



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 work capacity decision made by the Insurer on 26 July 2017 is set aside.
- b. The Insurer is to make another work capacity decision after an appropriate period of fair notice is given to the applicant.

Introduction and background

1. The applicant sustained a back injury in the course of his employment as a Quality Assurance Assistant on or about 01 May 2013. The insurer accepted liability and made weekly payments for all relevant periods.
2. The Insurer wrote to the applicant on 21 June 2017, purporting to give Fair Notice of an impending work capacity decision. For reasons unexplained, the insurer repeated this exercise, sending a letter in identical terms dated 5 July 2017.
3. The words "**Work Capacity Decision – Fair Notice**" appear in bold as a heading to both letters. In the first letter the following paragraph appears:

[The Insurer] wishes to provide an opportunity for you to supply any further information you believe relevant to a decision about your capacity to work. We request that this information be received before 05/07/2017 so [the Insurer] can consider the information when making our final decision which will then be communicated to you accordingly.

4. In the second letter, the only variation is that the date appearing as a deadline for the provision of further information is given as 20/07/2017. Otherwise both letters are identical, although they were signed by different case officers.



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5. On 26 July 2017 the insurer wrote again to the applicant, this time setting out the terms of a work capacity decision made that day. Inexplicably, one of the things the letter said was this:

As discussed [the insurer] wishes to confirm that we have undertaken a Work Capacity Assessment on 14 June 2017.

As a result of this assessment [emphasis added], we have now made a Work Capacity Decision in accordance with section 43 of the 1987 Act.

6. The Insurer has thereby admitted to making a decision based on a Work Capacity Assessment which was conducted prior to the date of both Fair Notice letters. There was no prospect of the applicant being able to influence the outcome, since the assessment had already occurred and the ultimate decision was based on that earlier assessment. It was incumbent on the insurer to give fair notice to the applicant prior to the assessment being conducted, since it was the outcome of the assessment which directed the final decision.
7. For the sake of procedural fairness the Insurer should have conducted a subsequent assessment following the effluxion of the fair notice period prior to making the final work capacity decision.
8. Although the *Guidelines* which came into effect on 1 August 2016 do not specify a hard and fast period of Fair Notice, the Insurer has in this case purported to give Fair Notice to the worker on two occasions, neither of which could result in any benefit to the applicant, since the assessment on which the decision was based had already occurred.
9. In the circumstances the applicant has clearly been denied procedural fairness and the work capacity decision must be set aside.

Finding

10. The applicant was denied procedural fairness.

RECOMMENDATION



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11. The work capacity decision made by the Insurer on 26 July 2017 is set aside.
12. The Insurer is to make another work capacity decision after an appropriate period of fair notice is given to the applicant.

A handwritten signature in blue ink, appearing to read "Wayne Cooper", with a long horizontal stroke extending to the right.

Wayne Cooper
Delegate of the Workers Compensation Independent Review Officer
09 January 2018