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*.*

SUMMARY:

a. The work capacity decision of the Insurer dated 31 July 2013 is set aside.

b. The applicant is to be reinstated to her weekly payments at the rate applicable immediately prior to 7 November 2013.

c. The payments are to be back-dated to 7 November 2013.

d. The payments are to continue until such time as a further work capacity decision is made and comes into effect.

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 31 July 2013. The decision stated that payments were to cease on 7 November 2013. The applicant sought internal review. The Internal Review Decision (IRD) was issued on 25 October 2013. The applicant sought Merit Review by the Authority. That decision issued on 13 May 2014.

2. The applicant was injured on 17 August 2006 while employed as a process worker. The applicant returned to suitable employment with her employer but that was unsuccessful. She was retrenched in 2008. She is currently not working. The Insurer made weekly payments as required under the provisions of the *Workers Compensation Act* 1987 (1987 Act).

3. The applicant was in receipt of compensation by way of weekly payments immediately before 1 October 2012. Accordingly 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's claim. Clause 17 of Schedule 8 to the *Workers Compensation Regulation* 2010 (the *Regulation*) required the assessment process to be completed *"within 18 months"* of 1 October 2012.

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4. The relevant version of the *WorkCover Work Capacity Guidelines (Guidelines)* is the one dated 27 September 2012, which came into effect on 1 January 2013. The *Guidelines* provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessments and decisions.

5. Where the work capacity decision involves a reduction in or cessation of the weekly benefits payable to the injured worker then the Insurer is required to give proper notice to the worker (see section 54(2)(a) of the 1987 Act).

Submissions by the applicant

6. The applicant raised various issues in the Application for Procedural Review. 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's submission is that the decision does not state that the notice period pursuant to section 54(2)(a) of the 1987 Act is 3 months and 5 business days

Submissions by the insurer

7. The Insurer's submissions answered the submission with respect to the notice period.

The Decision

8. It is not stated when the assessment was undertaken. Clause 23 of Schedule 8 to the *Regulation* requires the decision to be made as soon as practicable after the assessment. It is unclear in this case as to whether that has occurred.

9. There does not appear to be any legislative requirement to notify the applicant of the outcome of the assessment. However, *Guideline* 5.4.2 states that the decision must:

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

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- *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 line of reasoning for the decision.*

My finding is that the *Guidelines* result in the insurer being compelled to reveal the outcome of the assessment which would involve showing the date of the assessment.

10. The decision does not state that an assessment must be made within 18 months of the commencement of the 2012 amendments pursuant to Clause 17 of Schedule 8 of the Regulation and that the amendments commenced on 1 October 2012.

11. *Guideline* 5.4.2 requires the Insurer to reference the legislation. The decision's heading states that Notice is given in accordance with section 54 of the 1987 *Act.* The proper reference is to section 54(2)(a) of the 1987 Act. It also states that from *"7/11/2013 your weekly entitlement will be $0.00".* The decision does not state that this 3 month period is required to be given pursuant section 54(2)(a). The notice period is 3 clear months. It is not 3 months and 5 business days. Assuming the letter is posted then section 76(1)(b) of the *Interpretation Act* 1987 deems the letter to be delivered on the 4th working day after the day of postage. The decision is dated 31 July 2014. Assuming it was posted that day, the 4th working day after posting was 6 August 2013. A 3 month notice period has been allowed.

12. Stating that the applicant has a "*weekly entitlement"* to $0.00 is a novel concept.[1] *"Entitle"* is defined, *inter alia*, as *"to give (a person or thing) a rightful claim to a possession, privilege, designation, mode of treatment, etc*".[2] The decision therefore states that the applicant has a rightful claim to nothing. She, in fact, has no "entitlement." It is also not explained how $0.00 will be paid, whether by cheque or direct deposit. Perhaps the applicant could attend at the Insurer's office to be paid in cash.

[1] Novel, but much imitated latterly among scheme agents.
[2] *Oxford English Dictionary (Compact Edn.)*, OUP, 1971, Volume 1, p 219.

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13. The applicant is not advised that she is an *"existing recipient"* of weekly payments. Reference should be made to clause 1 of Part 19H of Schedule 6 to the 1987 Act and the definition of *"existing recipient of weekly payments"* and that it refers to an applicant who was in receipt of weekly payments of compensation immediately before 1 October 2012.

14. The applicant is advised that she has a current work capacity and is working less than 15 hours per week, and that certain jobs constitute suitable employment. Reference should be made to section 38(3)(b) of the 1987 Act. Reference is made to the definitions of *"current work capacity"* and *"suitable employment"* in section 32A of *"the Act",* that is, the Amending Act. It is unlikely that the applicant would be able to find these definitions in the 1987 Act. *"Current work capacity"* means an inability to work in pre-injury employment, but being able to work in *"suitable employment".* The definition of suitable employment is an important concept in the 2012 amendments to the 1987 Act. It involves, *inter alia*, having regard to *"the worker's age, education, skills and work experience"* while having no regard to *"the nature of the worker's pre-injury employment".* Few people relying on a normal understanding of English would realise that such a concept would be included in a simple phrase like suitable employment.

15. The decision attempts to explain *"current work capacity."* It states that the term *"focuses on your capacity to work in a role that is not your pre-injury role but is one where there are genuine job prospects in Australia. This is known as suitable employment."* That is not what the definition of suitable employment says. The definition states that it is work for which the applicant is suited regardless of *"whether the work or the employment is available, and whether the work or the employment is of a type or nature that is generally available in the employment market."* Whether or not there are genuine job prospects is not part of the test.

16. The decision then states that *"Based on the above assessment we have calculated you weekly entitlement as follows: Ceasing Benefits."* No calculation is set out, merely a statement that benefits will cease. Which benefits are to cease is not revealed. Are medical benefits or weekly payments or both to cease?

17. The next heading is *"What legislation and guidelines were used to make the decision?"* The decision then sets out that *"the following section/s of*

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the Act: a) s38 Special requirements for continuation of weekly payments after the second entitlement period (after 130 weeks)". What the decision does not set out is what the special requirements may be. Again, the reference is to the amending Act and the applicant is unlikely to locate section 38. The proper reference is to section 38(3)(b) of the 1987 Act. The *"guidelines"* the heading so hopefully refers to are the *"Work Cover work capacity guidelines".* No hint is given as to which part of that 31 page document is relied upon.

18. While there had been a partial setting out of section 38 in the decision[3], which was not referenced, no attempt is made to refer to the other part of the test in section 38(3)(b) of the 1987 Act of earning at least $155 per week. Such reference would also require a reference to that figure being indexed and what the current figure is.

19. The applicant is advised that she is entitled to claim medical expenses for 12 months after weekly payments cease. No reference is made to section 59A(2) of the 1987 Act. In addition, section 59A(3) of the 1987 Act states that the applicant may, after the entitlement to compensation for medical expenses ends, become eligible for further payments for medical expenses if the applicant becomes entitled to compensation for weekly benefits at some stage in the future and for such time as those weekly payments continue. This was not disclosed by the Insurer.

20. The applicant is advised that she may seek an internal review within 30 days from the date of the decision. Section 44(1)(a) of the 1987 Act, which is not referred to, does not impose any time limit. *Guideline* 6.2.2 says that there is a 30 day time limit. Later iterations of the *Guideline* only refer to *"timely lodgement"* and that the application should be lodged *"as soon as practicable"* after receiving the decision. The true effect of *"timely lodgement"* is yet to be tested.

FINDING

21. 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 and the *Workers Compensation Regulation* 2010.

[3] See paragraph 14 *supra.*

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RECOMMENDATION

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

23. I recommend that the Insurer pay the applicant the weekly benefit to which she was entitled immediately prior to 7 November 2013 until such time as she is properly transitioned. Those payments should continue from 7 November 2013 being the date on which they ceased.

24. Since the applicant is not currently in receipt of weekly payments, clause 21 of schedule 8 of the *Regulation* cannot apply and payments may resume immediately. The applicant is not required to produce work capacity certificates for the period from 7 November 2013 to date by virtue of the operation of section 44B(2) of the 1987 Act. These recommendations are binding on the insurer: see section 44(3)(h) of the 1987 Act.

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