



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 is set out in recommendation 6114 (#61 of 2014) and need not be repeated.
2. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 16 October 2015. The Applicant had applied for internal review within the usual timeframe and the Insurer conducted an internal review, conveying the results to the applicant by letter dated 10 December 2015.
3. A dispute seems to have arisen as to whether or not the applicant had been correctly transitioned, or transitioned at all. The applicant alleges that, having read the internal review, she formed the view that there was no need for merit review, since any errors had been accepted and rectified by the insurer. She changed her mind about this in April 2017, some 16 months following receipt of the internal review outcome. She then decided to seek merit review.
4. On 26 June 2017 the applicant sought Merit Review from the Authority, which 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 July 2017.



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5. An application to this office for procedural review was received on 24 August 2017.

Submissions by the applicant

6. 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:

- The applicant acknowledges that her request for merit review was out of time;
- This is explicable on the basis that she was unaware of whether or not the decision dated 15 October 2015 had transitioned her to the new payment regime;
- She submitted that the merit reviewer should have exercised some discretion and conducted a review for the reason above.

Submissions by the Insurer

7. The Insurer notes that:
 - There is no discretion available under the Act;
 - The applicant would appear in her present application before WIRO to suggest that she was never advised that she was deemed to be transitioned. This is clearly incorrect with [the applicant] advised of same in the correspondence to her of 16 October 2015; and
 - [The applicant] has sought Merit Review with Merit Review subsequently advising that it has no jurisdiction to determine her application.



Decision

8. Section 44A of the *Workers Compensation Act 1987* (1987 Act) provides that a work capacity assessment must be conducted in accordance with the Guidelines.
9. 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.
10. 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

11. 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 838¹. 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]

12. 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.

¹ The decision is currently under appeal and is case number 2017/193405 on the Court of Appeal. Until such time as an appeal is determined, the law remains as stated by Button, J.



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13. 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.

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

16. The application is dismissed.

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

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
26 September 2017