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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 seeks procedural review of a Work Capacity Decision made by the Insurer on 5 May 2015. The Decision advised the applicant that his weekly payments of compensation would cease on 11 August 2015. The applicant requested an internal review and the Internal Review Decision was dated 3 September 2015. That decision informed the applicant that his weekly payments of compensation would not cease but rather would be reduced to \$209 per week and re-commence from 3 September 2015.
2. The applicant sought Merit Review from the Authority by way of application dated 23 November 2015. The Authority delivered its decision dated 4 December 2015 stating that the application for review was not made within 30 days after the applicant received notice in the form approved by the Authority of the Insurer's decision on internal review. Therefore, the application for merit review was not made in accordance with Section 44BB(3)(a) of the *Workers Compensation Act 1987* (1987 Act) and the Authority does not have jurisdiction to undertake a review of the Work Capacity Decision.
3. The applicant then applied to this office for procedural review by way of application dated 16 July 2016. I am *not* satisfied that the application has been made within time and in the proper form.

##### **Submissions by the applicant**



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4. 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.
5. The applicant has made a submission that *“the WorkCover Work Capacity Guidelines were not adhered to, rendering the decision a nullity. No prior notice was given before the claim was made.”*
6. Primary submissions were received from the applicant’s solicitor dated 6 July 2016 which were directed to the WIRO solutions team (formerly called complaints) as the solicitor had not made an application for procedural review at that time. The solicitor submitted to WIRO solutions team:

*“You seem to be familiar with Sabanayagam matter.*

*If the review is conducted without prior notice, it is NOT a review.*

*That is a complaint.*

*The insurer must first follow the procedure and if it is given without following the Guideline the decision is not worth the paper it not written on.*

*Sabanayagam is an authority to say anything that purports to be a review cannot be a review since it has not followed the law, or am I reading something else.*

*Kindly read the three together, the decision of the arbitrator, that of the DP and then read the Court of Appeal, and I am sure it will possibly make sense.*

*Complaint is a statutory process and WIRO has statutory powers to set aside the decision which has NOT followed the fundamental process of lack of notice as in this case. Indeed there are dozens of cases on WIRO website where such reviews were set aside for lack of notice by directly approaching WIRO. The aggrieved cannot be subjected to nullity and void remains void and we request you to call it void and you have the jurisdiction to do so. There is no need for review to SIRA for it, if you find it to be a nullity and non-existent. You may need to ascertain if any notice, a statutory sine qua non for capacity review, was ever given and we submit it was not. It is called due*



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*process and fairness and in two matters it is laid down by the Supreme Court against WIRO, the principle does apply to capacity review. I am sure you are familiar with the cases reported in 2015, The Trustees of Sisters of Nazareth v Simpson and CSR Ltd v Burbridge where WIRO's contention the review process was not subject to the rules of procedural fairness was rejected." (sic)*

7. The WIRO Application for Procedural Review of Work Capacity Decision and further submissions were then received from the applicant's solicitor on 18 July 2016 submitting the following;

*"based upon the argument raised raised below the impugned decision was a nullity.*

*Forms, technicalities and formal procedures are not required under s44BB(3) of 1998 Act by IRO, I may add to review a nullity, as WIRO has informed itself of it.*

*The complaint resolution powers under WIM Act, it is submitted, are also assisting WIRO to overcome such technicalities." (sic)*

8. The solicitor has stated in his first submission that *"there are dozens of cases on WIRO website where such reviews were set aside for lack of notice by directly approaching WIRO."*
9. This is incorrect. All procedural review recommendations which have been published on the WIRO website resulted from applicants completing and submitting the *WIRO Application for Procedural Review of Work Capacity Decision*. WIRO does not perform a procedural review of any Work Capacity Decision without first receiving this application.
10. Section 44BB(3)(a) referred to by the applicant's solicitor is actually contained in the *Workers Compensation Act 1987* not the *Workplace Injury Management and Workers Compensation Act 1998*.
11. The remainder of the submissions are not relevant for the reasons below.



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### Submissions by the Insurer

12. The Insurer has made submissions by email dated 19 July 2016. The Insurer submitted that the Merit Review Recommendation was dated 4 December 2015 and based upon this the applicant failed to lodge his application for Merit Review within 30 days in accordance with Section 44BB(3)(a) of the 1987 Act and therefore his application should be rejected.

### Decision

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

14. Section 44BB(3)(a) of the 1987 Act states:

*(3) The following provisions apply to the review of a work capacity decision when the reviewer is the Authority or the Independent Review Officer:*

*(a) an application for review must be made **within 30 days after the worker receives notice in the form approved by the Authority of the insurer's decision on internal review of the decision (when the application is for review by the Authority) or the Authority's decision on a review (when the application is for review by the Independent Review Officer).***  
(emphasis added)

15. The decision of the Authority was dated 4 December 2015. The applicant's application for procedural review was dated 16 July 2016. The application was not made within *30 days of receipt* by the applicant of the decision of the Authority.

16. Section 44BB(3)(a) of the 1987 Act does not allow for discretion.

17. The applicant has failed to comply with the provisions of Section 44BB(3)(a) in seeking a procedural review of the Work Capacity Decision and as a result I do not have any jurisdiction to perform the procedural review.



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## **FINDING**

18. WIRO does not have jurisdiction to undertake a procedural review of the Work Capacity Decision dated 5 May 2015.

## **RECOMMENDATION**

19. The application is dismissed.

A handwritten signature in black ink that reads "T. Emanuel".

Tracey Emanuel  
Delegate of the Workers Compensation  
Independent Review Officer  
4 August 2016