

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*.

1. The injured worker is the applicant for procedural review of a work capacity decision made by a scheme agent of the Workers Compensation Nominal Insurer ("Insurer").
2. The applicant suffered injury to in the course of employment on or about 7 February 2005. There is no dispute about the injury having occurred in the course of employment.
3. The applicant no longer works for the original employer, and commenced work on reduced hours with a new employer on 26 October 2012. The insurer accepted liability and made continuing weekly payments for all periods until 2013. Accordingly the applicant was an "existing recipient of weekly payments" of compensation (as that term is defined in Schedule 6, Part 19H Division 1 of the *Workers Compensation Act 1987* [1987 Act]) immediately prior to 1 October 2012.
4. On 19 April 2013 the Insurer, having completed an assessment of the work capacity of the applicant, purported to issue a notice of a work capacity decision pursuant to Section 43 of the 1987 Act. The Insurer also purported to give the applicant notice pursuant to Section 54 of the 1987 Act of the reduction of his weekly payments to "nil." The cessation of weekly payments was said to be effective from 25 July 2013.
5. The Insurer later wrote to the applicant advising of the outcome of an internal review of the decision dated 19 April 2013. The internal review upheld the original decision.
6. A WorkCover Merit Review was completed and a Statement of Reasons issued, dated 15 August 2013. The Reviewer varied the Insurer's decision, substituting a recommendation of payments in the amount of \$116.08 per week.
7. On 16 September 2013, application was made to the Independent Review Officer to undertake a review of the decision of the Insurer pursuant to Section 44(1)(c) of the 1987 Act. I am satisfied that the

applicant has made that application within the 30 day time-limit imposed by section 44(3)(a), and the *WorkCover Work Capacity Guidelines* and on the relevant form.

Intervening events

8. At a time reasonably contiguous with finalisation of the merit review process, the Independent Review Office also received a complaint from the applicant concerning refusal by the Insurer to pay for proposed surgery and also advising of changed employment circumstances. Having already applied for a procedural review, the applicant later obtained a work capacity certificate stating that he had no work capacity due to the necessity of total knee replacement surgery. The applicant had also lost his part-time employment, which was said to be a result of his incapacity.
9. On 25 October 2013 the Insurer advised that they now have sufficient information to make a further work capacity decision. They indicated this will be non adverse. The applicant is to be paid \$758.80 per week from 3 October 2013 and continuing until a new work capacity decision is made. The Insurer also approved payment for knee replacement surgery.
10. While it might be thought that this retrocessive acceptance by the Insurer brings the dispute to an end, the unresolved question still remains concerning payments to the applicant between 26 July 2013 and 2 October 2013.

The original work capacity decision

11. The original decision was made on 19 April 2013. It is noted that the work capacity certificate stating that the applicant has no capacity is effective on and from 3 October 2013. It is also noted that not a single medical report on which the original decision was based had been obtained later than August 2012. The documents relied upon are said to be the following:
 - Vocational report, LF, 19 May 2012
 - Capabilities fax, Nominated Treating Doctor (NTD), 17 August 2012
 - Vocational Information, [Insurer], August 2012
 - Functional report, DH, 21 September 2012

- WorkCover medical certificate, NTD, 29 January 2013
- Rehabilitation report, RS, 1 February 2013
- Payslip, SF, 27 February 2013

I have assumed that the enigmatically titled “capabilities fax” from the applicant’s nominated treating doctor dated 17 August 2012 might loosely qualify for the description of a medical report; otherwise, not a single medical report was obtained prior to a work capacity decision being made. Whatever the status of the latter document, it has to be said that the contents and utility of the document described with an equal air of mystery as “Vocational Information, [Insurer]” are unknown.

Despite these obvious shortcomings, the applicant’s nominated treating doctor did certify him fit for work for 32 hours per week as recently as 29 January 2013 and the Insurer is entitled to rely on that assessment. The Insurer could not have known in April 2013 when the decision was made that the applicant’s knee condition would so rapidly deteriorate that an operation to replace the joint would become necessary as soon as October 2013.

12. The Insurer was directed by the merit review service to make payments of \$116.08 per week and those payments were made by the Insurer.

My Recommendation:

13. There is no procedural basis on which the original decision should be disturbed in this case and I note that the Insurer has undertaken to make a new, non-adverse decision in any event. That decision will not be effective before the date of the work capacity certificate certifying the applicant as having no capacity, which was dated 3 October 2013.
14. I recommend that in the course of making the new work capacity decision the Insurer obtain up-dated reports from the applicant’s nominated treating doctor and at least one Independent Medical Examiner.
15. I recommend that the Insurer take my views into account and I recommend that the insurer immediately give effect to them.



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