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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 25 February 2016. The Decision advised the applicant that her weekly payments of compensation would cease on 1 June 2016. The applicant requested an internal review on 23 March 2016 and the Internal Review Decision was dated 29 April 2016. That decision confirmed the Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application dated 7 June 2016. The Authority delivered its decision dated 30 June 2016 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.
3. 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.
4. The applicant then applied to this office for procedural review by way of application dated 25 July 2016. I am satisfied that this application has been made within time and in the proper form.

Submissions by the applicant



5. 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.
6. The applicant has made submissions that she advised the Insurer on 22 April 2016 that she would be overseas for the period 23 April 2016 to 2 June 2016. The Internal Review Decision was dated 29 April 2016. The applicant did not receive the Internal Review Decision until she returned from her holiday on 2 June 2016.
7. The applicant stated that upon her return and receiving the Internal Review Decision she contacted a lawyer about “*whether there was any other avenues I could take.*” In accordance with the lawyer’s advice the applicant stated she completed an “*Application for External Review by SIRA*” and sent this to the Authority on 7 June 2016. I assume this is the application for Merit Review.
8. The Authority declined to perform the review as the application was not sent within 30 days of receipt of the application of the Internal Review Decision from the Insurer. The applicant did not make any submissions to the Authority in respect of the reasons why her application was submitted out of time.
9. The applicant is now requesting a procedural review.

Submissions by the Insurer

10. The Insurer has provided written submissions in addition to emailed submissions dated 28 July 2016. Of interest I note that the applicant’s application for internal review of the Work Capacity Decision was actually sent to the Insurer by a solicitor. I note this is the same solicitor that the applicant contacted upon her return from holiday to ascertain what she should do with the Internal Review Decision.
11. As the applicant had submitted the application for internal review via a solicitor the Insurer, on 29 April 2016, issued to the applicant, care of her solicitor, an Internal Review Decision.



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12. The Insurer submits that as the Authority concluded that there was no jurisdiction to undertake a Merit Review, the worker is not permitted to make an application for procedural review, and WIRO does not have jurisdiction or power to undertake a procedural review of the Work Capacity Decision dated 25 February 2016.

Decision

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

14. In the circumstances of the present case the applicant was the subject of a Work Capacity Decision dated 25 February 2016. An application for internal review of the application was sent to the Insurer by the applicant's solicitor on 24 March 2016.

15. The applicant says in her statement that on 22 April 2016 she contacted the Insurer to advise them that she would be going overseas on a holiday for the period 23 April 2016 to 2 June 2016 and if they could direct all correspondence to her overseas or alternatively "hold off" until she returns to Australia.

16. On 29 April 2016 the Insurer issued an Internal Review Decision and sent it to the applicant, care of her solicitor, as it was the solicitor who had corresponded with the Insurer in respect of the internal review.

17. The applicant stated that it was not until her return to Australia on 2 June 2016 she became aware of the Internal Review Decision. She then contacted a lawyer and sent the application for Merit Review to the Authority dated 7 June 2016. By way of Decision dated 30 June 2016 the Authority concluded that it did not have jurisdiction to undertake a review of the Work Capacity Decision.

18. 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:



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(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).

19. The applicant is permitted to make an application for procedural review and has done so within time and in the proper form. The issue is whether WIRO can perform a procedural review in the circumstances of this case and that the Authority has made a decision that it has no jurisdiction to perform a Merit Review.
20. The applicant was aware that her Work Capacity Decision was in the review process at the time that she went on holiday. The Insurer was not in a position to delay their response until her return to Australia as they would have been in breach of the Guidelines and legislation.
21. I do note that the applicant had a solicitor submit the application for internal review on her behalf. The Insurer then sent the Internal Review Decision to the solicitor acting in the interests of the applicant. The Insurer had discharged its obligation to notify the applicant of the Internal Review Decision.
22. I do not accept with the Insurer's submission that as the Authority has concluded that it has no jurisdiction to perform a Merit Review that it automatically follows that WIRO has no jurisdiction to perform a Procedural Review. The more relevant issue is that the process of going to the Authority for Merit Review must be completed before an application is submitted to WIRO for procedural review. As Section 44BB(1) states that an injured worker may refer a work capacity decision for review to the Independent Review Officer but not *until* the *dispute* has been the subject of merit review.
23. The word "until" makes it a temporal requirement that both internal review and merit review precede an application for procedural review. It cannot be a requirement of the Act that both internal review and merit review produce decisions or recommendations, since it is actually stated in section 44BB(3)(b) that failure by an insurer to conduct an internal review



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and advise the worker of the outcome within 30 days is grounds for an applicant to seek merit review.

24. If the argument put forward by this insurer were accepted, it would mean that a worker could apply for merit review due to the absence of an internal review, but the same worker could not then apply for procedural review because of the same reason. This argument is, to say the least, fatuous and illogical.

25. In the present case the applicant had referred the dispute to the Authority for Merit Review and the Authority had made a Decision. The applicant is then entitled to make an application for Procedural Review in accordance with Section 44BB of the 1987 Act.

26. However, in the present case I accept that the applicant has not complied with Section 44BB(3)(a) of the 1987 Act and she is in breach of the review process. Therefore a procedural review cannot be performed.

FINDING

27. WIRO does not have jurisdiction to undertake a procedural review of the Work Capacity Decision dated 25 February 2016.

RECOMMENDATION

28. The application is dismissed.

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

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