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 application for procedural review of a work capacity decision is dismissed.

b. No recommendation is made.

Background

1. The applicant injured worker seeks procedural review of a work capacity decision dated 1 November 2013. Subsequently an internal review was conducted, which upheld the original decision. Consequently weekly payments ceased on 8 February 2014. The applicant sought merit review, and was advised of the outcome of by letter dated 19 May 2014, allegedly received on 6 June 2014. Nothing turns on the discrepancy of time, since an application to WIRO was dated 17 June 2014 and therefore within the 30 days statutorily allowed

2. The applicant was working as a supervisor for a company which manufactured screen security doors when on 21 November 2001 he sustained injury while lifting a heavy object, probably a Perspex security door. Relevantly, the applicant has not worked since 2001 and has received weekly payments of compensation for more than 590 weeks. His treating doctor continues to certify him as incapable of working for any period in any employment.

Submissions by the applicant

3. The applicant made extensive submissions. Primarily he argued against the decision made by the Insurer on merit grounds. A procedural review may not consider matters of merit by virtue of the specific wording in section 44(1)(c) which circumscribes procedural review as follows:

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> *a review only of the insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer in making the decision*[1]

The applicant did raise some procedural grounds, to be addressed below. Specifically he accuses the Insurer of relying on untested "evidence," giving undue weight to the opinions of doctors he has not seen and failing to correctly explain the effect of the work capacity decision. He identifies glaring errors made by the insurer in the course of internal review (including an incorrect work history) but these errors do not form part of the work capacity decision the subject of this review. The original decision did not have the historical errors later identified and is therefore not invalid by virtue of those errors.

Submissions by the Insurer

4. The Insurer made no formal submissions to this office however had set out extremely lengthy reasons in the original work capacity decision. Most relevantly, the Insurer adopted the position that the work capacity certificates relied upon by the applicant were not a true reflection of his ability to work, due to the existence of other conflicting evidence.

Relevant legislation

5. Section 44B(1) of the *Workers Compensation Act* 1987 (1987 Act) provides for only two categories of evidence relevant to the issue of work capacity to be provided to an insurer by a worker:

> **44B Evidence as to work capacity**
>
> (1) A worker must provide to the insurer:
>
> (a) ***certificates of capacity*** in accordance with this section in respect of the period in respect of which the worker is entitled to weekly payments, and

[1] See *Workers Compensation Act* 1987 section 44(1)(c). The misspelling of "judgement" appears in the Act.

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> (b) ***a declaration*** in the form approved by the Authority as to whether or not the worker is engaged in any form of employment or in self-employment or voluntary work for which he or she receives or is entitled to receive payment in money or otherwise or has been so engaged at any time since last providing a certificate under this section.

No other section identifies evidence of work capacity and in the current case this presents the applicant with a problem.[2]

The work capacity decision

6. The Insurer gave a lengthy recital of the history of the claim and the fair notice phone call made prior to the decision being made. An idea of the reason for terminating the weekly payments of the applicant may be understood by a few quotes from the early part of the letter dated 1 November 2013. Discussing a surveillance DVD, the Insurer writes:

> We recall that during the conversation you advised that it would not be you witnessed in the surveillance and it might be either your dad gardener or your wife. As we had confirmed with the doctors that the person in the surveillance was in fact the same person that attended the assessment we advised you that we were certain the footage was in fact you. You requested a copy of the surveillance and the paper report provided and we requested a copy of the DVD from the surveillance company which I provided to you on receipt.

Two pages later, the following appears:

> While we note that your nominated treating doctor continues to provide you with a Certificate of Capacity which stipulates that you have no capacity to work, I have included a report received from Dr [D] on the 4 October 2012, who in light of the information provided to him is now of the opinion that a change in your fitness level is warranted on your Certificate of Capacity.[3]

[2] See *infra* under the heading "Consideration."
[3] Note that this doctor is not the applicant's nominated treating doctor.

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A further two pages in, this:

> The current medical evidence from Dr [CO] IMC, Ass Professor [GB], Professor [MK], Dr [TS] IME, Dr [UD] IMC along with a letter from Dr [D] all support that your current certification of unfit is not a true and accurate certification of your capacity to work. The surveillance obtained also reflects that you have some capacity to work.

7. The applicant's submission relevantly says the following:

> The insurer has used misleading very selective subjective surveillance that cannot prove functional capacity and so-called IME reports from 2002-2005 [….] to compile a prejudiced and irrelevant amount of file documents to serve the insurer's own purpose. I would expect that WIRO would be interested in the complete lack of procedural fairness in circumstances where an insurer is relying upon video evidence provided to non-examining non-treating clinicians/IME in early 2013 as part of their [the insurer's] decision process in a work capacity assessment and decision. That the said video has not been properly tested and reviewed by an independent body to ensure no editing or selective use of video was used, in circumstances where the videographer has not been questioned or tested and in any circumstance that might involve trespass on private property to obtain video footage.

8. The applicant is clearly not an unsophisticated observer, having rightly raised the spectre of untested evidence being relied upon. He even goes so far as to point out the errors and omissions of the Insurer in relation to section 59A, thus:

> The work capacity decision did not say that the effect of the decision is that 12 months after the last payment of weekly benefits, the entitlement to medical benefits wou,d automatically come to an end under section 59A(2). Similarly there was no

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reference to section 59A(3) or 59A(4), which is the section that my treating clinicians opine that I should be assessed under.[4]

CONSIDERATION

9. In an ordinary case, the failure of the Insurer to correctly advise the applicant of the full effect of section 59A(2) would render the work capacity decision invalid. This is because the Guidelines[5] require the Insurer to fully explain the effect of the decision to an injured worker. But this is no ordinary case; clearly, this applicant has a very thorough knowledge of the legislation, which he has demonstrated in his submissions. It would be disingenuous at best to suggest that he needed to be told the effect of section 59A(2),(3) and (even)(4) in circumstances where he has given a very accurate summary of the relevant legislation himself.

10. At paragraph 5 *supra* I noted that the limited evidentiary requirements in section 44B(1) presented this applicant with a problem. The problem he has is that he can rely on only two forms of evidence to prove his work capacity: (a) certificates of capacity; and (b) his own declarations of unchanged circumstances. The latter must carry little weight in the absence of the former. In this case the certificates of capacity are impugned as a result of surveillance footage which has been shown to a considerable number of doctors, all of whom seem to suggest that the certificates are of no value due to discrepancies in presentation. There appears to be little or even no doubt that the applicant appears in the surveillance. He makes no attempt to explain the surveillance; rather he attempts to impugn the processes by which it was obtained, including the underlined words in paragraph 7 *supra*.

11. A question arises about what the Insurer can do in this case. The applicant understandably suggests that untested evidence should not be relied upon, but there appears to be no known means by which such evidence can be "tested." Certainly there is no tribunal before which a witness can be called and cross-examined. The Workers Compensation Commission (which itself discourages the showing of film and cross-

[4] Section 59A(4) says that section 59A does not apply to "seriously injured workers." There is no existing medical assessment certificate certifying this applicant as suffering more than 30% Whole Person Impairment, which invalidates the assertion.
[5] At 5.3.2.

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examination of witnesses, which may only be done with leave) has no jurisdiction to determine work capacity disputes and therefore has no role to play in the present case. The Insurer has sent the surveillance footage to a considerable number of medical practitioners, all of whom say that the evidence in the DVD is damning to the credibility of the certificates of capacity created as a result of only examining the applicant.

12. There being no available procedure by which the Insurer or an independent body might "test" the surveillance evidence, it falls to the Insurer to exercise its discretion. Here is the problem for the applicant: procedural review might not intrude into the judgement or exercise of discretion by the Insurer.[6] It is clearly a matter of discretion on the part of the Insurer to rely on the surveillance evidence, together with the resultant revised medical opinion, in order to reject the credibility of the certificates of capacity presented by the applicant.

13. Otherwise the decision of the Insurer is commendable for its accuracy and comprehensiveness. Whilst noting medical reports from 2002, it specifies that the decision is based on the current capacity of the applicant as assessed in twelve reports from 2013. It gives lengthy summaries of individual reports, correctly explains the effect of section 38(3) and advises the applicant of his rights of further review.

14. The only relevant oversight I can find[7] was accurately identified by the applicant himself, thereby proving that he did not need to be told by the Insurer in the first place.

FINDING

15. I find that the Insurer has followed the procedures as set out in the WorkCover *Guidelines* as required by Section 44A of the 1987 Act. The Insurer has also followed the 1987 Act and the *Workers Compensation Regulation* 2010*.*

[6] See paragraph 3 and footnote 1, *supra.*
[7] Failure to explain the effect of section 59A(2)

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RECOMMENDATION

16. In the circumstances the application is dismissed and I make no recommendation.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
5 August 2014