



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 for procedural review is dismissed.

Introduction and background

1. The applicant seeks procedural review of a Work Capacity Decision made by the Insurer on 1 March 2016. The Decision advised the applicant that his weekly payments of compensation would cease on 16 June 2016. The applicant requested an internal review on 4 April 2016 and the Internal Review Decision was dated 22 April 2016. That decision confirmed the Work Capacity Decision.
2. The applicant sought Merit Review from the Authority by way of application dated 30 May 2016 received 31 May 2016. The Authority delivered its decision dated 23 June 2016 stating that the application for review was not made within 30 days after the applicant received notice 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 and received 1 August 2016. I am *not* satisfied that this application has been made within time and in the proper form.
5. The applicant previously sought a review of a Work Capacity Decision dated 28 May 2014. The applicant was successful and the Work Capacity Decision was set aside by an earlier recommendation of this office.¹

¹ Reported and numbered as 22814



6. The facts and circumstances surrounding the background of this claim are set out in the aforementioned recommendation and need not be repeated.
7. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the WorkCover Work Capacity Guidelines (Guidelines).

Submissions by the applicant

8. 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.
9. The applicant has made submissions that his weekly payments ceased abruptly and he has not been able to obtain employment despite his various applications. He is seeking reinstatement of his compensation payments until he obtains paid employment.
10. I am unable to consider the personal circumstances of the applicant or the state of the labour market. I am only able to review the procedures of the Insurer in making the Work Capacity Decision.

Submissions by the Insurer

11. The Insurer has provided submissions by email dated 9 August 2016. The Insurer noted that the Authority had declined to perform a Merit Review as the applicant’s application was made out of time.
12. Furthermore, the Insurer submitted that the applicant’s payments did not cease “abruptly.” The Work Capacity Decision was dated 1 March 2016 and the applicant’s payments ceased on 16 June 2016. The Insurer submitted that this notice period was actually in excess of that required by Section 54(2)(a) of the 1987 Act and Section 76(1)(b) of the *Interpretations Act 1987*. I note that the Insurer’s submission is correct on this point.

Decision



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

14. The Authority declined to perform a Merit Review of the Work Capacity Decision dated 1 March 2016 as the applicant had not made the application for review within the required 30 day time frame in Section 44BB of the 1987 Act.

15. 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).

16. In this case the Authority's decision declining to perform a review was dated **23 June 2016**. The applicant is required to make an application for procedural review within **30 days of receipt** of that decision. The applicant's application for procedural review was dated **1 August 2016**. It was received by this office on that day.

17. I note that the letter from the Authority notifying the applicant of the Merit Review decision was sent by email and by post. Even if a period of four clear business days is allowed for the applicant to receive the Authority's decision by mail (in accordance with Section 76(1)(b) of the *Interpretations Act 1987*) the applicant has still *not* made the application for procedural review within 30 days.

18. The applicant is aware of the procedures required to seek a Merit Review and Procedural Review as he was previously successful in the review process.



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19. In the present case the applicant has not complied with Section 44BB(3)(a) of the 1987 Act and he is in breach of the review process. Therefore a procedural review cannot be performed.

FINDING

20. WIRO does not have jurisdiction to undertake a procedural review of the Work Capacity Decision dated 1 March 2016.

RECOMMENDATION

21. The application for procedural review is dismissed.

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

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