

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 with symptoms first being noticed in the late 1990s. On 31 October 2000 the applicant lifted a door at work and thereafter noticed a worsening of symptoms in the cervical spine region (neck) and both shoulders. He was able to continue at work until 2007, but thereafter has not worked for his previous employer and has been in receipt of weekly workers compensation benefits. There is no dispute about the injury having occurred in the course of employment. In 2008 a settlement was reached for lump sum compensation based on a finding of 12% Whole Person Impairment.
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 54 of the *Workers Compensation Act 1987* ("1987 Act") on 24 April 2013.
4. The Insurer also purported to give the applicant notice pursuant to Section 43 of the *1987 Act* of the reduction of his weekly benefit to "nil." This information was contained within a letter to the applicant dated 24 April 2013, which letter enclosed a purported notice pursuant to Section 54 of the 1987 Act.
5. On 29 May 2013 the Insurer wrote to the applicant advising of the outcome of an internal review of the decision dated 24 April 2013. The internal review upheld the original decision.
6. A WorkCover Merit Review was completed and a Statement of Reasons issued on 5 July 2013. The Reviewer upheld the determination of the Insurer.
7. On 10 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 believes that the work capacity decision was made on the basis of only one claim for Whole Person Impairment, whereas he says that he had multiple claims, including two with GIO for his left arm;
 - (b) more specifically, he itemizes a claim in July 2003 with an insurer for which he has no other details beyond stating that it was “my left arm related”;
 - (c) a further claim for the left arm was apparently settled in 2006 for what is described as “further 10% loss of the use of left arm”; and
 - (d) he states that the claim for 12% WPI resolved with another insurer in October 2008 was in relation to “loss of the use of right arm.”

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.

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) One Insurer is not a party to the current claim. The number of Whole Person Impairment claims resolved between the worker and various insurers is not a relevant consideration for the purposes of a work capacity review.
 - (b), (c) and (d) Similarly, there is no relevant correlation between a work-capacity decision and the various body-parts for which Whole Person Impairment compensation is awarded.

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 24 April 2013 the Insurer advised that under section 54 of the 1987 Act the applicant would no longer be entitled to receive weekly benefits of compensation "from 24 July 2013." Section 54 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. 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 24 April 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 31 July 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.
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
2 August 2013



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