



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. On or about 1 September 2017 the applicant claims to have suffered bilateral wrist injuries while working in the role of night filler. These injuries are said by the applicant to incapacitate him. The insurer accepted liability but made no payments for all relevant periods. The applicant held two other jobs at the same time as the one at which he suffered injury.
2. On 17 October 2018 the insurer made a work capacity decision, finding that the applicant had an ability to earn \$1,102.00 per week in suitable employment, but had a PIAWE of only \$383.77. Accordingly, the applicant was advised that his weekly compensation entitlement would remain \$0.00 and that this decision would take effect immediately.
3. The applicant sought internal review. On 11 December 2018 the insurer sent to the applicant a notice advising that the earlier work capacity decision had been affirmed following internal review.
4. The applicant sought merit review by the Authority, with the application received on 10 January 2019. For reasons which will become apparent, I note at this point that the Authority made findings on 11 February 2019. In a notice dated 11 February 2019, the Authority made the following findings and recommendation:

Findings:

- The applicant has 'current work capacity' as defined in section 32A of the 1987 Act;
- The applicant's PIAWE is \$754.47; and
- The applicant has an entitlement to weekly payments of compensation calculated to be nil.



Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

Recommendation:

- The insurer is to determine the applicant's entitlement to weekly payments of compensation (if any) having regard to the finding that the amount of PIAWE is \$754.47.
5. An application to this office for procedural review was received on 17 June 2019. I am not satisfied that the application has been made within time.

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 has provided the following 'submissions:'
- The applicant maintains that the decision of the merit review service or a subsequent decision by the insurer dated 16 February 2019 were not sighted by him until he looked at the MRS Portal on 16 June 2019 and found it there.
 - He insists that his inability to perform pre-injury tasks with this employer is all due to the injury to his forearms suffered on 1 September 2017.
 - He makes other statements, but this is all I need repeat for current purposes.
7. It is a matter of considerable interest that the applicant makes no reference at any stage to the prior injury he sustained to his right forearm in 2011, which was serious enough to require surgery in 2012, and from which the applicant told this office he had not fully recovered in 2015 (see WIRO recommendation 14815).

Submissions by the Insurer

8. When advised by me that the applicant alleged no receipt or sight of the merit review decision or subsequent insurer decision until June 2019, the Insurer sent the following reply:



Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

I understand the worker concerns however according to our file notes on the claim file, dated documentation etc it was all completed on 18th February, mailed to the correct home address as well as multiple phone contacts with [the applicant] on 15 Feb, 18 Feb & 19 Feb respectively

On 22nd March, we received a call to a case manager from [the applicant] and the notes indicate he discussed his submitted review of his WCD at the time, which would confirm it was previously received.

Decision

9. A precautionary check with the Authority revealed that they forwarded the merit review outcome to the applicant's email address on 12 February 2019 as well as posting a copy to his residential address.
10. In the circumstances it is more than tolerably clear that the applicant is out of time. The legislation requires an application for procedural review to be made to this office within 30 days of receipt of the merit review outcome. Under the postal service rules the applicant would have been deemed to receive the merit review no later than late February 2019 and he did not apply to this office for procedural review until mid-June. Further, the merit review service has a record which I have seen showing that the outcome was emailed to the applicant's current email address on 12 February 2019.
11. If, instead of the merit review outcome, the applicant is in fact complaining of non-receipt of a subsequent work capacity decision by the insurer, any such decision cannot be the subject of review by this office. Any such decision would need to go through internal review and then proceed to the Workers Compensation Commission, in line with legislative amendments which came into effect on 1 January this year.
12. It follows that I have no power to conduct a procedural review in this case.

Finding



Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

13. The application for procedural review was made out of time. Accordingly this office has no power to conduct a review.

RECOMMENDATION

14. The application is dismissed.

A handwritten signature in blue ink, appearing to read "Wayne Cooper", with a long horizontal flourish extending to the right.

Wayne Cooper
Delegate of the Workers Compensation
Independent Review Officer
18 July 2019