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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 seeks procedural review of a Work Capacity Decision made by the Insurer on 20 December 2013¹. The Decision advised the applicant that her weekly payments of compensation would "be reduced from \$452.60 per week to Nil, effective from 29 March 2014."
2. For reasons which are not obvious, the applicant did not seek internal review of the original decision. The following words appeared at page 6:

To request a review of the decision

You may request a review of our decision by completing the enclosed '**Work Capacity – Application for Procedural Review by Insurer**' form. You may attach any additional supporting information to the form.

The request for review must be sent to us within 30 days of you receiving this notice.²

The Insurer did all it could reasonably be expected to do in terms of advising the applicant of her right to an internal review and how to request one.

3. It appears that the applicant next sought merit review, although not until very late in 2015. The merit review service wrote to the applicant on 3

¹ The application gives the "Date of Insurer Decision" as 23 March 2016, but that is the date of a belated internal review, not the date of the original work capacity decision. The internal review was delayed by the conduct of the applicant, not the Insurer.

² Untrue at the time – the 30 day requirement was only in force for merit review and procedural review. Due to the later insertion of section 44BC which allows for a stay, it is indeed advisable, although still not compulsory, for a worker to now seek internal review within 30 days as described.



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January 2016 advising they lacked jurisdiction to conduct a review on the grounds that no internal review had been undertaken³.

4. The applicant requested an internal review on 1 March 2016⁴ and the Internal Review Decision was dated 23 March 2016. That decision confirmed the original Work Capacity Decision.
5. The applicant next sought Merit Review from the Authority on 28 June 2016. It might be noted that this is more than 2 months after the date of the internal review decision by the Insurer. The Authority declined to conduct a merit review on the same jurisdictional grounds as before, this time because more than 30 days had elapsed since receipt by the applicant of the internal review decision. This is clearly a breach of section 44BB(3)(a).
6. In the course of correspondence and in conversation with the merit review service, the applicant herself said she cannot recall the date when she received the internal review decision, and the solicitors retained by the applicant said no more than that they experienced "difficulties" in getting a response from the Insurer. There is no denial that (a) an internal review was done and (b) it was received by the applicant. There is certainly no suggestion credibly put forward that the applicant applied for merit review within 30 days of receipt of the internal review decision.
7. In the circumstances, the Authority had no choice but to refuse to conduct a review. The applicant was thus advised by letter dated 26 July 2016.
8. The applicant next sought procedural review of the work capacity decision by application to this Office ostensibly dated 1 August 2016. Considerable doubt must be cast on the date when the application was signed, since in the hand-written text under "Grounds for seeking a review" the following appears:

Please find attached letter from Dr [name supplied] dated 8 August 2016.

³ Strictly speaking, not good grounds to decline jurisdiction, since all the worker need do is apply for procedural review. Section 44BB(3)(b) allows such a worker to seek merit review if the Insurer has failed to advise the outcome of internal review within 30 days of the request.

⁴ Note that this is nearly three months after the date and likely receipt of the letter from the merit review service of SIRA.



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9. Further doubt might be cast on the date of the application being signed by the applicant by (a) the doctor's letter proving to be dated 8 August 2016 and (b) receipt by this Office of the application via email on 11 August 2016.
10. Nothing much turns on this, since the Merit Review service issued its letter to the applicant on 26 July, so considerably less than 30 days had elapsed since receipt by the applicant.
11. While the applicant clearly has problems at other levels of review, I am satisfied that the application to this Office was made within time and on the correct form.

Submissions by the applicant

12. 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.”*

13. The applicant makes the following submissions:

- I seek review of the decision made by the WorkCover (*sic*) Merit Review Service because I have not been in the right state of mind to make the application within 30 days.
- Please find attached letter from Dr [name supplied] datd 8 August 2016.

14. I have no power to “review” any actions taken by the Authority. I can only examine the procedures of the Insurer. As far as the substantive submission seems to go, namely that the applicant has a medical condition precluding timely action, that is a war which should have been fought when the outcome it could have made a difference. It is too late to produce medical evidence after a decision has been made by the Authority.

Submissions by the Insurer

15. The Insurer has provided written submissions which go to various matters of general principle. The only relevant submission seems to me to be unanswerable:

- ii. The worker has not identified or submitted any ground upon which the work capacity decision involved procedural error or flaw, sufficient to warrant any action being taken by the [W]IRO.



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16. While I am conscious of the proposition that “submissions” *per se* are of limited utility in cases where the only real consideration is the construction of statutory words,⁵ it has to be the case that a submission to the effect that I perform a task which I have no power to perform cannot succeed. Hence, I cannot review the Authority’s letter to the worker, however that is described.⁶

Decision

17. The decision of the Insurer had no identifiable procedural errors.

18. In any event, I accept that the applicant has not complied with Section 44BB(3)(a) of the 1987 Act and she is in breach of the review process. Therefore a procedural review cannot be performed.

FINDING

19. WIRO therefore does not have power to undertake a procedural review of the Work Capacity Decision of the Insurer. Nor can WIRO review the actions of the Authority.

RECOMMENDATION

20. The application is dismissed.

A handwritten signature in blue ink, appearing to read "Wayne Cooper".

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
26 August 2016

⁵ See *Insurance Australia Ltd t/a NRMA v Milton* [2016] NSWCA 15, at paragraphs 9-10.

⁶ It might be thought to be (i) a decision, or (ii) a recommendation, or (iii) a finding that no recommendation can be made, or (iv) just a letter.