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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 applicant sustained bilateral tenosynovitis and related musculo-skeletal overuse syndrome in May 2000 in the course of her employment as a Packer (Quality Control). She is unable to return to physically demanding work, but has recently been employed on a casual basis as a Teacher's Aide. The work is intermittent with widely varying hours per week. The insurer accepted liability and has made weekly payments of compensation for all relevant periods. Since she was in receipt of weekly payments immediately prior to 1 October 2012, the applicant is an "existing recipient," as defined.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 22 September 2016. The Decision informed the applicant that her weekly payments of compensation would cease on 29 December 2016. She was advised that her last payment would be for 28 December 2016 and she would receive nothing thereafter. The decision was based on non-compliance with section 38(3).
3. The applicant sought internal review and the Internal Review Decision was dated 2 November 2016. The Internal Review Decision confirmed the original Work Capacity Decision.
4. The applicant sought Merit Review from the Authority by way of application received on 17 November July 2016. The Authority delivered its Findings and Recommendations dated 14 December 2016. The Authority made findings that the applicant: (i) is able to return to work in suitable employment as a School Learning and Support Officer



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or as a Teacher's Aide; (ii) has current work capacity; and (iii) does not satisfy the special requirements in section 38(3) for the continuation of weekly payments beyond 130 weeks. The Authority did not make any recommendations in this matter, thereby causing considerable doubt to be cast over the purpose of the merit review.

5. The applicant made an application to this office for procedural review received on 19 December 2016. 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 Guidelines. The relevant Guidelines came into effect on 1 August 2016.

Submissions by the applicant

7. 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.*" The applicant made submissions which are reproduced below, verbatim:

I am seeking a review as I have been cut off my payments after almost seventeen years on work cover benefits .Earlier this year I obtained my first work trial at my local high school (behind my house) which lead to me gaining some employment after so long out of work, as long as I continue with my 30hours a week university degree (Bachelor of Arts).The insurance company made offers to pay my wages/insurance for a period of two years along with a cash incentive to the school if they kept me on for three permanent days a week .Sadly this didn't eventuate and I stay on daily call at the school .This year for a period of six months I earned a total of \$3400.Other pay was made up by the insurance company ,as per decision made by Arbitration commission in 2013, which stated that the insurance company must pay my wages and or make up pay until I can return to a 38hour week job .It was bought up midway this year with the doctor(after my work trial) ,to increase my work hours from 20hours a week (which has stood for years) without any physical upgrading, in order to fulfil the hours at the school. It was lifted to twenty five hours a week after alot of deliberation by myself and the doctor with job provider present. But the insurance company are looking at obtaining forty hours a week, which I feel is an unachievable goal and was refused by the doctor just recently .When I started at the school I was assured in writing by the insurance company that my payments of



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makeup pay would continue so long as I fulfilled looking for work ,going to work and my thirty hours a week study. I have been through two reviews already ,which have supported the insurance company's decision to cut me off my benefits .I cannot understand how I can possibly be expected to live off this money earnt ,and I worry how I will pay my rent and feed myself. I always do the right thing and I'm constantly exhausting avenues trying to keep up with the expectations on me .I'm tired, after so long of fighting this and if I could walk away and gain a new start over all this, I would it's a constant battle that wears on me/my children emotionally .In order to work at the school I must restrict physical activity on other days to obtain enough strength to fulfil the days I get at the school .Unfortunately I don't know when those days will be ,and I get just an hours' notice, so I have to mainly rest and wait for work to call, which could be a month between calls so I can't plan anything .I do hope that after being there for a while that they may consider me for a three day contract (which is the normal work on offer for an SLSO or support worker) when another more permanent position becomes available. But at this stage any work is an improvement after so long of being out of work and I'm constantly studying to improve my chances at any other suitable work .But I need the financial support of my payments from the Insurance company to continue studies and maintain a roof over my head ,as I'm not at a stage of being able to support myself in permanent work .I have a current workcover certificate in which I get six monthly assessed by my doctor and have supplied for almost seventeen years now, my condition is not expected to improve any .My current certificate will run out in January and I will go and see the doctor again .After so many years without dramatic improvements in my health or circumstances and with relapses such as the one I had during my work trial at the school, where I lost strength in my legs due to repetitive use of the stairs/unlevel grounds .Which meant I had to have the next day off, to wait till the strength was regained in my legs, before returning to any walking .The doctor has restricted me to no physical exertion, yet I sacrifice myself due to finding the work very rewarding and making me feel a part of something ,rather than an insurance battle .The school work ,working with children, helps me to deal with my own problems and allows me to help others who are suffering with theirs. I shouldn't be punished for doing all I can.The workers compensation laws are always changing constantly, it has my head spinning and I never know what to expect.I do know that there is no job security for me at this time and along with no super funds / money saved to fall back upon I could very well end up on the streets.

8. As interesting as the above paragraph is, it has no relevance to the procedures of the Insurer in making the work capacity decision.



Submissions by the Insurer

9. The Insurer made the following submissions in response to the application:

- The Insurer submits that whilst we acknowledge [the applicant's] hardships we are unable to make comment as they are merit based.¹
- The Insurer submits that we have adhered to the legislation and guidelines in making our decision.

Decision

10. On 22 August 2016 the Insurer gave the applicant fair notice of the impending assessment of her work capacity which would lead to an adverse decision.

11. The Insurer informed the applicant that the work capacity assessment was completed on 22 September 2016 and she was notified of the Work Capacity Decision by letter of the same date.

12. Section 54(2)(a) of the 1987 Act requires at least three months and four working days' notice be given if payments are being reduced or ceased. This notice period takes into account Section 76(1)(b) of the *Interpretations Act 1987*. As a result the applicant was advised that her payments would cease on 28 December 2016. This is the appropriate notice period.

13. The Insurer has referenced and explained Section 59A (2) and (3) of the 1987 Act and advised the applicant that her entitlement to medical expenses will cease on 28 December 2018 as she has been assessed by an Approved Medical Specialist as having a permanent impairment of less than 10%. The Insurer has adequately explained this at page 2 of the Decision.

14. The Insurer informed the applicant that she has received 852 weekly compensation payments. Therefore any ongoing entitlement to weekly payments of compensation is subject to Section 38 of the 1987 Act. The

¹ The submission makes grammatical sense if you substitute "submissions" for "hardships," although the insurer may view the two as interchangeable.



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Insurer clearly explained the special requirements of Section 38(3)(b) and (c) of the 1987 Act at pages 4 and 5 of the Work Capacity Decision.

15. Pursuant to Section 43(1)(a) of the 1987 Act the Insurer has noted that the applicant has been certified with capacity for 6.5 hours per day, 4 days per week in the Certificate of Capacity from the nominated treating doctor. The Insurer determined that the applicant had current work capacity in accordance with that assessment.
16. The Insurer determined, pursuant to Section 43(1)(b), the roles of Administrative Assistant, Customer Service Officer and Teacher's Aide to be suitable employment. The Insurer based its determination upon a vocational assessment report and the approval from the nominated treating doctor.
17. In making these determinations pursuant to Section 43 of the 1987 Act the Insurer has displayed an adequate understanding of the relevant Guidelines and legislation.
18. It is clear that the applicant currently does not meet the requirements set out in section 38(3)(b).
19. The Work Capacity Decision of the Insurer has displayed a careful consideration of the requirements of the Guidelines and legislation in force at the time.

Finding

20. There are no procedural errors identifiable in the decision.

RECOMMENDATION

21. The application for procedural review is dismissed.



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A handwritten signature in blue ink, appearing to read "Wayne Cooper", with a long horizontal flourish extending to the right.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
20 January 2017