

## **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 19 April 2013. The insurer advised the applicant that his weekly payments of compensation would cease from 19 July 2013. The applicant sought internal review on 3 May 2013 and the Internal Review Decision was dated 3 June 2013 confirming the cessation of the applicant's weekly compensation payments.
2. The applicant then sought Merit Review from the Authority on 20 March 2015 and they delivered a decision dated 30 April 2015. The Authority's finding on page 1 was that the applicant did not meet the special requirements under Section 38 of the *Workers Compensation Act 1987* (the 1987 Act) and was therefore not entitled to ongoing weekly payments of compensation. However, at page 8 of the decision the delegate found that the applicant did meet the special requirements of that section however, his entitlement was nil.
3. The applicant applied for procedural review by way of application dated 3 May 2015.

#### **The Decision**

4. Section 44 of the 1987 Act regulates the review of work capacity decisions. Section 44(1)(c) stipulates that I can only review the insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer in making the decision but not until the dispute has been the subject of internal review by the insurer and merit review by the Authority. Therefore I am to ensure that the proper procedures have been followed up to and including the application for procedural review being made.

5. Section 44(3) of the 1987 Act states that the following provisions apply to the review of a work capacity decision when the reviewer is the Authority or 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),*

*(b) an application for review by the Authority may be made without an internal review by the insurer if the insurer has failed to conduct an internal review and notify the worker of the decision on the internal review within 30 days after the application for internal review is made,”*

6. The applicant is seeking review of a work capacity decision dated 19 April 2013. The applicant correctly applied for internal review on 3 May 2013. The insurer performed an internal review dated 3 June 2013. The applicant then applied for merit review by the Authority on 20 March 2015. This is quite clearly outside the 30 day period stipulated in Section 44(3)(a) of the 1987 Act. In order for the procedural review to take place the merit review by the Authority must be valid.
7. At paragraph 16 of the merit review decision from the Authority the delegate states *“No issues have been raised in the submissions or in the other materials before me about the validity of the application for review by the Authority.”* As a procedural issue it is not incumbent upon the parties to raise the issue of *“validity of the application”* when the application does not comply with the Section of the Act which regulates when such application must be made.
8. The Authority has erroneously assumed jurisdiction and their merit review was not allowable under the Act. As the merit review application was not validly made and did not follow proper procedure it follows that procedural review cannot be performed due to Section 44(1)(c) of the 1987 Act.



### **Finding**

9. The application which the applicant made for merit review was not in accordance with Section 44 of the 1987 Act and amounted to a procedural error. It therefore follows that procedural review cannot occur as the preceding step required by Section 44(1)(c) (being that the application for merit review must be made within 30 days of receipt of the insurer's internal review decision) has not been complied with.

### **Recommendation**

10. The application for procedural review is dismissed.

Tracey Emanuel  
Delegate of the WorkCover Independent Review Officer  
9 June 2015