

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.**

Background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 18 November 2014.
2. That decision followed an earlier recommendation from this office reported as 11014 (or 110 of 2014), which had overturned an earlier work capacity decision on procedural grounds.
3. The applicant was advised that his weekly payments would continue until 2 March 2015, but from 3 March 2015 he would receive no further weekly payments.
4. The applicant sought an internal review by the Insurer. The internal review decision was issued by the Insurer on 7 January 2015, upholding the decision dated 18 November 2014.
5. The applicant sought merit review on 6 February 2015. A recommendation was issued on 13 March 2015. The decision of the Insurer was affirmed.
6. A screen-shot of a signed application for procedural review, ostensibly dated 13 April 2015, was received in this office on about 16 April 2015.

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 totality of the applicant's submissions are as follows:

- The applicant seeks review of the Insurer’s “review” (possibly a reference to Internal Review).
 - He seeks “also a review of NSW WorkCover’s review decision” (a likely reference to the Merit Review recommendation).
 - The basis for the above two submissions appears to be that this office had detected previous breaches of the *Guidelines* and relevant legislation.
 - The final submission is in these words: “As well there has been gross incompetence in these reviews.”
8. None of these are grounds for review, since this office cannot review the “reviews” of WorkCover and the only consideration I can have is for the procedures adopted by the Insurer in making the original work capacity decision.

Submissions by the insurer

9. The Insurer made the novel submission that the applicant was out of time, since the date of the merit review recommendation was 13 March 2015 and the applicant had not applied for procedural review within 30 days of that date. Even if it is accepted that the application was dated 13 April 2015, that is not “within 30 days” of the date of the merit review decision.
10. Unhappily for this submission, the correct test is not whether or not the applicant seeks procedural review within 30 days of the date of the merit review recommendation, but whether it is within 30 days of receipt by the worker of the merit review recommendation. As the Insurer is aware the applicant lives in a remote location and it has been a feature of the correspondence from the Insurer to the applicant that phrases such as “we attempted to contact you unsuccessfully” and “there were further attempts ... without success” appear regularly. I am therefore inclined to accept that the applicant did not receive the merit review recommendation on the date it was issued.
11. It is surprising that the Insurer made no positive submissions in support of its decision.

The Decision

12. The first decision of the Insurer which was overturned by this office was replete with procedural errors, which seem to have been addressed in the course of the decision dated 18 November 2014.
13. The applicant was advised of the dates on which both work capacity assessments were conducted (first 6 June 2013, most recently 13 November 2014). This is properly done.
14. The notice period in section 54(2)(a) is fully set out and explained. It was also complied with.
15. Section 43 of the 1987 Act is relevantly extracted and explained.
16. There is a correct and coherent explanation of the operation of section 59A(2) and (3).
17. The applicant was advised that since he had received 438 weeks of compensation he was subject to section 38, which was in turn explained fully and with some clarity. The operation of section 38(7) and section 38(3) were particularly set out and explained.
18. The calculation of PIAWE was properly explained.
19. The concept of suitable employment was set out and explained, with the legislation relevantly referenced.
20. The evidence on which the Insurer based its findings was clearly set out, as required by the *WorkCover Work Capacity Guidelines*.
21. The reasoning process of the Insurer was set out and explained clearly.
22. It appears that the Insurer has fully complied with the legislation and Guidelines.

FINDING



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23. I find that the Insurer has implemented the procedures as set out in the WorkCover *Guidelines* which is required by Section 44A of the 1987 Act. The Insurer has also followed and correctly applied the 1987 Act and the *Workers Compensation Regulation 2010*.

RECOMMENDATION

24. The application for procedural review is dismissed.

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