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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 30 November 2016. The Decision informed the applicant that her weekly payments of compensation would cease from 09 March 2017 because she was capable of working for 36 hours per week in suitable employment and in that employment she was able to earn $1,092.60 per week, an amount which far exceeded 80% of her pre-injury average weekly earnings ($707.66 gross). Under section 37, this rendered her ineligible for ongoing payments.

2. An internal review on 06 February 2017 reached the same conclusion.

3. The applicant sought Merit Review from the Authority in an application dated 05 May 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. The Authority so advised the applicant by letter dated 26 May 2017.

4. Somewhat unusually, the applicant next applied to the Insurer for another internal review. This was on 5 June 2017, on a form dated 29 May 2017. The application specifically referred to the original work capacity decision of 30 November 2016. There is no suggestion that a subsequent work capacity decision was ever made.

5. Having received no response from the Insurer within 30 days, the applicant once again approached the merit review service by application dated 10 July 2017, this time purporting to be within time on the basis

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that the second application for merit review was made within 30 days of the deadline for receipt of the second internal review, which never materialised.

6. Perhaps unsurprisingly the Authority once again found that it lacked jurisdiction, since nothing the applicant did brought her within the original timeframe set out in the legislation, i.e. within 30 days of receipt of the internal review by the insurer dated 6 February 2017.

7. An application to this office for procedural review was received on 10 August 2017.

Submissions by the applicant

8. 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."* The applicant provided the following by way of submissions:

    - Both the Insurer and the Authority fell into procedural error by concluding they had no jurisdiction as a previous request for review was out of time;
    - S44BB of the 1987 Act and S287A of the 1998 Act are in similar terms and S287A allows more than one request for a review; and
    - S44BB of the 1987 Act does not contain a prohibition as does S66(1A).

9. Trying to unscramble the first submission, it might be noted that: (a) the Insurer never asserted it "lacked jurisdiction"; and (b) the Authority would not "fall into procedural error" reviewable by this office even if making an error of law were thought to be a procedural error in this context. The allegation of error seems to be an allegation against the Authority rather than the Insurer, and the decision of the Authority is not subject to review by this Office. Even if recommendations made by the Authority were reviewable by this Office, in the present instance I would find that the Authority was correct, it being no error of law nor a procedural error to properly interpret and apply the legislation.

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10. To describe section 44BB of the 1987 Act and section 287A of the 1998 Act as being "in similar terms" requires a redefinition of "similar" beyond reason. The first section sets out the regime under which work capacity decisions can be reviewed. Not all work capacity decisions involve liability disputes. If an Insurer makes a decision to cut off benefits, a section 54 Notice would issue. If no change to benefits results from a work capacity decision, there would be no need for a section 54 Notice.

11. In contradistinction to this, section 287A is concerned with the review of liability decisions as set out in section 74 Notices issued under the 1998 Act. That is to say, liability *simpliciter* must always be in issue for the purposes of section 287A. There is no such requirement in section 44BB. While there exists a decision by a former Deputy President of the WCC purporting to equate section 54 Notices with section 74 Notices for the purposes of describing "dispute notices" in the context of 289(2)(a) of the 1998 Act[1], that of itself is no warrant for any assertion of general interchangability.

12. I might also take this opportunity to draw to the attention of the solicitors for the applicant that section 287A of the 1998 Act in no way contemplates multiple applications for review. It appears that an informal practice has arisen of insurers undertaking multiple reviews, but this appears to be for the purpose of avoiding litigation, which is an obligation imposed on insurers as part of the "model litigant" policy adopted by SIRA and its predecessor in title. There is no enforceable right to more than one review under section 287A.

13. The final submission praying in aid the lack of a prohibition similar to that found in section 66(1A) might be sensibly ignored altogether; however, for the purposes of completeness, I will observe that whereas section 66(1A) is a bar on making further or subsequent claims for lump sum compensation, that is claims made in addition to previous claims for such compensation, the review process in section 44BB does not address the issue of multiple claims for weekly benefits. The submission is irrelevant.

Submissions by the Insurer

[1] See *Department of Corrective Services v Bowditch* [2007] NSWWCCPD 244 (at 33) per Roche DP.

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14. The Insurer has provided submissions in response to the applicant's application. In summary, the Insurer asserts that there is no allowance in the legislation for more than one internal review, one merit review and one procedural review of a particular work capacity decision. Since the applicant concedes that the only work capacity decision made by the insurer was dated 30 November 2016 and the Insurer performed an internal review in February 2017 at the request of the applicant, and the applicant was found to be out of time in a subsequent request for merit review, there is nothing further to be done.

Decision

15. Section 44A of the *Workers Compensation Act* 1987 (1987 Act) provides that a work capacity assessment must be conducted in accordance with the Guidelines.

16. 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.

17. I am only able to review the procedures used by the Insurer in making this Work Capacity Decision. Prior to 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

18. 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

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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]

19. It follows in the present case that the Authority had no discretion to allow a review to proceed when the application was made out of time.

20. I respectfully suggest that the correct way to read the legislation is in accordance with the findings of the Supreme Court in *Bhusal.* The lack of an "ameliorative ancillary regime" is clear evidence that the legislature wanted the timelines in the legislation to be strictly observed.

21. While it is true that there is no specific prohibition in section 44BB against multiple requests for review, public policy requires an end to litigation with finality imposed either by deadlines or by decisions being made. Imagine the chaos which might ensue if a worker could endlessly seek internal, merit and/or procedural review. Given the operation of section 44BC, the "stay" which requires insurers to maintain weekly payments for the duration of section 44BB review could result in the fund being drained.

22. 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

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

RECOMMENDATION

24. The application is dismissed.

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Wayne Cooper
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30 August 2017