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

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.

1. The applicant seeks a review of the work capacity decision of the Insurer.

2. There is no dispute that the applicant was injured in the course of his employment on 14 August 2009. The applicant returned to his position but then underwent surgery. After recuperating the applicant returned to suitable employment with the Employer. The Insurer made weekly payments for the earnings differential as required under the provisions of the then *Workers Compensation Act* 1987 (1987 Act).

3. The NSW Government introduced significant reforms to the Workers Compensation Scheme in June 2012 including the calculation of weekly payments.

4. The applicant was in receipt of compensation by way of weekly payments as at 1 October 2012. 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 to the applicant.

5. Section 44A of the 1987 Act provided that a work capacity assessment is an assessment of the injured worker's current work capacity and must be conducted in accordance with the *WorkCover Work Capacity Guidelines (the Guidelines)*.

6. The relevant version of the *Guidelines* is the one published on 27 September 2012 which applied to all claims from 1 January 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 payments payable to the injured worker then the Insurer is required to give proper notice to the worker (Section 54 of the 1987 Act).

8. The applicant has been in receipt of weekly payments for 121 weeks as at the date of the decision and therefore Section 37 of the 1987 Act applies.

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9. The decision of 5 June 2013 advises that the applicant would no longer be entitled to receive weekly benefits of compensation from 4 September 2013. 2013. Section 54 of the 1987 Act requires that applicants are accorded three months clear notice prior to having their payments changed. By virtue of the postal service rule (Section 76(1)(b) of the *Interpretation Act 1987)*, "notice" delivered by post requires the addition of four clear working days to any specified period of notice. The Insurer was required (Section 54(4) of the 1987 Act) to give the applicant notice personally or by post. This notice was sent by post. The decision therefore does not give 3 months notice as required.

10. The *Guidelines* require at Part 5.4.2 that the legislation be referenced. The decision does not refer to section 54 of the 1987 Act.

11. The decision does not state that a work capacity assessment has been made. The decision refers to "*This assessment..."* but this reference seems to be a reference to Functional & Vocational Assessments. The insurer is required to make a decision "as soon as practicable" after the assessment is made: *Clause 23, Schedule 8, Workers Compensation Regulation 2010*. There does not appear to be any legislative requirement to notify the applicant of the outcome. However, the *Guidelines* at Part 5.4.2 state that the decision must;

    - *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 reasoning for the decision.*

    My finding is that the *Guidelines* result in the insurer being compelled to reveal the outcome of the assessment.

12. In this case the applicant cannot know whether an assessment has been made or the date of the assessment if it was made. The applicant cannot know whether the decision was made as soon as practicable after the assessment and is therefore in breach of *Clause 23, Schedule 8, Workers Compensation Regulation 2010.*

13. The decision states correctly that treatment expenses cease to be paid after 12 months, although it gives the incorrect date of 4 September

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2014. The *Guidelines* require at Part 5.4.2 that the legislation be referenced. Section 59A is not referred to in the decision.

14. The decision sets out the transitional amount but fails to refer to Schedule 6, Part 19H, Division 1, Clause 2 of the 1987 Act.

15. The decision sets out the Average Weekly Earnings, and that the applicant's deemed AWE is the transitional amount. Section 35 is not referred to. The decision shows the calculation for the rate of pay being nil, but fails to refer to section 37 of the 1987 Act.

16. The *Guidelines* at Part 5.4.2 state that a decision must "*detail any support, such as job seeking support, which will continue to be provided during the notice period".* This decision is silent as to any support which may be available.

17. The *Guidelines* at Part 5.4.2 state the decision must, inert alia:

- *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.*

18. The decision glibly refers to:

> *...all available medical or other evidence and information gathered over the life of your claim including your current employment. Further information and reports have been obtained where considered appropriate from your treating doctor(s), independent specialist medical examination, Functional & Vocational Assessments and other sources as considered relevant.*

19. No evidence is outlined. It is impossible from this decision to know what the decision maker had before him, or what he took into account.

20. Further, the above *Guidelines* also state that the work capacity decision notice must advise the applicant that any documents or information that have not already been provided to him can be provided on request to

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the Insurer. The Insurer has failed to so advise the applicant and has not even advised as to what documents have been considered in making the decision.

21. There is one major difficulty which faced the Insurer in making its work capacity decision and that is the requirement contained in Clauses 5 and Clause 5.1 of the *Guidelines*. That was in the following terms:

"Clause 5

Work capacity decisions should be made in line with the Best Practice Decision- Making Guide."

and then:

"Clause 5.1

When making a work capacity decision the insurer should follow the Best Practice Decision-Making Guide."

That Guide did not exist and has never existed or been published by WorkCover.

FINDING

22. 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.

RECOMMENDATION

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

24. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 4 April 2013 until such time as he is properly transitioned. Those payments should continue from 4 September 2013 being the date on which they ceased.

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BRIAN HATCH
Delegate of the WorkCover Independent Review Officer

13 January 2014