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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 is an injured worker with high needs. He sustained a left knee injury on 4 September 2014. The Insurer accepted liability and made weekly payments for all relevant periods.

2. In a work capacity decision dated 15 June 2017 the Insurer made the following statement:

> On assessment of the available information we consider for the purposes of section 59A of the 1987 Act, your permanent impairment may result in an assessment of more than 20%.
>
> - You are therefore considered to be a 'worker with high needs' as per section 32A of the 1987 Act.

3. Despite what appears above, the insurer went on to find that the applicant had current work capacity and could in fact work for 8 hours per day, 5 days per week as either a Dispatch Clerk, Sales Assistant (Hardware) or Light Delivery Driver. The finding was consistent with current certification from the applicant's Nominated Treating Doctor.

4. Under section 38(7) the applicant's entitlement to weekly compensation would be recalculated, down from $618.40 to $0.00. The effective date of the decision was said to be 23 September 2017. This is in excess of the notice required under section 54(2)(a).

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5. An Internal Review Decision was dated 24 July 2017. It varied the original Work Capacity Decision in peculiar, unpredictable ways. First, the applicant was suddenly found to have an injury which "resulted in a degree of permanent impairment assessed to be 10% or less." This is not only incompatible with the original decision, it is also based on no disclosed evidence. Consequently the insurer advised that any entitlement to ongoing medical expenses would cease as at 23 September 2019. This also contradicts the advice in the original decision to the effect that the applicant would have access to medical and related expenses unlimited by time. Secondly, the insurer advised that the applicant would be entitled to continue to receive weekly payments "until 15 June 2017 as per the work capacity decision." This is nonsensical, since the work capacity decision specified that payments would continue until 23 September 2017, not 15 June 2017.

6. Unsurprisingly, the applicant sought Merit Review from the Authority. The application was dated 30 August 2017 and was received by SIRA on 1 September 2017. This was unfortunate, since the internal review was dated 24 July 2017 (a Monday) and by virtue of the *Interpretation Act* 1987 the applicant would be deemed to have received the decision by post on Friday 28 July 2017. Since the Act requires a Merit Review application to be made "within 30 days" of receipt of the Insurer's internal review decision, the last date on which an application could have been validly made would have been 26 August (there being 31 days in July). The Authority therefore rejected the application on the grounds that it was made out of time and therefore the Authority had no jurisdiction. The reasons were clearly and fully set out in paragraphs 15-22 of the Authority's anomalously named "Decision on application for merit review by the Authority" dated 25 September 2017.

7. The summation of the law appearing in the Authority's document accords with the Supreme Court decision on similar facts in ***Bhusal v Catholic Health Care*** [2017] NSWSC 838. Put shortly, the Authority has no power to accept an application made more than 30 days after the worker receives the internal review decision. To allow for such a power would be to grant the Authority a discretionary licence it does not have under the Act.

8. It follows that the Authority was correct to reject the application and had no alternative open to it.

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9. The applicant made an application to this office for procedural review received on 30 October 2017. I am satisfied that the application has been made within time and in the proper form.

10. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the relevant *Guidelines*.

Decision

11. For the reasons already set out, the Authority did not and could not conduct a merit review. Section 44BB(1)(c) relevantly says:

> 44BB Review of work capacity decisions
>
> (1) An injured worker may refer a work capacity decision of an insurer for review:
>
> (c) to the Independent Review Officer (as a review only of the insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer in making the decision), ***but not until the dispute has been the subject of*** internal review by the insurer and ***merit review by the Authority.*** [emphasis added]

12. The inability of the Authority to accept the application for merit review has the consequence that procedural review is also not open to the applicant. This is particularly unfortunate in this case, given the absurdity of the insurer's internal review decision. Despite what follows, it would be highly desirable for this insurer to revisit its internal review decision and re-examine the findings referred to in paragraph 5 *supra.*

Finding

13. The Authority could not conduct a merit review due to a want of jurisdiction because the application was made out of time. It follows that this office has no power to conduct a procedural review, because it is a requirement of section 44BB(1)(c) that a merit review must have preceded any procedural review.

RECOMMENDATION

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14. The application is dismissed.

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Independent Review Officer
24 November 2017