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 06 March 2014 is set aside.**

b. **The applicant is to be reinstated to his weekly payments at the rate applicable immediately prior to 13 June 2014.**

c. **The payments are to be back-dated to 13 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 06 March 2014. The decision stated that payments were to cease on 13 June 2014. The applicant sought internal review. The Internal Review Decision (IRD) was issued on 26 May 2014. The applicant sought Merit Review by the Authority. The Merit Review was issued on 27 June 2014.

2. The applicant was injured on various dates between 1987 and the early 1990s. He suffered injury to his lower back, shoulder and a knee. He was medically terminated by the culpable employer in 2000. He subsequently obtained suitable employment which he has maintained, albeit on reduced hours usually in the range of 21-24 hours per week. 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

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(the Regulation) required the transitioning 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, published on 8 October 2013, and 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. 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 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. 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 largely went to the merits of the decision, that is, the judgement or discretion of the Insurer. Further, the submissions called into question the appropriateness and applicability of the transitional rate. Since the transitional rate is prescribed by legislation, it is not a matter for debate or review. To that extent, the submissions are not of any relevance. The applicant is on firmer ground when noting the short-comings of the insurer in explaining and/or referencing the legislation. Specifically the applicant says that the Insurer has not adequately explained the relevance and effect of section 38, nor has the Insurer adequately explained the transitional rate or the concept (and applicability) of pre-injury average weekly earnings (PIAWE). Lastly he notes that on the final page of the decision the Insurer has referred to a number of legislative provisions irrelevant to the claim.

Submissions by the insurer

7. The Insurer made no submissions.

The Decision

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8. The applicant is told the following:

   - As you have now already received 150 weeks of weekly entitlements[1] you fall under S38 o0f the Act. You therefore fall at 80% of $948.50 which is $758.80. The current information sates (*sic*) you are working and earning more than the transitional PIAWE ($758.80 gross per week).
     Therefore your weekly benefits will cease.
     Under the (*sic*) S38 of the Act you are required to be working more than 15 hours per week or earning more than $168. Due to you working more than 15 hrs per week and are receiving more than the Pre-injury average weekly earnings. The likely outcome of this review is that your weekly benefits are to cease.[2]

   It is not explained that the transitional rate is used as the applicant was in receipt of weekly payments immediately before 1 October 2012.[3] The Insurer should have referred to clause 1 (the definition of "existing recipient of weekly payments"), clause 2 (the transitional amount as indexed which is why the figure used is $948.50), and clause 9(3) (the deeming provision) of Part 19H of Schedule 6 of the 1987 Act.

9. The applicant is advised that his claim is subject to section 38 of the 1987 Act, and that for weekly payments to continue he must work more than 15 hours per week **or** earn more than $168 per week.[4] The correct reference is to section 38(3)(b) and (c) of the 1987 Act. It is incorrect to state that the section requires either 15 hours work per week ***or*** earnings of $168 per week. The section clearly requires both. This is a demonstrable error.

10. On the very next page the worker is advised as follows:

> Regardless of your pre-injury average earning amount (PIAWE)[5] we are required to use the transition amount[6] for **all claims notified prior to the 1/10/12**.[7]

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[1] A common synonym for "weekly payments of compensation."
[2] An odd final sentence to include in the actual decision notice.
[3] *Au contraire*, see para 10 *infra*.
[4] See quote in paragraph 8 *supra*.
[5] The acronym is correct, the preceding words are not.

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This clearly involves a demonstrable error of law.

11. In a following paragraph the following appears:

> Note. The transitional amount is used as the deemed amount of the pre-injury average weekly earnings of an injured worker for the purpose of determining the weekly payments of compensation payable to existing recipients of weekly payments after they become subject to the weekly payments amendments.

No definition of “existing recipient” is forthcoming, nor is there any explanation of when it is that such existing recipients “become subject to the weekly payments amendments.” In the absence of any such explanation, the applicant could not begin to understand what he has been told. This is in clear breach of *Guideline 5.3.2* which requires the Insurer to reference the legislation and to explain the effect of the decision to the injured worker.

12. Guideline 5.3.2 requires the Insurer to *“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 states that the applicant has been sent copies of the 3 documents listed in the decision. He is not told that he may request copies of other documents.

FINDING

13. 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

[6] An apparent reference to the transitional amount
[7] A misapplication of the law – “prior receipt of compensation” is the test, not prior notification of claim.

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

15. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 13 June 2014 until such time as he is properly transitioned. Those payments should continue from 13 June 2014 being the date on which they ceased.

16. 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 13 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
26 August 2014