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.

SUMMARY:

a. **The work capacity decision of the Insurer dated 6 March 2014 is set aside.**

b. **The applicant is to be reinstated to his weekly payments at the rate applicable immediately prior to 18 June 2014.**

c. **The payments are to be back-dated to 18 June 2014.**

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

Background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 6 March 2014. The decision stated that payments were to cease on 18 June 2014. The applicant sought internal review. The Internal Review Decision (IRD) was issued but I do not have a copy of the IRD. The applicant sought Merit Review by the Authority. That decision issued on 5 June 2014.

2. The applicant was injured on 22 August 2012. He was assaulted in the course of his employment and suffered an injury to his left knee. The applicant returned to suitable employment with his employer until he underwent surgery in February 2013. He has not returned to employment since that time. 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

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

(the *Regulation*) required the assessment process to be completed *"within 18 months"* of 1 October 2012.

4. The relevant version of the *WorkCover Work Capacity Guidelines (Guidelines)* is the one dated 4 October 2013, which came into effect on 11 October 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 submissions went to the merits of his matter, that is, the judgement or discretion of the Insurer and are therefore not relevant.

Submissions by the insurer

7. The Insurer made no submissions.

The Decision

8. The assessment was completed on 6 March 2014. There does not appear to be any legislative requirement to notify the applicant of the outcome of the assessment. However, *Guideline* 5.3.2 states 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;*

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

- *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.

9. 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.

10. The decision has a covering letter of the same date. The covering letter must form part of the decision. The covering letter advises that the applicant can seek an internal review by completing the attached form and *"provide any further information in support of your request".* This wording suggests that further information must be provided in order that the review proceed. Section 44(2) of the 1987 Act only requires that *"grounds"* for the review be provided. There is no requirement that further information be provided. Such wording misrepresents the nature of the appeal process and may lead an applicant to forego an appeal for want of further information.

11. The applicant has been in receipt of weekly payments *"for more than 13 weeks, but less than 130 weeks".* It is not explained that this is the *"second entitlement period"* and that this term is defined in section 32A of the 1987 Act.

12. The decision states that the transitional amount is applied as the pre-injury average weekly earnings (PIAWE) as $948.50. The correct reference is made to Clause 2(1) of Part 19H of Schedule 6 of the 1987 Act. It should be explained that this is the rate as indexed. If the applicant went to the legislation he would see that the figure is $906.25.

13. Section 37(2) of the 1987 Act is then partially explained. The need to return to work for 15 hours per week is set out, but no reference is made to the need to be in receipt of $155 per week (as indexed). The calculation is explained as *"(AWE x 95%) – (E + D) where E = your current weekly earnings and D the amount of any non pecuniary benefits".* What is not explained is that *"AWE"* is the transitional amount and is the same as *"PIAWE"* which had been explained earlier in the

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

decision. To add to the confusion the decision states that a decision has been made in relation to *"Section 43(1) (a) & (d)".* That section is reproduced in full, but no mention is made as to which legislation the section may be found in. Reproducing the section includes the provision that a decision may be made *"about the amount of an injured worker's pre-injury average weekly earnings or current weekly earnings".* The applicant has been told that the transitional amount is to be used as the PIAWE, and also that the Insurer can make a decision as to the applicant's PIAWE. Which of these is to be used to determine the PIAWE is left unexplained.

14. Having stated that the transitional amount will be applied the decision sets out section 37(2). Which legislation this section is in is not revealed. This section refers to *"current work capacity".* No reference is made to the definition of *"current work capacity"* in section 32A of the 1987 Act. That definition is qualified by *"suitable employment",* which is also defined in section 32A. *"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 lists 8 documents, including Certificates of Capacity. It is stated that these documents are the *"Evidence considered in making the decision".* The Merit Review by the Authority lists 36 documents. *Guideline* 5.3.2 requires the Insurer to "*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".* The Insurer has clearly not taken into account all evidence in making the decision. This is a demonstrable error.

16. Given that the vast majority of documents said to have been considered are neither work capacity certificates nor declarations by the applicant in a form approved by the Authority as stipulated in section 44B(1)(a) and (b), they are, by definition, irrelevant considerations.

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 and the *Workers Compensation Regulation* 2010.

RECOMMENDATION

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

19. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 18 June 2014 until such time as he is properly transitioned. Those payments should continue from 18 June 2014 being the date on which they ceased.

20. 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 18 June 2014 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
21 July 2014