



## **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 24 March 2017. The Decision informed the applicant that her weekly payments of compensation would cease from 30 June 2017.
2. An internal review on 18 April 2017 reached the same conclusion.
3. The applicant sought Merit Review from the Authority in an application dated 10 June 2017. The Authority declined to undertake a merit review due to the application being made out of time; that is to say, the application was made more than 30 days after receipt by the applicant of the internal review decision made by the Insurer. The Authority cited section 44BB(3)(a) and noted that it had no jurisdiction to conduct a review outside the timeframe set by the legislation.
4. An application to this office for procedural review was received on 03 August 2017.

##### **Submissions by the applicant**

5. Section 44(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.*" The applicant provided the following by way of submissions:



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

- My merit review was sent in late by myself as I was awaiting medical advice from relevant treating psychologist which supports myself unable to be in a stressful working environment;
  - This information was not available to NTD at time of review;
  - I had since asked for a new review but to date has gone unanswered;
  - I understand that the guidelines were outside of normal 30 day period but there are extenuating circumstances and at times the review may still be able to go ahead, but they have said they do not have jurisdiction to make a decision.
6. I am only able to review the procedures used by the Insurer in making this Work Capacity Decision.

#### **Submissions by the Insurer**

7. The Insurer has provided submissions in response to the applicant's application. The Insurer has submitted that:
- The applicant's application for merit review was outside the 30 day timeframe and as such the Authority did not have jurisdiction to review the application.
8. It appears to be an unstated corollary to the above submission by the Insurer that WIRO cannot conduct a procedural review when the applicant is out of time for merit review.

#### **Decision**

9. Section 44A of the *Workers Compensation Act 1987* (1987 Act) provides that a work capacity assessment must be conducted in accordance with the Guidelines.
10. The relevant Guidelines for the purposes of section 44A are the ***Guidelines for claiming workers compensation*** which came into effect on 1 August 2016. They replaced the previous Guidelines.



11. Before going on to consider the legal question which must determine the outcome of this application, I note that the Insurer seems to have complied with the legislation and the *Guidelines* in the course of making the work capacity decision. There would therefore be no basis for overturning the decision on procedural grounds.

### **Jurisdiction**

12. An examination of the wording in section 44BB(3)(a) was conducted by the Supreme Court of NSW in *Bhusal v Catholic Health Care* [2017] NSWSC 838. In that case a worker had applied for merit review and on the face of the application it seemed that the application was out of time because the worker had nominated the wrong date. Button, J held that, even if the date was incorrect and otherwise the worker had been within time, this was insufficient reason to overturn the Authority's decision that it lacked jurisdiction. His Honour held that use of the word "must" in the phrase "must be made within 30 days" is mandatory in the true sense. His Honour went on to say:

I think one should take that word at face value. I also think Parliament could have created some sort of ameliorative ancillary regime if it had wished to; it did not.[at 44]

13. It follows that, contrary to the submissions by the applicant in the present case, there is no provision for "extenuating circumstances" when it comes to applying section 44BB(3)(a.). The Authority had no discretion to allow a review to proceed when the application was made out of time.
14. This Office itself can only conduct a procedural review when a merit review has taken place. The proscription appears also in section 44BB(3)(a). In the circumstances of this case, it is not possible for a procedural review to be conducted. The precedent of *Bhusal* precludes any further consideration of the application by this Office.

### **Finding**

15. This Office has no jurisdiction to conduct a procedural review.

### **RECOMMENDATION**



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

16. 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  
18 August 2017