



Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

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 suffered injury on 7 January 2013 in the course of her employment as a Coffee Shop/Bistro Attendant. She currently does not work. The Insurer accepted liability and made weekly payments for all relevant periods.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 24 February 2016. The Decision informed the applicant that her weekly payments of compensation would cease on 6 June 2016 because she does not meet the requirements of section 38(3)(b) and (c).
3. This decision was maintained following internal review. Relevantly, the date of the internal review decision was 28 July 2016.
4. The applicant sought Merit Review from the Authority by way of application received 6 September 2016. The Authority did not conduct a merit review, since the application was not made within 30 days of receipt by the worker of the internal review decision. This is a breach of section 44BB(3)(a). The applicant was advised of this outcome by the Authority in a document headed "DECISION ON APPLICATION FOR REVIEW BY THE AUTHORITY" dated 28 September 2016.
5. An application was made to this Office for procedural review received via email on 21 October 2016. I am satisfied that the application was made within time and in the correct form. I am not satisfied, however, that this Office has the power to undertake a procedural review when the applicant was statute-barred from succeeding at merit review.



Relevantly, section 44BB(3)(a) is in the following terms (**highlighting added**):

- (3) The following provisions apply to the review of a work capacity decision when the reviewer is the Authority or the Independent Review Officer:
 - (a) **an application for review must 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 of the decision (when the application is for review by the Authority)** or the Authority's decision on a review (when the application is for review by the Independent Review Officer),

This follows section 44BB(1)(c):

- (1) An injured worker may refer a work capacity decision of an insurer for review:
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 - (c) to the Independent Review Officer (as a review only of the insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer in making the decision), **but not until the dispute has been the subject of internal review by the insurer and merit review by the Authority.**
6. Since there has not been (and cannot be) a merit review in this case, and since this Office cannot conduct a procedural review "until" there has been such a review, I am unable to proceed further.
7. It may be advisable for the applicant to seek independent legal advice in relation to any prospects which may (or may not) exist for judicial review of the decision by the Authority to not conduct a merit review. In the absence of that decision being vacated I cannot proceed.

Finding

8. In the absence of a merit review by the Authority, due to expiry of the limitation period in section 44BB(3)(a), this Office has no power to conduct a review.

RECOMMENDATION

9. The application for procedural review is dismissed.



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A handwritten signature in blue ink, which appears to read "Wayne Cooper". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
21 November 2016