantive letter containing the decision the following wording was used:

> To date you have been paid weekly payments under section 37 of the Workers Compensation Act 1987 at the rate of $883.49. I am now writing to advise you that as a result of the work capacity assessment and after careful consideration of your claim, I have made a work capacity decision that you are no longer entitled to weekly payments under section 37 ….
>
> In line with the notice period [the Insurer] is required to give under section 54(2)(a) … your weekly payments will continue at the current rate for 3 months and 1 week (to allow for delivery of this notice) to 01/10/17. The change in your weekly payments will become effective following this notice period.

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This decision will mean that you no longer have any weekly payments entitlement. The change in your weekly payments will become effective from 01/10/17.

4. It is tolerably clear that the insurer was attempting to convey to the applicant that her entitlement to ongoing weekly benefits was coming to an end as of 1 October 2017. It is difficult to see what more the insurer could have done to make this understood.

5. The applicant sought internal review and on 11 August 2017 the insurer upheld the original decision.

6. An application for merit review was received by the Authority on 17 August 2017 and findings and recommendations were issued on 13 September 2017. The Authority found that the applicant: (i) has current work capacity in accordance with the definition under section 32A; (ii) is able to return to work in suitable employment as a sales assistant, product assembler or process worker; (iii) has an ability to earn $1,016.00 per week in suitable employment; (iv) has a PIAWE of $$1,105.09 for the first 52 weeks; and (v) has a PIAWE of $$1,028.90 after the first 52 weeks.

7. The Authority recommended that the Insurer make a work capacity decision in accordance with those findings, applicable from 22 June 2017.

8. The applicant subsequently sought procedural review by this Office. I find that the application was made within time and in the correct form.

9. 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

10. 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.*"

11. The applicant made the following submissions:

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i. On page 3 of the work capacity decision the insurer informed the applicant that "*any entitlement you may have to weekly payments is limited to a maximum of 260 aggregated weeks (section 39 of the … Act).*" However the applicant may be entitled to weekly payments beyond 260 weeks if her level of whole person impairment is assessed over 20%. The applicant was misled by the insurer as to her entitlements or potential entitlements to weekly payments beyond 260 weeks.

ii. On page 7 of the work capacity decision the insurer [in]form[ed] the applicant that her "*new weekly payments of $0.00 per week commence effective 1/10/17.*" By stating that payments of $0 per week would be made, the insurer has mislead the applicant that those weeks will be counted towards the 260 weeks [for the purposes of section 39].

12. The suggestion that the applicant was misled in either submission is misguided in the circumstances of the case. Had the applicant been assessed at more than 20% WPI, it is obvious that the failure to advise of the exception to section 39 would have been a serious omission, with a material effect on the outcome of the decision. But since the applicant has neither an assessment of more than 20% nor, as far as I am aware, any assessment for WPI, it is hard to see the relevance of that exception to this applicant.

13. The second submission might have more teeth but for the great pains taken by the insurer to explain that there would be no ongoing entitlement after 1 October 2017, as set out in paragraph 3 *supra*. The words quoted from page 7 of the decision may well be interpreted a certain way in isolation, but in the context of what earlier appears in both the covering letter and on page one of the decision, there can be no serious argument that the applicant was in any doubt as a result of what the insurer said.

Submissions by the Insurer

14. The insurer made no submissions in reply.

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The Decision

15. The applicant was given fair notice in writing on 29 May 2017 that an assessment leading to a decision was underway.

16. In the notice dated 22 June 2017, the Insurer advised that a work capacity assessment had commenced on 29 May 2017 and was completed on 22 June 2017.

17. 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.

18. 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).

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

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

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

22. Suitable employment was identified.

23. Section 59A was correctly explained, including both ss 59A(2) and 59A(3).

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

Finding

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

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RECOMMENDATION

26. The application is dismissed.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
14 November 2017