

**RECOMMENDATION FOLLOWING AN APPLICATION FOR REVIEW OF THE INSURER'S WORK CAPACITY DECISION PURSUANT TO SECTION 44(C) OF THE *WORKERS COMPENSATION ACT 1987*.**

1. The applicant seeks a review of the work capacity decision of the insurer.
2. The applicant was injured in the course of his employment on 29 April 2003 when he suffered injury to his cervical spine and on 9 March 2004 when he suffered injury to his lumbar spine. There is no dispute about the injury having occurred in the course of employment.
3. The Insurer completed an assessment of the work capacity of the applicant and purported to issue a notice of a work capacity decision pursuant to Section 43 of the *Workers Compensation Act 1987* ("1987 Act") on 8 February 2013.
4. The Insurer also purported to give the applicant notice pursuant to Section 54 of the *1987 Act* of the reduction of his weekly benefit to "nil." This information was contained within a letter to the applicant dated 8 February 2013, which letter enclosed a purported notice pursuant to Section 43 of the *1987 Act*.
5. On 18 March 2013 the Insurer wrote to the applicant advising of the outcome of an internal review of the decision dated 8 February 2013. The internal review upheld the original decision.
6. A WorkCover Merit Review was completed and a Statement of Reasons issued on 17 May 2013. The Reviewer upheld the determination of the Insurer.
7. On 31 May 2013, the applicant requested the Independent Review Officer to undertake a review of the decision of the Insurer pursuant to Section 44(c) of the *1987 Act*. I am satisfied that the applicant has made that application within the time provided by that section.
8. At the time of the applicant's original application, no approved form as authorised by WorkCover was available for use by injured workers

seeking procedural review. Once such a form became publicly available in late June 2013, the applicant submitted the correct form in further support of his earlier application.

## **The Legislative Framework**

9. The legislative framework which governs the entitlement to and the transition from the previous benefits is complex and must be difficult for an injured worker without legal assistance to navigate through and to understand its impact.
10. Similarly, insurers and employers may have difficulties with making and issuing notice of valid decisions.

## **Process of the Insurer**

11. The decision reached by the Insurer appears to be appropriate in the circumstances of the case. The decision maker had regard to vocational assessments and medical evidence in addition to an accurate post-injury work history of the applicant. As far as the process undertaken by the Insurer in reaching the work capacity decision is concerned, I am satisfied that there was no breach of procedural fairness and that the rules of natural justice were fully complied with. The applicant attended a vocational assessment where he was able to make comment and representations about his ability to work and he related a lengthy work history at that time which was fully considered and referred to by the Insurer in the course of making the decision.

## **My Reasons:**

12. Despite this, I remain unsatisfied on the question of notice given to the applicant under section 54.
13. In the letter to the applicant dated 8 February 2013 the Insurer advised that under section 54 of the 1987 Act the applicant's weekly payments of compensation would be reduced to "nil" as of 9 May 2013. Section 54

requires that applicants in the position of this applicant should be accorded three months clear notice prior to having their payments changed. By virtue of the postal service rule (Section 76(1)(b) of the *Interpretation Act 1987*), the Insurer was required (Section 54(4) of the 1987 Act) to give this applicant notice personally or by post.

14. Therefore in order to comply with the requirements of Section 54 of the 1987 Act a notice posted on 8 February 2013 would not permit the reduction in payments until the expiry of four working days (not including the day of posting) which would set an earliest possible date of Wednesday 15 May 2013.
15. The question which arises is whether strict compliance with the provision of the proper notice is required such as to render a non compliant notice invalid. In my view strict compliance is required for three reasons:
  - (a) The effect of a Work Capacity Decision to reduce weekly benefits payable to the injured worker has the potential to impact on that worker's ability to meet financial obligations and the time period was important to ensure that the worker could reorganise his or her affairs.
  - (b) Failure to give the proper notice is regarded so seriously in the legislation that it is an offence.
  - (c) There is no provision in the legislation which enables an insurer to amend the notice.

### **My Recommendation:**

16. I recommend that the Insurer issue a valid section 54 notice, which gives the applicant three clear months notice of variation of his weekly benefits. Such notice should include four clear working days for service by post.
17. 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.



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18. I recommend that the insurer take my views into account, and I recommend that the insurer immediately give effect to them.

KA Garling  
WorkCover Independent Review Officer  
29 July 2013