WiRO

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 December 2013 is set aside.**

b. **The applicant is to be reinstated to her weekly payments at the rate applicable at 1 April 2014.**

c. **The payments are to be back-dated to 1 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 31 December 2013. The applicant sought internal review and the Internal Review Decision (IRD) was issued on 7 February 2014. She then sought Merit review by the Authority and a recommendation issued forth on 30 May 2014. Following receipt of the Merit Review Service (MRS) recommendation, the applicant made application to this office.

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 1 June 2012. The applicant has been unsuccessful in returning to her pre-injury hours of employment as a pharmacy assistant, but has worked for three hours per day, three days per week.

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.

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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 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, while comprehensive and not without some interest, essentially go to the merits of the case. This takes them outside the scope of procedural review which is limited to an examination of the procedures of the insurer while in the course of making a work capacity decision.

Submissions by the Insurer

9. The Insurer has made submissions in response to the application, which were received by this office on 10 July 2014. They do little more than provide a chronology and repeat an error which is fatal to the work capacity decision.

The Decision

10. The Work Capacity Decision is dated 31 December 2013. *Section 54(2)(a)* of the 1987 Act requires 3 months' notice be given when weekly payments are to be reduced or ceased. A better way to explain the 3

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month period is to explain that the *Interpretation Act* 1987 section 76(1)(b) states that service by mail is taken to be on the fourth working day after the letter is posted. A working day is a day other than *"a Saturday or Sunday, or a public holiday or a bank holiday in the place to which the letter was addressed"*: section 76(2)(a) and (b) of the *Interpretation Act* 1987. Therefore, the proper notice period is 3 months and four days.

11. This work capacity decision advises the applicant that the change in her entitlement will take effect 'in three (3) months being thirteen (13) weeks from the date of this letter (this period allows a week to allow for postage of this document to you) meaning your weekly benefits will cease on **1 April 2014**.' [1]

12. *Section 17* of the *Interpretation Act* 1987 defines '*month*' as *'calendar month'* which is then defined as *'a period commencing at the beginning of any day of a named month and ending:*

    (a) at the end of the day before the corresponding day of the next named month; or

    (b) if there is no such corresponding day – at the end of the next named month.'

13. In contradistinction to this, the Insurer appears to have assumed that a month is four weeks and has counted thirteen weeks from the date of the decision. This is clearly incorrect.[2]

14. Pursuant to the 1987 *Act* the required notice period of three months and four days would have taken the notice period to 4 April 2014. The incorrect notice period being provided to the applicant by the Insurer is a clear breach of the 1987 *Act* and the *Guidelines*.

15. *Section 59A(2)* of the 1987 Act states that treatment expenses and related expenses are no longer payable 12 months after weekly payments cease.

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[1] Keen-eyed and regular readers might have noticed at this point a striking, if depressing, verisimilitude between recommendation **9914** and the present recommendation. This is no accident, since they both concern a work capacity decision by the same insurer, made on the same day.

[2] This incorrect notice period is the error which was repeated in the submissions of the Insurer, [at point 3 thereof].

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16. The present decision advises the applicant that her entitlements to 'reasonable and necessary medical treatment will continue for twelve months after the cessation of her weekly payments unless it is determined that this treatment is not reasonable and necessary'. The decision fails to clearly advise the worker that her entitlements will actually cease after the twelve month period. The decision also fails to advise the applicant of *Section 59A (3)* of the 1987 Act.

17. *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.

18. *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 present decision advises that applicant that she may request copies of the documents listed in the decision but fails to advise that she can request copies of ***any*** documents or information. This is a clear breach of the *Guidelines.*

19. *Section 44B(1)* of the 1987 Act describes "evidence as to work capacity" as (a) certificates of capacity and (b) a declaration by the worker of unchanged circumstances. Despite this, the Insurer has purported to rely on a report by someone described as a "rehabilitation counsellor" and an IME report. No reason is given for either completely ignoring or giving no weight to the worker's certificates of capacity, nor is an explanation forthcoming which might justify the reliance placed upon evidence which falls outside section *44B(1).* This must constitute demonstrable error.

FINDING

20. 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 is invalid.

RECOMMENDATION

21. 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.

22. I recommend that the Insurer pay the applicant the weekly benefit to which she was entitled prior to 1 April 2014 until such time as she is properly transitioned. Those payments should continue from 1 April 2014 being the date on which they ceased.

23. 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 31 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.

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