

**RECOMMENDATION FOLLOWING AN APPLICATION FOR REVIEW OF THE INSURER'S WORK CAPACITY DECISION PURSUANT TO SECTION 44(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 13 November 2013. The insurer advised the applicant that his weekly payments of compensation would cease on 21 February 2014.
2. For unknown reasons the Insurer issued a section 74 Notice declining liability to make weekly payments on 18 November 2013.
3. The applicant did not seek internal review of the work capacity decision dated 13 November 2013 until 10 December 2014. On 22 December 2014 the Insurer announced that it would not conduct an internal review on the following grounds:

“As the request has been made out of time, it is not able to be actioned.”<sup>1</sup>

4. The applicant sought Merit Review from the Authority on or about 16 January 2015. That application was validly made, because more than 30 days had elapsed since the request for internal review and the insurer had failed to conduct that review.
5. The Merit Review Service of the Authority wrote to the applicant on 23 February 2015 and made the following observations in the course of declining to conduct a review:

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<sup>1</sup> While this statement is clearly incorrect, since under the relevant legislation there is no such thing as being “out of time” to request internal review, it may have been based on the version of the *WorkCover Guidelines* which did require internal review to be requested “within 30 days” of receipt by a worker of a work capacity decision. That misleading *Guideline* has now been corrected.

“In my view the decision to decline liability for your claim in the notice issued on 18 November 2013<sup>2</sup> is a decision to dispute liability for weekly payments of compensation and a decision that can be the subject of a medical dispute, and fall under section 43(2)(a) and (b) of the 1987 Act respectively, therefore not amenable to review by the Authority.

“I acknowledge that a work capacity decision under section 43 of the 1987 Act has been made on your claim, however, this work capacity decision pre-dates the decision to decline liability. Accordingly, the Authority is unable to go behind the decision of the Insurer to decline liability and conduct a merit review of the Insurer’s work capacity decision.

“Therefore the Authority does not have the jurisdiction to conduct a merit review in your matter.”

6. The applicant applied to this office for procedural review on 25 March 2015. I am satisfied that the applicant has made the application for procedural review in the proper form.

### **Submissions by the applicant**

7. 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 has requested a procedural review and has relied on the same submissions made in the application for internal review. As such, they go exclusively to the merits of the claim and are irrelevant to procedural review.

### **Submissions by the Insurer**

8. The Insurer has not made submissions in response to this application.

### **The Decision**

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<sup>2</sup> The section 74 Notice referred to in paragraph 2 *supra*.

9. Section 54(2)(a) of the 1987 Act requires at least three months and four working days notice be given if payments are being reduced or ceased having regard to Section 76(1)(b) of the *Interpretation Act 1987*. In this decision the Insurer has referenced and explained both sections of each piece of legislation. As a result the applicant was advised that his payments would cease from 21 February 2014. This is in excess of the required notice period. The Insurer has complied with the legislation and relevant Guideline.
10. Guideline 5.3.2 requires the Insurer to explain the relevant entitlement periods. These have all been carefully and fully explained.
11. Guideline 5.3.2 also requires the insurer to advise the applicant of the impact the decision has on his entitlement to medical and related treatment expenses. The Insurer has referenced Section 59A(2) of the 1987 Act and advised the applicant that his entitlement to medical expenses will cease 12 months after her entitlement to weekly payments. The provisions of Section 59A(3) were also explained. The Insurer has complied with the Guideline. Given the present uncertainty that surrounds Section 59A of the 1987 Act<sup>3</sup> as evidenced by conflicting views from the Workers Compensation Commission it is unlikely the insurer could do any more in the present case.
12. The insurer has also informed the applicant that support would continue to be provided to assist the applicant to return to work for the duration of the notice period. This is in accordance with the Guidelines.

### **The preliminary question.**

13. It remains to determine what to do about the want of a merit review which was not conducted by the Authority in this case. Section 44(1)(c) is very clear in stating that procedural review may not occur “until the dispute has been the subject of internal review by the insurer and merit review by the Authority.” There has been no review by the Authority on the grounds set out in paragraph 5 *supra*.

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<sup>3</sup> See *Vella v Penrith City Council* [2014] NSWCC 363; *Brassaud v Chubb Fire Safety Ltd* [2014] NSWCC 202; and latterly *Flying Solo Properties Pty Ltd t/as Artee Signs v Collet* [2015] NSWCCPD 14.



14. Whether or not the grounds relied upon by the Authority for failing to undertake a merit review are regarded by others as fallacious or completely correct is of no moment: in my view, the simple finding by the Authority that it lacked jurisdiction to conduct a merit review is sufficient to preclude any subsequent procedural review by this office.
15. On the basis that this conclusion proves to be incorrect, I make the following finding and recommendations in any event.

### **Finding**

16. There are no procedural errors identifiable in the decision. The insurer has complied with the Guidelines and relevant legislation.

### **RECOMMENDATION**

17. The application for procedural review is dismissed.

Wayne Cooper  
Delegate of the WorkCover Independent Review Officer  
15 May 2015