



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 factual background to this matter was set out in recommendation 8615 (# 86 of 2015) and need not be repeated. There was also a further recommendation by this Office numbered 4616 (# 46 of 2016).
2. The applicant now seeks procedural review of a Work Capacity Decision made by the Insurer on 30 June 2016. The Decision informed the applicant that his weekly payments of compensation would cease from 10 October 2016 due to non-compliance with section 38(3)(b) and (c). It was determined that he had a capacity to work for up to 25 hours per week in suitable employment as a Sales Assistant or Car Park Attendant.
3. An internal review conducted on 21 December 2016 resulted in the same decision.
4. The applicant sought Merit Review from the Authority, which was accepted on 23 February 2017, supposedly "pursuant to section 44BB(3)(b) of the 1987 Act."¹
5. Without going into the reasoning of the merit reviewer, who ultimately made "no recommendation," it is clear that there was an error of a jurisdictional nature. Section 44BB(3)(b) allows a worker to apply for merit review in circumstances where the Insurer has failed to conduct an internal review within 30 days of receiving an application.

¹ See paragraph 11 of the merit review determination dated 7 March 2017.



6. There can be no serious dispute that in the present case the Insurer did conduct an internal review within 30 days of receipt of the application from the applicant.
7. In the Reply to the Application for Merit Review the Insurer made the following submission:

“Further to our Reply, [the Insurer] submits that [the applicant] has not lodged his application within 30 days, thus the Merit Review [Service] does not have jurisdiction.”
8. For unexplained reasons this submission received no attention from the merit reviewer in the course of the reasons for determination.
9. Section 44BB(3)(a) requires a worker to apply for merit review within 30 days of receipt of the internal review. It is obvious that 23 February 2017 is well outside the relevant limitation period for an internal review dated 21 December 2016. It is equally obvious that section 44BB(3)(b) is irrelevant.
10. An application to this office for procedural review was received on 13 March 2017. I am satisfied that the application has been made within time and in the proper form.
11. While I am satisfied as to the matters set out in paragraph 11 *supra*, there remains an insurmountable jurisdictional problem. Since the applicant was clearly out of time when making his application for merit review, that review should not have occurred and can have no validity.
12. It follows that since there is a jurisdictional problem with merit review, it also precludes any action being validly taken by this office, other than a dismissal of the application. The reason for this is that no procedural review may be undertaken in the absence of a prior merit review.² Such merit review would have to be conducted within power by the relevant Authority. There being no valid merit review, this Office has no power to conduct a procedural review.

² See section 44BB(1)(c).



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

RECOMMENDATION

13. The application is dismissed.

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
12 April 2017