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 30 August 2013 is set aside.

b. The applicant is to be reinstated to her weekly payments at the rate applicable at 8 December 2013.

c. The payments are to be back-dated to 8 December 2013.

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 30 August 2013. The applicant sought internal review and the Internal Review Decision (IRD) was issued on 11 February 2014. He then sought Merit Review on or about 7 March 2014 and the Authority issued the Merit Review recommendation on 4 June 2014, some 89 days later[1]. Following receipt of the Merit Review Service (MRS) recommendation, the applicant made application to this office on 4 July 2014.

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

3. The applicant suffered injury to his back on 19 October 1999. The applicant was successful in returning to work on suitable duties as a Cleaner. The applicant remains employed and was in receipt of an award of weekly payments of compensation in the sum of $250 per

[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 12 August 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."*

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

week up until the time the work capacity decision purported to come into effect. The award of $250 per week was entered by the Workers Compensation Commission on 29 August 2005.

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 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 12 August 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 "*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 relevant submissions include no referral to legislation and no consideration of recent evidence. The remaining submissions are not relevant to a procedural review.

Submissions by the Insurer

9. The Insurer has made submissions in response to the application including providing a helpful chronology.

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

The Decision

10. *Guideline* 5.3.2 requires the Insurer to advise the worker of the date that the '*decision will take effect'.* That *Guideline* also requires the Insurer to *'state the impact of the decision on the worker in terms of entitlement to weekly payments, entitlement to medical and related expenses and return to work obligations*.'

11. The Insurer has advised the applicant that 'your new current rate will commence on 8 December 2013'. The new current rate is $Nil. *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.

12. It would be more appropriate in the circumstances to have advised the applicant that his weekly payments of compensation will cease on 8 December 2013 rather than advising him that he has an ongoing entitlement to $Nil per week.

13. The Insurer has failed to advise the applicant of the impact the work capacity decision will have on his entitlement to ongoing medical treatment. In fact the decision does not refer to ongoing treatment or medical expenses at all.

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

15. The present decision fails to advise the applicant that his entitlements to medical expenses will cease twelve months after the cessation of his weekly payments. The decision also **fails** to advise the applicant of *Section 59A (3)* of the 1987 Act.

16. *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.

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

17. The Insurer has failed to comply with the relevant *Guideline*.

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 decision has failed to so advise the applicant and fails to comply with the *Guideline*.

19. In dealing with the applicant's submissions we note that in making the decision the Insurer relies upon various medical reports and certificates. It is crucial to note that.

20. The evidence assists in determining the applicant's current work capacity. Emphasis here is on the word ***current***. A review of the medical evidence relied upon is as follows:

    - Medical report of Dr S dated July 2004;
    - Functional Workplace Assessment dated 10 February 2012;
    - Workcover medical certificate dated 16 August 2010;
    - Medical report of Dr K dated March 2012;
    - Wage reimbursement schedules of the employer (various).

21. The report of Dr K referred to above is also referred to within the work capacity decision. It is noted within the decision that the worker consulted with Dr K on 8 March 2013. If this is correct then it would update that medical report by 12 months.

22. It is understandable that the applicant is of the impression that current medical evidence was not taken into consideration when making the decision. Even taking into consideration the report of D K being dated 8 March 2013 it is still some 6 months old at the time the decision is made. The remaining medical evidence ranges from 2 years to 9 years old.

23. *Guideline* 2.3 requires that the Insurer's decision should be *"timely, informed and evidence based."* The medical evidence used by the Insurer does not comply with the Guideline.

24. The applicant's next submission is failure of the Insurer to refer to relevant legislation and this is dealt with above. As previously indicated the remainder of the applicant's submissions did not deal with issues considered in a procedural review.

WiRO
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

FINDING

25. 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

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

27. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 8 December 2013 until such time as he is properly transitioned. Those payments should continue from 8 December 2013 being the date on which they ceased.

28. 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 8 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.

T. Emanuel

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
1 September 2014