WiRO
WorkCover independent review office

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

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 applicant for a review of the decision made by the Insurer on 4 April 2013.

2. There is no dispute that the applicant was injured in the course of her employment on 25 February 1997. The applicant returned to suitable employment with the Employer but that employment was terminated in March 1998. Since that time the applicant has been self employed in suitable employment. The Insurer made weekly payments for the earnings differential as required under the provisions of the then *Workers Compensation Act* 1987 (1987 Act).

3. The NSW Government introduced significant reforms to the Workers Compensation Scheme in June 2012 including the calculation of weekly payments.

4. The applicant was in receipt of compensation by way of weekly payments as at 1 October 2012. 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 to the applicant.

5. Section 44A of the 1987 Act provided that a work capacity assessment is an assessment of the injured worker's current work capacity and must be conducted in accordance with the *WorkCover Work Capacity Guidelines (the Guidelines)*.

6. The relevant version of the *Guidelines* is the one published on 27 September 2012 which applied to all claims from 1 January 2013. That publication stated that the *Guidelines* provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessments and decisions.

7. Once the Insurer has conducted an assessment then the Insurer is required to make a work capacity decision. Where that decision involves a reduction in the weekly payments payable to the injured worker then the Insurer is required to give proper notice to the worker (Section 54 of the 1987 Act).

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

8. The applicant has been in receipt of weekly payments for more than 130 weeks as at the date of the decision and therefore Section 38 of the 1987 Act applies.

9. The decision does not state that a work capacity assessment has been made. 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 evidence 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.

10. In this case the applicant cannot know the date of the assessment. A fair notice call was made on 8 March 2013. This call is required by the *Guidelines.* It is not clear whether the assessment was referred to in that call. The applicant does not appear to have any evidence as to whether an assessment has been made or the date of any assessment.

11. While the fair work call occurred, the *Guidelines* in Part 5.2 states that the "*information should also then be confirmed in writing to the worker."* The Insurer admits that this letter was not sent and as such is a breach of the *Guidelines.*

12. The *Guidelines* at Part 5.4.2 require the Insurer *"to state the impact of the decision on the worker in terms of their entitlement to weekly payments, entitlement to medical and related treatment expenses and return to work obligations".* The decision sets out that medical treatment benefits only continues for 12 months, but says that benefits will end on 3 April 2014. I take this to be 12 months after the decision, not 12 months after the weekly payments end which is the correct time frame pursuant to section 59A of the 1987 Act. The insurer then refers to section 50 of the 1987 Act, not section 59A. The *Guidelines* require at Part 5.4.2 that the legislation be referenced. That has not occurred.

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

13. The decision refers to the transitional amount and the legislation is referenced. The decision states that the applicant will *"no longer have any weekly benefit entitlement".* The decision does not explain the calculation used to reduce the weekly payment to nil. There is no reference to section 38 of the 1987 Act. This is a clear breach of the *Guidelines.*

14. The decision of 4 April 2013 advises that the applicant would no longer be entitled to receive weekly benefits of compensation from 4 July 2013. Section 54 of the 1987 Act requires that applicants are accorded three months clear notice prior to having their payments changed. By virtue of the postal service rule (Section 76(1)(b) of the *Interpretation Act 1987)*, "notice" delivered by post requires the addition of four clear working days to any specified period of notice. The Insurer was required (Section 54(4) of the 1987 Act) to give the applicant notice personally or by post. This notice was sent by post. The decision therefore does not give 3 months notice as required.

15. Further, the above *Guidelines* also state that the work capacity decision notice must advise the applicant that any documents or information that have not already been provided to her can be provided on request to the Insurer. The Insurer has failed to so advise the applicant.

16. There is one major difficulty which faced the Insurer in making its work capacity decision and that is the requirement contained in Clauses 5 and Clause 5.1 of the Guidelines. That was in the following terms:

    "Clause 5

    Work capacity decisions should be made in line with the Best Practice Decision- Making Guide."

    and then:

    "Clause 5.1

    When making a work capacity decision the insurer should follow the Best Practice Decision-Making Guide."

    That Guide did not exist and has never existed or been published by WorkCover.

WiRO
WorkCover independent review office

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

FINDING

17. I find that the Insurer has failed to follow the procedures as set out in the WorkCover *Guidelines* which is required by Section 44A of the 1987 Act. The Insurer has also failed to follow the 1987 Act.

RECOMMENDATION

18. I recommend that the Insurer conduct a new work capacity assessment and make a new work capacity decision in accordance with the WorkCover *Guidelines*.

19. I recommend that the Insurer pay the applicant the weekly benefit to which she was entitled prior to 4 April 2013 until such time as she is properly transitioned. Those payments should continue from 4 July 2013 being the date on which they ceased.

BRIAN HATCH
Delegate of the WorkCover Independent Review Officer

9 January 2014