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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 was a secondary school teacher of a STEM subject and sustained a psychological injury in the course of her employment on or about 7 April 2014. The applicant made a claim for compensation following which the Insurer accepted liability and made weekly payments for all relevant periods.
2. On 27 December 2018 the insurer made a work capacity decision, finding that the applicant was capable of working as a secondary school teacher and as a tutor. A medical certificate tendered by the applicant as recently as 18 December 2018 had supported the conclusion that she was fit to work as a tutor. Other relevant medical evidence had supported the view that she was capable of working as a teacher for forty hours per week at an alternative school to the one at which her injury was sustained.
3. Since the applicant had received more than 130 weeks of compensation payments, her claim fell within the period covered by section 38. It is a requirement for the ongoing receipt of payments within this period that claimants currently work for a minimum of 15 hours per week, earning no less than a statutorily indexed amount (currently around \$190 per week).
4. The applicant does not currently work. Accordingly, the insurer advised the applicant that her payments would be terminated from 10 April 2019. This exceeded the minimum notice period under section 54(2)(a), as it was at the time.
5. An internal review was conducted on 27 February 2019. That review maintained the original findings. It was also noted in the course of internal review that an updated medical report from the applicant's treating doctor



certified her fit to work at an alternative school and fit to work as a tutor. It was further noted that the applicant has made no claim for Whole Person Impairment.

6. The applicant sought merit review by the Authority, which delivered the following findings and recommendations on 13 May 2019:
 - The role of secondary teacher constitutes suitable employment for the applicant;
 - The applicant has current work capacity;
 - The applicant does not satisfy the special requirements for continuation of weekly payments after the second entitlement period pursuant to section 38; &
 - As the findings above in respect of current work capacity, suitable employment and section 38(3)(b) are identical to the insurer's, the insurer is not required to make any further review decision.
7. As has become distressingly customary in this situation, the Authority chose to make no recommendations. Presumably they thought this was helpful. Given that the Insurer had apparently made submissions claiming to have no liability to make payments beyond 9 April 2019, and making the bizarre submission that there was no stay of the original work capacity decision in place, despite the review process under the former section 44BB continuing, it might have been slightly more helpful if the Authority had at least made the recommendation that the insurer continue to make payments until the conclusion of the review process.
8. An application to this office for procedural review was received on 12 June 2019. I am satisfied that the application has been made within time and in the proper form.

Submissions by the parties

Applicant submissions

9. The applicant appears to have repeated the same submissions she made to the merit review service, which largely go to the conduct of the employer and the insurer during the course of her claim, rather than



addressing any procedural issues about the decision-making process or the form of the notice of the decision.

10. To the extent that the applicant made submissions about irrelevant or out of date evidence being relied upon, I can only repeat that her own treating doctor certified her fully fit for pre-injury work, except at the very school at which injury was caused. The most recent certification was dated in 2019 and post-dated the original work capacity decision. The decision of the insurer was also supported by the Authority following merit review.

11. While there are clearly difficulties with the conduct of the employer, which appears to be playing fast and loose with the truth about the applicant's prospects of redeployment, that regrettable conduct does not impugn the insurer's work capacity decision. The employer's failure to retrain or attempt to update the skills of the applicant is also an irrelevant consideration for present purposes; however, this is not the first injured worker to make the same complaint about this employer.

Insurer submissions

12. The insurer made no formal submissions, although in the course of correspondence dated 13 June 2019 I was informed that the applicant continued, as at that date, to receive weekly payments. This alleviates to a considerable extent the problem created by the Authority, as described at paragraph 7 *supra*. I assume payments continue to the present time.

Decision

13. The insurer set out the basis for the decision in a letter dated 27 December 2018. As at that date the applicant had received 155 weekly payments of compensation. Section 38 applies to workers who have some current work capacity and who have received in excess of 130 weekly payments. In order for payments to continue to such a worker section 38(3) must be satisfied. That section requires a worker to have returned to work for a minimum of 15 hours per week and to earn a minimum of around \$190 per week. In this case the worker had not met either of those conditions. In the circumstances the insurer had no choice but to terminate weekly payments.



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14. The applicant was told that the last payment would be received on 9 April 2019. This exceeds the three months notice required under the legislation at the time.
15. Sections 59A(2) and 59A(3) were both clearly explained.
16. Section 38 was clearly referenced and was set out and explained at some length. The applicant would have no misunderstanding of the way that part of the legislation operates.
17. The medical and other reports relied upon were set out and summarised, where relevant. Recent evidence was relied upon, including evidence provided by the applicant's own treating doctor.

Finding

18. I find that there were no procedural errors in the insurer's processes and that the legislation and Guidelines were correctly followed.

RECOMMENDATION

19. The application is dismissed.

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

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
09 July 2019