



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*.

1. The injured worker (the applicant) seeks procedural review of a work capacity decision made by the Insurer.
2. The applicant was employed as a scaffolder and suffered injury to his right shoulder on or about 12 January 2009. The applicant returned to work doing suitable duties. Six months later he underwent surgery to his shoulder. He has not returned to work since that time. There is no dispute about the injury having occurred in the course of employment. The Insurer paid weekly benefits for all relevant periods and therefore the applicant was an existing recipient of weekly payments of compensation immediately prior to 1 October 2012.
3. The applicant had previously received a work capacity decision on 27 March 2013. An internal review was issued on 24 May 2013. A merit review was issued on 25 June 2013. The applicant then applied to the Independent Review Officer to undertake a review of the decision. That Review is dated 6 August 2013. The decision was overturned because the Insurer failed to give 3 months notice as required by section 54 of the 1987 Act.
4. On 12 August 2013 the Insurer advised the applicant in writing of a work capacity decision which had been made on that date. He was advised that his entitlement to ongoing weekly payments of workers compensation would be terminated since he was found to have no entitlement under section 38 of the *Workers Compensation Act 1987* (1987 Act). The decision stated the following:
 - It was noted that the applicant does not currently work and has received weekly payments for considerably longer than 130 weeks.
 - No advice is given as to whether a work capacity assessment has been undertaken.

- That the fair notice telephone call had taken place on 12 March 2013.
5. On 26 September 2013 the Insurer wrote to the applicant advising that an Internal Review had upheld the original decision.
 6. The applicant applied to the WorkCover Authority for a Merit Review of the Insurer's decision on 25 September 2013 and in a recommendation dated 18 November 2013 the merit reviewer upheld the original decision of the Insurer.
 7. On 19 November 2013, the applicant requested the Independent Review Officer to undertake a review of the decision of the Insurer pursuant to Section 44(1)(c) of the 1987 Act.

The Applicant's Stated Grounds for Procedural Review

8. The applicant's grounds for pursuing procedural review are:
 - (i) The decision is 5 pages long but the applicant only received pages 1, 3, and 5. The applicant did not receive a full copy of the decision until the Insurer provided it to this office despite first bringing the matter to the attention of the insurer when seeking internal review on 19 August 2013.
 - (ii) The fair notice call of 12 March 2013 took place prior to the first decision of 27 March 2013. Much may have occurred with respect to the applicant's capacity between March and the second decision of 12 March 2013, a period of 5 months.

Submissions by the Insurer

9. The Insurer made the following submissions in response to the application:

- (i) The review of 6 August 2013 “confirmed CGU did not require a further or repeat decision of the section 43 work capacity decision already made and upheld”.
- (ii) The fair notice call took place on 12 March 2013, prior to the decision of 27 March 2013.
- (iii) The application for internal review only had pages 1, 3, and 5 of the decision attached.
- (iv) The application for merit review only had pages 1, 3, and 5 of the decision attached.

Legislation

10. Section 44(1)(c) of the 1987 Act limits the scope of procedural review to a review only of:

the insurer’s procedures in making the work capacity decision and not of any judgement or discretion exercised by the insurer in making the decision.¹

The procedures to be followed by the Insurer are set out in *WorkCover Work Capacity Guidelines (the Guidelines)*. Given the overall beneficial nature of the 1987 Act and the serious consequences to workers if decisions are made incorrectly, strict compliance with the *Guidelines* is required.

My Reasons:

11. In an email of 25 November 2013 to this office the Insurer says that the decision of 12 August 2013 was not double sided but printed single sided. I take this to be an admission that only 3 pages of the 5 page decision were sent to the applicant. If I am wrong about this admission, I accept the applicant’s assertion that he only received 3 pages. The decision was posted to him; he then sought advice from his union; the application for internal review was sent on 19 August, a week after the decision was issued.

¹ Judgement is misspelt in the Act as “judgment.”

12. Page 2 which the applicant did not receive includes the statement that the applicant had already received over 130 weeks of payments, that medical expenses would cease 12 months after weekly payments ceased, and the effect of section 38(3)(b). This error alone constitutes sufficient reason to invalidate the decision.

13. I accept that the applicant only received 3 of 5 pages. This means that the applicant has not received a valid Notice pursuant to section 54.

My Recommendation:

14. For the reasons set out above I recommend that the Insurer undertake another work capacity assessment in accordance with the *Guidelines*.

15. Since the applicant was an existing recipient as at 1 October 2012, he remains entitled to receive his pre-transition rate of weekly benefits until such time as he is validly transitioned under the Act. This cannot happen until a valid notice under section 54 is issued. Accordingly he remains entitled to his former weekly payments until he is validly transitioned and a section 54 notice issues and the relevant period of notice therein has expired.

16. Noting the binding nature of these recommendations² I recommend that the Insurer takes my views into account, and I recommend that the Insurer immediately gives effect to them.



K A Garling
WorkCover Independent Review Officer
13 January 2014

² See section 44(3)(h) of the 1987 Act – recommendations made by the Independent Review Officer are binding on the insurer and the Authority.