



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 seeks procedural review of a work capacity decision made by the Insurer on 11 July 2014. The decision informed the applicant that her weekly payments of compensation would cease from 19 October 2014. The applicant requested an internal review by the Insurer on 10 June 2015 and the Internal Review Decision was dated 21 July 2015. That decision confirmed the original work capacity decision.
2. The applicant applied for Merit Review by the Authority on 20 October 2015. The Authority delivered its decision dated 17 November 2015. The Authority made a decision that the Application for Merit Review was not made within 30 days after the applicant received the Insurer's decision on Internal Review and was therefore not in compliance with Section 44BB(3)(a) of the *Workers Compensation Act 1987* (1987 Act). The Authority concluded that it had no jurisdiction to undertake a review of the work capacity decision dated 11 July 2014.
3. The applicant then made an application to this office for procedural review by way of application dated 16 December 2015. I am satisfied that this application has been made within time and in the proper form.
4. On 1 September 2010 the applicant suffered injury to her left knee and lumbar spine arising from her duties as an assistant manager with the employer. The applicant underwent a L4/5 lumbar discectomy on 22 June 2012.
5. On 23 September 2014 the applicant underwent a L4/5 and L5/S1 fusion. I note that the Insurer had declined liability for the surgery on the basis that it was not reasonably necessary. The applicant had the



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surgery performed separate to her present claim. Since that time the applicant has been certified as having no work capacity.

6. At the time of the work capacity decision was made on 11 July 2014 the applicant was in receipt of weekly payments of compensation.
7. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the WorkCover Work Capacity Guidelines (Guidelines).

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 has applied for a procedural review making the following submissions:
 - The work capacity decision was dated 11 July 2014. The Insurer’s notice relied upon various medical and other evidence dating through to June 2014. On 23 September 2014 the applicant underwent a fusion at L4/5 and L5/S1. Since that time the applicant has remained totally unfit for work. The Insurer denied liability for the surgery;
 - The applicant’s capacity for work changed significantly between the time of the Insurer’s 11 July 2014 notice of the Work Capacity Decision and the date it took effect on 19 October 2015;
 - The applicant submits that it was not sufficient for the Insurer to rely upon the denial of liability for surgery without fully re-evaluating the Work Capacity Decision having regard for her change in circumstance;
 - The application for Internal Review was provided to the Insurer under cover letter of a legal provider dated 10 June 2015. The Insurer responded directly to the applicant and failed to notify her solicitor of the result. A direct consequence of the decision not being communicated to the applicant’s legal representative was that the 30 day period for Merit Review had expired prior to the application being made; and



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- An application for Merit Review was submitted to the Authority in any event. It was unsuccessful on the ground that the Merit Review Officer concluded that the Authority lacked jurisdiction to consider the application as it had not been submitted within 30 days of the Insurer's decision.

Submissions by the Insurer

9. The Insurer made submissions dated 23 December 2015 in response to this application. The Insurer has submitted:

- At the time of the Work Capacity Decision dated 11 July 2014 the Insurer took into consideration the information available at the time;
- The Insurer denied liability for the surgery performed in 2014 on the basis that it was not reasonably necessary;
- The Insurer sent the notice to the applicant advising of its Internal Review Decision in accordance with Guideline 7.2.7 of the Work Capacity Guidelines;
- Section 44BB(3)(a) of the 1987 Act states that the application for review must be made within 30 days after the worker receives notice; and
- As outlined in point 26 of the decision on Application for Review by the Authority from SIRA dated 17 November 2015, the applicant did not make the Application for Merit Review by the Authority within 30 days after she was notified of the internal review decision.

Decision

10. The relevant Guidelines are dated 4 October 2013 and came into effect on 11 October 2013.

11. The applicant has submitted that her circumstances changed from the time the work capacity decision was made to the time it came into effect. The intervening factor being that the applicant underwent spinal surgery on 23 September 2014.



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12. Whilst I concede that this is a significant issue it cannot impact upon the work capacity decision which was made on 11 July 2014. The Insurer has submitted that it reviewed all relevant medical evidence that it had **on file as at the date of making the work capacity decision**. The Insurer has fulfilled its obligations in accordance with the legislation and Guidelines.
13. Any additional evidence which was obtained post the work capacity decision which the applicant may wish to submit to the Insurer should be submitted and considered in a further work capacity assessment. Guideline 4.2 notes that a work capacity assessment may be conducted at any stage throughout the life of a claim. Depending upon the outcome of the assessment it may lead to the making of a work capacity decision.
14. In respect of the applicant's submission that it is not sufficient for the Insurer to rely upon the denial of liability for the surgery without re-evaluating the work capacity decision I refer to Section 43 of the 1987 Act which clearly states that a decision about a liability dispute for weekly payments or a medical dispute are not work capacity decisions. Therefore this submission is not relevant in this instance.
15. The Applicant's main submission remains, as it was at Merit Review, that as the Insurer sent the Internal Review Decision to the applicant and not her legal representative the Insurer has not properly complied with its obligations and it is this action by the Insurer which caused the applicant to be late in making her application for Merit Review.
16. The Internal Review Decision of the Insurer was dated 21 July 2015. The applicant concedes that she received a copy of the Internal Review Decision by regular mail within a week of the date of the decision.
17. I note the Authority declined to perform a Merit Review on the basis that the applicant failed to make the application for Merit Review within the 30 day period as required by Section 44BB(3)(a) of the 1987 Act.
18. I have considered the applicant's submissions in respect of procedural error discussed above at paragraphs 11 to 14. I do not consider that the issues raised by the applicant constitute procedural error.



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19. As the application for procedural review is dismissed there is no cause for me to consider the issue of jurisdiction.

RECOMMENDATION

20. The application for procedural review is dismissed.

Tracey Emanuel
Delegate of the Workers Compensation
Independent Review Officer
18 January 2016