WiRO
WorkCover independent review office

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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 (the applicant) seeks procedural review of a work capacity decision made the Insurer.

2. The applicant was employed as a waitress and suffered injury to her left knee back on or about 7 October 2007. There is no dispute about the injury having occurred in the course of employment. She returned to work on suitable duties but these were withdrawn by the employer in 2008 and she has not been employed since that time. The Insurer paid weekly benefits for all relevant periods and therefore the applicant was an existing recipient of weekly payments of compensation immediately prior to 1 October 2012.

3. On 3 June 2013 the Insurer advised the applicant in writing of a work capacity decision which had been made on that date. She was advised that her entitlement to ongoing weekly payments of workers compensation would be terminated since she was found to have no entitlement under section 38 of the *Workers Compensation Act* 1987 (1987 Act). She was told the following things:

    - The relevant entitlement periods in the legislation were clearly and correctly explained in the decision;

    - It was noted that the applicant does not currently work and has received weekly payments for considerably longer than 130 weeks;

    - That in accordance with section 38(3)(b) of the *Workers Compensation Act 1987* weekly payments would reduce to nil;

        - That reasonable medical expenses would continue to be paid, but such payments would cease 12 months after weekly payments ceased.

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4. On 1 July 2013 the applicant sought internal review. On 1 August 2013 the Insurer wrote to the applicant advising that an Internal Review had upheld the original decision.

5. The applicant applied to the WorkCover Authority for a Merit Review of the Insurer's decision on 26 August 2013 and in a recommendation dated 13 November 2013 the merit reviewer upheld the original decision of the Insurer. The merit reviewer found that the applicant has no entitlement to weekly benefits in accordance with section 38 of the 1987 Act.

6. On 26 November 2013, the applicant requested 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 time provided by that section and on the correct form.

The Applicant's Stated Grounds for Procedural Review

7. The applicant's grounds for pursuing procedural review are:

   (i) The injury has left the applicant with a reduced capacity for work such as with lifting, sitting, and standing;

   (ii) The applicant has dyslexia which reduces her employment options.

Submissions by the Insurer

8. The Insurer made the following submissions in response to the application.

   - A fair notice call was delivered to Ms Baharoglu 9/05/2013. Ms Baharoglu was advised that the reason for the telephone call was to discuss changes in the legislation and how this would impact her claim. Ms Baharoglu was invited to send in any further information for CGU to review prior to a WCD being made.

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- A Work Capacity Decision was made on this claim on 3/6/2013. The applicant was contacted on 31/5/2013 and advised that a WCD had now been made on her claim which would have an adverse affect on her entitlement to ongoing weekly benefits. This decision was based on various medical reports on file which confirmed that the applicant does have a current capacity for work, has been in receipt of weekly benefits for more than 130 weeks and is not currently in employment. The applicant was advised that her weekly benefits would continue for 3 months and that reasonably necessary medical treatment will continue for 12 months after the last date he received weekly benefits from CGU. The applicant was advised of her right to request a review of our decision and that this information would be included in a letter sent to her on 3/6/2013.

- The applicant completed an Application to Insurer for Internal Review on 1/7/2013 which was received by CGU on 2/7/2013. Correspondence was also attached with the Application to Insurer for Internal Review from the injured worker dated 29/5/2013.

- Phone call to the applicant on 04/07/2013 acknowledged receipt of her Application to Insurer for Internal Review. An acknowledgement letter was also sent to the applicant on 4/7/2013 advising that a decision will be made by 1/8/2013.
- Phone call to the applicant on 1/8/2013 advising outcome of the internal review. The injured worker was advised that she has no ongoing weekly benefit entitlements as evidence on file supported that she has a current work capacity but is not currently working, therefore does not meet the criteria to receive ongoing weekly benefits. A letter was also sent to the applicant on this date explaining the reasons for the decision and also provided information on how to request a review of this internal decision.

- A Work Capacity – Application for Merit Review by the Authority form was completed by the applicant on 26/8/2013

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and received by CGU on 26/8/2013. Further correspondence from the injured worker dated 26/8/2013 was provided with her application form.

- CGU completed a Work Capacity – Reply to an Application for Merit Review on 3/9/2013 with a copy being sent to merit review and also the applicant.

- A merit review was completed on 13/11/2013 by the Merit Review Service which found that in accordance with section 38 of the Workers Compensation Act 1987, the applicant is not entitled to compensation after the second entitlement period due to her being assessed as having a current work capacity and not currently working/employed

- WIRO Application for Review of Work Capacity Decision completed by the applicant on 26/11/2013.

Legislation

9. Section 44(1)(c) of the 1987 Act limits the scope of procedural review to a review only of:

> *the insurer's procedures in making the work capacity decision and not of any judg[e]ment or discretion exercised by the insurer in making the decision.*[1]

10. Therefore while it remains the case that no discretion is unreviewable, the insurers discretion when making a work capacity decision appears only to be reviewable in the course of merit review or judicial review.

11. The procedures to be followed by the insurer are set out in the *WorkCover Work Capacity Guidelines.* The *Guidelines* must be complied with in order for a work capacity decision to be validly made. Given the overall beneficial nature of the 1987 Act and the serious consequences to workers if decisions are made incorrectly, strict compliance with the *Guidelines* is required.

[1] Judgement is misspelt in the Act as "judgment."

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Process of the Insurer

12. The decision reached by the Insurer was certainly within the range of available decisions. The applicant has been paid for more than 130 weeks, and therefore section 38 is the applicable section of the Act to calculate entitlement.

13. Being an existing recipient of weekly payments immediately prior to 1 October 2012, the applicant is subject to the transitional rate in Schedule 6, Part 19H, clause 2 of the 1987 Act. However, such considerations are of no interest on procedural review where the main relevant consideration is not *why* a decision is made, but *how* it is made.[2]

My Reasons:

11. The applicant's stated grounds for seeking procedural review deal with the merits of the case and are therefore not relevant in relation to a procedural review.

12. The submissions of the insurer set out a useful timeline as well as helpful information such as the timing of the fair notice call.

13. Since procedural review requires a scrutiny of the decision-making processes of the Insurer, including an examination of compliance with legislation and *Guidelines*, rather than a consideration of submissions made by either party, the review process may proceed despite the absence of relevant submissions from either party. Any demonstrable error[3] on the part of the Insurer may invalidate the decision.

14. There are in my view several breaches of the *Guidelines* and the 1987 Act which either individually or taken together are sufficient to invalidate the work capacity decision made by the Insurer.

[2] For a related and recent discussion of the distinction see *Minister for Immigration and Citizenship v Li* (2013) 297 ALR 225 per Gageler, J at 253.
[3] For a recent examination of "demonstrable error" see *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] NSWSC 1792 (11 December 2013) at paragraphs 39-56.

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- The work capacity decision letter made reference to the true impact of the decision on the applicant's entitlement to medical and related treatment expenses. The *Guidelines* at Part 5.4.2 require the decision to reference the legislation. Section 60 of the 1987 Act is referred to, but then section 59 is referred to rather than section 59A.

- The decision does not advise as to whether a work capacity assessment has been undertaken as required by *Schedule 6, Part 19H, Division 2, clause 8(1)* of the 1987 Act. The insurer is required to make a decision "as soon as practicable" after the assessment is made: *Clause 23, Schedule 8, Workers Compensation Regulation 2010*. There does not appear to be any legislative requirement to notify the applicant of the outcome. However, the *Guidelines* at Part 5.4.2 state that the decision must;

    - *State the decision and give brief reasons for making the decision;*

    - *Outline the evidence considered in making the decision, noting the author, the date and any key information. All evide3nce considered should be referred to, regardless of whether or not it supports the decision;*

    - *Clearly explain the reasoning for the decision.*

My finding is that the Guidelines result in the insurer being compelled to reveal the outcome of the assessment.

In this case the applicant cannot know the date of the assessment and therefore whether the decision was made as soon as practicable after the assessment was made.

15. 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 has been more than one breach of the *Guidelines* and the 1987 Act. Accordingly the work capacity decision must be found to be invalid.

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My Recommendation:

16. For the reasons set out above I recommend that the Insurer undertake a work capacity assessment and make another work capacity decision, the *Guidelines* and according to the relevant legislation. I

17. Since the applicant was an existing recipient as at 1 October 2012, she remains entitled to receive her pre-transition rate of weekly benefits until such time as she is validly transitioned under the Act.

18. Noting the binding nature of these recommendations[4] I recommend that the Insurer takes my views into account, and I recommend that the Insurer immediately gives effect to them.

BRIAN HATCH
Delegate of the WorkCover Independent Review Officer

8 January 2014

[4] See section 44(3)(h) of the 1987 Act – recommendations made by the Independent Review Officer are binding on the insurer and the Authority.