

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 worker's application for procedural review of work capacity decision of the Insurer dated 23 August 2013 is dismissed.**

Background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 23 August 2013. The decision determined to cease weekly payments as of 30 November 2013. The applicant sought internal review. The Internal Review Decision (IRD) was consistent with the original decision. The applicant sought Merit Review by the Authority. The Merit Review decision also upheld the original decision. I am satisfied that the application for procedural review dated 11 June 2014 was made within time and on the correct form.
2. The applicant sustained injuries to his right shoulder and left elbow in October 2003 while employed as a process worker. He returned to work on reduced hours but was ultimately terminated by the employer in August 2005. He was in receipt of weekly payments of compensation for all subsequent periods.
3. The applicant was therefore in receipt of compensation by way of weekly payments immediately before 1 October 2012 and is therefore able to be styled as an "existing recipient of weekly payments" as that term is defined in the 1987 Act.¹ Clause 8 of Part 19H of Schedule 6 to the 1987 Act required the Insurer to conduct a work capacity assessment for the purpose of facilitating the application of the amended weekly benefits provisions to the applicant.

Submissions by the parties

¹ See clause 1, division 1, part 19H, schedule 6 to the 1987 Act.

4. 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 made only this submission:

“I disagree with the evidence used by the insurer.”

5. The Insurer made lengthier submissions, but they did little more than rehearse the procedures undertaken when making the decision.

The Decision

6. The Insurer wrote to the worker on 23 August 2013 and set out the evidence it had considered in reaching its decision. That evidence included medical reports from the treating doctor (a general practitioner), an Orthopaedic Surgeon and a further IME who all agreed with the assessment that the applicant had work capacity. The reports are all dated July and June 2013, so they would clearly be “current” for the purposes of determining current work capacity.
7. It is likely that the somewhat enigmatic submission by the applicant that he did not “agree with” the evidence relied upon by the Insurer is an allusion to a DVD which purportedly shows him moving, walking, jogging, bending, lifting and carrying in ways apparently inconsistent with his presentation to various doctors in the course of pursuing his claim. While it would be forensically unsatisfactory to rely on any such visual representations of a worker in the absence of cross examination of the party who created the DVD and some testimony from the person allegedly portrayed therein, there does not appear to be any bar on an insurer using it for background or ancillary purposes. It is not suggested that the DVD was determinative. The existence of the DVD does not and cannot derogate from the existence of the overwhelming tsunami of medical opinion supporting the conclusion of the Insurer that the applicant has work capacity and would be capable of working in suitable employment.
8. The Insurer gave the applicant the correct notice under section 54(2)(a). They have complied with the Guidelines issued by WorkCover, having



correctly referenced the legislation and explained the reasoning process behind the decision. There is no basis on which the procedures of the Insurer can be found to be at fault.

9. The decision is something of a collector's item, being the first I have seen to have complied fully with the requirements of the legislation, the Guidelines and even the Regulation.

RECOMMENDATION

10. In light of the compliance with all procedural requirements by the Insurer the application for procedural review must be dismissed.
11. Accordingly I make no recommendation..

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
11 July 2014