

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 employed as a Plant Operator when between 2004 and 2010 he suffered a series of frank injuries to his left shoulder, neck and thoracic spine (upper back) while driving a tractor. The most recent insult to the back and neck was either in August 2010 or December 2010 when his tractor ran into a pot-hole. After a short time off he returned to work on restricted duties four hours per day. There is no dispute about the injury having occurred in the course of employment. He was able to continue at work on suitable duties until they were withdrawn by his employer in November 2012. Thereafter the applicant has not worked for his previous employer and has been in receipt of weekly workers compensation benefits.
3. As at 1 October 2012 the applicant was an "existing recipient" of workers compensation as that term is defined in the legislation. On 5 April 2013 the Insurer completed an assessment of the work capacity of the applicant and purported to issue a notice of a work capacity decision, however in doing so made no reference to Section 43 of the *Workers Compensation Act 1987* ("1987 Act").
4. The Insurer also purported to give the applicant notice of an impending reduction his weekly benefit to "nil." This information was contained within the same letter to the applicant dated 5 April 2013, which letter also omitted any reference to Section 54 of the 1987 Act. The letter advised the applicant that his payments would cease and the decision would take effect "from 1 July 2013."
5. On 7 May 2013 the Insurer wrote to the applicant advising of the outcome of an internal review of the decision dated 5 April 2013. The internal review upheld the original decision.
6. A WorkCover Merit Review was completed and a Statement of Reasons issued on 4 July 2013. The Reviewer upheld the determination of the Insurer.

7. On 24 July 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.

Grounds of Procedural Review

8. The grounds on which the applicant seeks review are stated to be as follows:
 - (a) He remains under medical treatment and believes the decision is premature;
 - (b) The work for which he is said to be suitably qualified is both unavailable and beyond his current capabilities, experience and qualifications;
 - (c) Vocational assessments used by the insurer overestimated the potential earnings of various positions for which he was said to be suitable;
 - (d) The Merits Review by WorkCover was erroneous in that it simply accepted at face value the evidence of the vocational assessments without seeking further corroboration from other sources; and
 - (e) He wishes to retrain and needs to be able to support himself financially while doing so.

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. Similarly, insurers and employers may have difficulties with making and issuing notice of valid decisions.

Process of the Insurer

10. 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. There were a number of reports considered by the Insurer, including medical reports.
11. The grounds sought to be relied upon by the applicant for procedural review do not raise issues relevant to the making of a work capacity decision.
 - (a) The issue of on-going medical treatment goes to the merits of the decision, and cannot be considered as part of procedural review.
 - (b) The suitability of proposed alternative work also goes to the merits of the case and cannot be considered as part of procedural review.
 - (c) The overestimation of potential earnings was addressed by the Merits Reviewer, who corrected it. While it forms no part of procedural review, I note that the Insurer was prepared to find that the applicant had an earning capacity of over \$1,400 per week, solely on the basis that the vocational assessment stated that this was an amount typically made by workers in that industry of the same age as the applicant, without taking into account that such workers would also typically have decades of experience in the industry, in contradistinction to the applicant. Following correction by the Merits Reviewer, the applicant's earning capacity was adjusted to a more realistic \$763.00 per week, which seems to accord with the earnings of other occupations suggested by the vocational assessment.

Grounds (d) and (e) relied upon by the applicant are not relevant for the purposes of procedural review.

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 5 April 2013 the Insurer advised that the applicant would no longer be entitled to receive weekly benefits of compensation "from 1 July 2013." Section 54 of the 1987 Act requires that applicants in the position of the 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*), "notice" delivered by post requires the addition of four clear working days to any specified period of notice. The Insurer was required (Section 54(4) of the 1987 Act) to give the 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 5 April 2013 would not permit the reduction in payments until the expiry of three months and four working days (not including the day of posting) which would set an earliest possible date of 12 July 2013 for cessation of payments.
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.



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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.
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
6 August 2013