

**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 is the applicant for a review of the decision made by the Insurer.
2. The applicant was employed as a teacher when he was assaulted and received threats to both himself and his family in the course of his employment. Liability was accepted and there is no dispute about the injury having occurred in the course of employment.).
3. The Insurer continued to make payments under the former section 40 of the *Workers Compensation Act 1987* ("1987 Act") making up the difference between pre-injury and post-injury earnings. In May 2013 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 1987 Act on 30 May 2013.
4. The Insurer also purported to give the applicant notice of the cessation of his entitlement to weekly benefits, to take effect on 30 August 2013. In the original notice dated 30 May 2013 it is clear that the Insurer gave the applicant insufficient notice to comply with section 54 of the 1987 Act, which requires three months notice and such notice must, by operation of the postal service rule, allow for four working days after posting the notice for receipt (see section 76(1)(b) of the *Interpretation Act 1987*).
5. On 27 June 2013 the Insurer wrote to the applicant advising of the outcome of an internal review of the decision dated 30 May 2013. The internal review upheld the original decision.
6. The same letter of 27 June 2013 from the Insurer also referred to the earlier breach of section 54 and noted that the breach had been brought to the Insurer's attention by WIRO. As a result, the letter of 27 June 2013 advised the applicant that his make-up payments under the former section 40 would cease from 1 October 2013. Thus section 54 had now purportedly been complied with (but see more below at paragraph 14 *et seq*).

7. A WorkCover Merit Review was completed and a Statement of Reasons issued on 31 July 2013. The Reviewer upheld the determination of the Insurer.
8. On 1 August 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.

### **Applicant's Grounds for seeking Procedural Review**

9. (a) The applicant is of the view that the difference between physical injury and psychological injury has not been addressed by the work capacity decision maker, asserting that the industry is "geared for physical injury";  
  
(b) the applicant contests the finding that "suitable capacity" has been found; and  
  
(c) the applicant has approximately halved his salary and work conditions and responsibility, and given that the decision has not taken this into account, he says that the decision is not "on just terms."

### **The Legislative Framework**

10. 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.
11. Similarly, insurers and employers may have difficulties with making and issuing notice of valid decisions.

## Process of the Insurer

12. The decision reached by the Insurer appears to be appropriate in the circumstances of the case. 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 Insurer had regard to (i) submissions by the applicant himself; (ii) reports by various doctors (iii) payment advice slips from the employer.

## My Reasons:

13. The grounds upon which the applicant seeks to rely can be dealt with shortly:
  - (a) The Insurer had regard to a report from the applicant's own treating psychiatrist, which contained a prognosis for full recovery, estimated to occur within 18-24 months of November 2012. The report also noted that the applicant was coping "reasonably well" with his work. There is no evidence that the Insurer had no regard to the nature of psychological injury as distinct from physical injury.
  - (b) The Insurer has had regard to medical evidence in coming to a decision about work capacity, which included a report from the treating doctor who noted that the applicant was coping with his current duties. The assertion by the applicant concerning his capacity for suitable employment goes to the merits of his case and cannot be a consideration in the process of procedural review.
  - (c) The transition from receipt of payments under the former section 40 to the new system following a work capacity review will mean that the "make-up" pay formerly available under section 40 is no longer possible for an applicant in the position of the applicant. This reflects a correct application of the legislation to the facts.

14. However, as referred to in paragraphs 4-6 above, section 54 of the Act must be complied with and it requires that the worker be advised of a variation or cessation of payments in person or by post. As set out in paragraph 4 above, the postal service rule requires that four working days be allowed for service by post. A letter posted on 27 June 2013 would therefore be deemed to be received on 3 July 2013 (29 and 30 June 2013 being a Saturday and Sunday). Therefore the earliest date on which any notice under section 54 posted on 27 June 2013 could be thought to take effect is 3 October 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 with section 54 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.
  
16. In considering the facts and circumstances of this application I have had regard to the provisions of section 44(3)(a) of the 1987 Act which provides a timeframe of 30 days for the worker to seek a review by the merit reviewer of the decision, however the timeframe only commences from the receipt by the worker of the insurer's decision on internal review which must be contained in *the form approved by the authority*.

As at the date of this decision there was no such form approved by the Authority and therefore the worker has yet to receive the proper notice of the decision of the internal reviewer and it appears that time has not started to run for him to seek a merit review.



A question of some nicety arises as to whether in that circumstance there was any jurisdiction for the WorkCover Authority to conduct a merit review and therefore whether there was any jurisdiction for me to consider a procedural review.

Given the outcome in this particular matter that issue may not arise, but it remains a matter of concern in relation to all applications to the Authority for merit review.

**My Recommendation:**

17. I recommend that the insurer undertake a further work capacity assessment of the applicant prior to making any further decision.
18. I recommend that the Insurer give the applicant further opportunity to make submissions and submit evidence prior to any decision being made.
19. I recommend that the insurer take my views into account, and I recommend that the insurer immediately give effect to them.

Wayne Cooper  
Delegate of the WorkCover Independent Review Officer  
21 August 2013