



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*.

SUMMARY:

a. The application for procedural review is dismissed.

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 1 June 2015. The decision informed the applicant that his weekly payments of compensation would cease on 9 September 2015. The applicant sought internal review on 26 June 2015 and the Internal Review Decision was dated 27 July 2015. That decision confirmed the original work capacity decision.
2. The applicant applied to the Authority for Merit Review on 24 August 2015 and they delivered findings and recommendations dated 15 September 2015. The Authority agreed with the Insurer.
3. The applicant then made an application to this office dated 7 October 2015. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.
4. The applicant had previously been the subject of a work capacity decision and had successfully challenged the earlier decision on procedural grounds. The background to the claim can be found in the recommendation numbered 7014 at paragraphs 1-3. The decision by the Insurer the subject of current scrutiny was made following receipt of the earlier recommendation of this Office.
5. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines*¹ (Guidelines).

¹ As they somewhat anachronistically continue to be styled.



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Submissions by the applicant

6. Section 44(1)(c) of the 1987 Act states that this review is “*only of the insurer’s procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer.*” The applicant has applied for a procedural review.
7. The applicant seeks no more than “to have the Insurer’s decision reviewed to see whether the Insurer has complied with all procedural requirements.”

Submissions by the Insurer

8. The Insurer submits that all procedures have been correctly followed.

The Decision

9. The earlier recommendation of this Office identified certain shortcomings in the first work capacity decision, which had been made in 2013. The Insurer appears to have corrected those errors and has not committed any further errors which are discernible to me.
10. The list of errors originally made in 2013 might be fairly listed as follows:
 - No “fair notice” as required by Guideline 5.2.
 - No explanation of the impact the decision would have on the applicant’s entitlements.
 - Inadequate or no referencing of relevant legislative provisions.
 - Inadequate notice under section 54(2).
 - No explanation of the impact of section 59A(2) and (3) on future entitlement to pre-approved medical and related expenses.
 - The creation of a fictitious requirement that a worker may need new or additional evidence to be provided to the Insurer in the course of internal review.



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11. In contradistinction to the list above, the Insurer has in 2015 complied with all procedural requirements. More specifically:

- A fair notice call involving an interpreter in the applicant's language took place on 28 April 2015. A letter of the same date summarising the content of the telephone call was also sent.
- The applicant was clearly told that his weekly payments would cease on 9 September 2015.
- The Insurer referred to all relevant sections of the legislation and provided explanations where necessary.
- The notice provided was in excess of that required under section 54(2)(a).
- The Insurer took three paragraphs to explain the effect of section 59A(2) and (3), but did so to good purpose, having clearly identified the relevant nuances which have attended the interpretation of that section in recent times.

Finding

12. Under the legislation the Insurer can make an assessment of the applicant's work capacity and then a decision about that work capacity, but they must comply with the legislation, the Regulation and the Guidelines in order to produce a procedurally correct result. In the current instance there have been no breaches of the legislation or the Guidelines which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be validly made.

RECOMMENDATION

13. The application for procedural review is dismissed.

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Delegate of the Workers Compensation



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Independent Review Officer
6 November 2015