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 27 December 2013 is set aside.

b. The applicant is to be reinstated to his weekly payments at the rate applicable at 27 December 2013.

c. The payments are to be back-dated to 3 April 2014.

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

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 27 December 2013. The applicant sought internal review and the Internal Review Decision (IRD) was issued on 5 February 2014. He then sought Merit Review on or about 21 February 2014 and the Authority issued the Merit Review recommendation on 19 May 2014 at least some 87 days later[1]. Following receipt of the Merit Review Service (MRS) recommendation, the applicant made application to this office on 5 June 2014.

2. I am satisfied that the applicant has made the application for review in the proper form and within time.

3. The applicant was injured on 18 August 2011. The applicant has not returned to his pre-injury duties as a storeman. The applicant remains in the employ of the employer and was in receipt of weekly payments of

[1] *Guideline* 10.14 of the *Guidelines for work capacity decision Internal Reviews by insurers and Merit Review by the WorkCover Authority (Review Guidelines)*, which came into effect on 11 October 2013, states that "*The Authority will write to the worker and insurer as soon as practicable and preferably within 30-days of receiving the application advising of the outcome of the merit review."*

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compensation up until the time the work capacity decision purported to come into effect.

4. The applicant was in receipt of weekly payments immediately before 1 October 2012. Accordingly *Clause 8* of *Part 19H* of *Schedule 6* to the *Workers Compensation Act* 1987 (the 1987 Act) required the Insurer to conduct a work capacity assessment.

5. *Section 44A* of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines (Guidelines).*

6. The relevant version of the *Guidelines* came into effect on 11 October 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 benefits payable to the injured worker then the Insurer is required to give proper notice to the worker (*Section 54(2)(a)* of the 1987 Act).

Submissions by the applicant

8. The applicant raised various matters in the Application for Procedural Review. *Section 44(1)(c)* of the 1987 Act states that this review is sought upon the grounds that the decision by the employer does not state that application for review must be filed within 30 days of the decision being made and does not advise the applicant of the date that his medical benefits cease.

Submissions by the Insurer

9. The Insurer has made submissions in response to the application received by this office on 19 June 2014.

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The Decision

10. Procedural review requires scrutiny of the decision making processes by the Insurer, including an examination of compliance with the *Guidelines*, rather than a consideration of the submissions by either party. Any demonstrable error[2] on the part of the Insurer may invalidate the decision.

11. *Guideline* 5.3.1 states that the Insurer *"must provide the worker and the relevant parties with plain language communication regarding the work capacity decision."* Plain language communication requires communicating a clear message and presenting concise information. Importantly, it requires an adapting the communication style to meet the worker's needs.

12. The Insurer has stated in the decision *"your entitlement to benefits for medical or related expenses will continue in accordance with the provisions of the Act. We note in accordance with Section 59A(2) of the Act compensation or medical expenses is not payable in respect of any treatment or service provided more than 12 months after a worker* ***ceases to be entitled*** *to weekly payments of compensation. This decision* ***does*** *cease you entitlement to weekly payments."*

13. Whilst the above statement is legally correct it does not convey clearly and succinctly to the applicant that his entitlement to medical expenses ceases on 3 April 2015.

14. The decision also **fails** to advise the applicant of *Section 59A (3)* of the 1987 Act.

15. *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.

[2] 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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16. The decision lists 4 documents relied upon in making the work capacity decision. The documents are a WorkCover NSW Final Medical Certificate dated 28 September 2012, an Earning Capacity Assessment Report dated 16 May 2013, medical report of Dr M dated 9 August 2013 and an email from the applicant dated 11 December 2013. Given that the documents said to be 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.

17. *Guideline* 5.3.2 states that the Insurer must *"advise that any documents or information that have **not** already been provided to the worker can be provided to the worker on request to the Insurer".* The decision advises the worker that the documents relied upon to make the decision have previously been provided to him. The decision fails to advise the applicant that any documents or information that has not been provided can be provided upon request.

FINDING

18. 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* which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

RECOMMENDATION

19. I recommend that the Insurer conduct a new work capacity assessment and make a new work capacity decision in accordance with the WorkCover *Guidelines*. This should be done with current medical evidence.

20. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 27 December 2013 until such time as he is properly transitioned. Those payments should continue from 3 April 2014 being the date on which they ceased.

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21. 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 27 December 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.

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
25 July 2014