

**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 work capacity decision of the Insurer dated 10 February 2014 was not subject to merit review due to the application being out of time.**
- b. **It is a statutory requirement that merit review take place in order for procedural review to proceed.**
- c. **There is no discretion to be exercised for particular circumstances.**
- d. **Accordingly the application is dismissed and no recommendation is made.**

**Introduction and background**

1. The applicant has applied for procedural review of a work capacity decision made by the Insurer on 10 February 2014. The decision was made to cease weekly payments with the last date for payment to be 19 May 2014. The applicant sought internal review. The internal review decision (IRD) was sent to him on 26 March 2014. The IRD affirmed the original decision. The applicant sought merit review by an application received by the Authority on 16 May 2014. A reply was issued on 2 June 2014, noting that the application was out of time and advising that the 30 day time limit set in section 44(3)(a) of the *Workers Compensation Act 1987* is not discretionary. On 15 June 2014 the applicant sought procedural review by this office.

**Submissions by the applicant**

2. The applicant (clearly with the aid of either an amanuensis or a tutor or both) cites the following as grounds for review:

My initial request was rejected on the basis it was outside of the allowed 30 day request for review period. Due to my limited

English reading capacity, I did not understand there was a 30 day limit to respond.<sup>1</sup>

I sincerely apologise for my oversight. I was only made aware of this issue when my son-in-law read and explained the Merit review Service rejection letter dated 2<sup>nd</sup> June. If I had understood the 30 day deadline, I would have submitted my request in a more timely manner. I hope you will review my submission as I am genuinely unable to work and have documentation from my doctor outlining the reasons.

### **Submissions by the Insurer**

3. A representative of the Insurer made the following short and understated submission:

If necessary please correct, but my understanding of Section 44(1)(c) of the 1987 WCA is the injured worker can only proceed to the Independent Review Officer if the dispute has been subject of an internal review (which has been the case) and merit review by the Authority (which is not the case).

### **Consideration**

4. The relevant legislation is found in both section 44(3)(a), and the obscurely worded section 44(1)(c). To this extent the Insurer relies on the correct section to answer the jurisdictional question. That section allows for procedural review by this office, but “not until the dispute has been the subject of internal review and merit review by the authority.” It is obvious that in this case merit review has not occurred and cannot occur.
5. The merit review service has identified the true weakness in the applicant’s case, since section 44(3)(a) not only requires an application to be made “within 30 days after the worker receives notice in the form approved by the Authority of the insurer’s decision on internal review,” but it also allows no leeway to the merit review service to make exceptions to what is a paradigm case of a very hard-and-fast rule.

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<sup>1</sup> That is to say, “respond” to the internal review decision by applying for merit review.



6. It follows that the merit review service had no choice but to reject the application for merit review. This has led to a further unfortunate consequence for the applicant. By virtue of section 44(1)(c) this office has no power to review a work capacity decision “until” merit review has occurred. Merit review having not occurred, and being impossible in the circumstances, it follows that procedural review is also not possible. This office has no more discretion to extend time to an applicant than does the merit review service.

### **FINDING**

7. I find that the applicant has no right to make application to this office for procedural review in the absence of a merit review recommendation.

### **RECOMMENDATION**

8. For the reasons set out above, I dismiss the application and I make no recommendation.

Wayne Cooper  
Delegate of the WorkCover Independent Review Officer  
24 July 2014