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 8 May 2013 is set aside.

b. The applicant is to be reinstated to his weekly payments at the rate applicable immediately prior to 16 August 2013.

c. The payments are to be back-dated to 16 August 2013.

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 8 May 2013. The decision stated that payments were to cease on 16 August 2013. The applicant sought internal review. The Internal Review Decision (IRD) was issued on 5 July 2013. The applicant sought Merit Review by the Authority. The Merit Review was issued on 26 June 2014.

2. The applicant was injured on 29 July 1995. The injury was to his back. He returned to suitable employment with the employer. 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 (the Regulation) required the transitioning process to be completed *"within 18 months"* of 1 October 2012.

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4. The relevant version of the *WorkCover Work Capacity Guidelines* (Guidelines) is the one dated 27 September 2012, which came into effect on 1 January 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 went partly to the merits of his case and as such went to the judgement and discretion of the Insurer and cannot be relevant to a procedural review. He also sought to explain the reason for his delay in seeking Merit Review.[1] That is also not relevant to a procedural review.

Submissions by the insurer

7. The Insurer made no submissions.

The Decision

8. The decision states that a work capacity assessment is required to be undertaken. The decision does not state that the assessment ever took place. The decision does not state that the assessment is required pursuant to Clause 8 of Part 19H of Schedule 6 to the 1987 Act. As such the legislation has not been properly referenced as *Guideline* 5.4.2 requires.

9. There does not appear to be any legislative requirement to notify the applicant of the outcome of the assessment. However, *Guideline* 5.4.2 stated that the decision must:

[1] Application for merit review was made on 27 May 2014.

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- *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;*
- *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.

10. The decision states that a decision must be made *"for all existing recipients of weekly payments of compensation where* [the Insurer] *was **notified of the injury** prior to 1/10/2012."* That the claim was notified prior to 1October 2012 is a necessary pre-condition but the relevant test is whether or not a worker was **in receipt of weekly payments** immediately before 1 October 2012. The Insurer should have referred to Part 19H of Schedule 6 of the 1987 Act: clause 1 (the definition of "*existing recipient of weekly payments*"), clause 2 (the transitional amount as indexed - $938.30), and clause 9(3) (the deeming provision). The test as incorrectly stated is a demonstrable error.

11. The applicant is advised that pursuant to section 43(1) (a) *"I have determined that you have a current work capacity of Fulltime hours per week with restrictions".* Further, that pursuant to section 43(1) (c) *"you are able to be earn $XX gross per week in suitable employment."* The Insurer should refer to section 32A of the 1987 Act and the definitions of *"current work capacity"* and *"suitable employment."* An untutored applicant would not expect 'current work capacity' to mean being unable to return to pre-injury employment, but being able to work in *"suitable employment."* That term is central to the 2012 amendments. The definition includes, *inter alia*, that suitable employment includes work *"whether the work or the employment is of a type or nature that is generally available in the employment market."* An applicant is unlikely

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to know from the term suitable employment that it may include work which may not exist.[2]

12. The decision then states that pursuant to section *"43(1) (d), as your claim is transitioning to the new weekly payment arrangements in accordance with schedule 12, Part 19H, Divsion 1, Part 2 of the* Workers Compensation Amendment Act *2012, the deemed amount of your pre-injury earnings is $938.30 your current weekly earnings are* $XX". If the applicant referred to the *Amendment Act* he would find that schedule 12 has been repealed. The applicant could not be expected to know that the relevant provision is now in the 1987 Act.

13. The decision correctly states that the applicant is subject to the transitional rate. It is stated that the transitional rate *"has been determined to be $938.30".* The applicant should again be referred to Part 19H of Schedule 6 of the 1987 Act as set out in paragraph 10 above.

14. The applicant is then advised that he has received more than 130 weeks of weekly payments and that his new weekly entitlement will be at 80% of the transitional amount. There is no reference to any legislation. The applicant should be referred to the definition of *"second entitlement period*" in section 32A of the 1987 Act and section 38(7) of the 1987 Act. The formula in section 38(7) then requires reference to section 35 of the 1987 Act and the definitions of the terms used in the formula. Reading the decision may leave the applicant with the view that the Insurer has devised its own formula to calculate the rate of weekly payments.

15. *Guideline* 5.3.2 requires the Insurer *"to state the impact of the decision on the worker in terms of their entitlement to weekly payments, entitlement to medical and related treatment expenses and return to work obligations."* The decision correctly states that treatment expenses and related expenses are no longer payable 12 months after weekly payments cease although no reference is made to section 59A(2) of the 1987 Act . The legislation has not been properly referenced.

[2] Technological change may lead to further complications, since work as a toll collector or a train ticket inspector (for instance) may be drying up as a result of the invention of the transponder and the Opal card.

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16. The Insurer failed to advise that section 59A(3) of the 1987 Act provides that the applicant may, after the entitlement to compensation for medical expenses ends, become eligible for further payments for medical expenses if he becomes entitled to compensation for weekly benefits at some stage in the future and for such time as those weekly payments continue. This was not disclosed by the Insurer.

17. 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 documents listed in the decision. He is not told that he may request copies of other documents. Further, the Insurer has relied upon WorkCover medical certificates the most recent of which is February 2012. Section 44B(3)(b) of the 1987 Act only allows a medical certificate to be valid for 28 days. Section 44B(4) allows for an extended certificate in certain circumstances but it is not stated that those conditions have been met. It is a grave procedural error for an Insurer to rely on certificates more than 12 months old when attempting to assess "current" work capacity.

FINDING

18. 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

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

20. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 16 August 2013 until such time as he is properly transitioned. Those payments should continue from 16 August 2013 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 16 August 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
27 August 2014