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 23 August 2013 is set aside.

b. The applicant is to be reinstated to his weekly payments at the rate applicable at 1 December 2013.

c. The payments are to be back-dated to 1 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 23 August 2013. The applicant sought internal review and the Internal Review Decision (IRD) was issued on 24 October 2013. He then sought Merit Review on or about 20 November 2013 and the Authority issued the Merit Review recommendation on 27 June 2014, some 241 days later[1]. Following receipt of the Merit Review Service (MRS) recommendation, the applicant made application to this office on 13 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 24 May 1998. The applicant was unable to return to his pre-injury duties. The applicant obtained alternative employment and is presently working 32.5 hours per week. The applicant was in receipt of an award of weekly payments of

[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

compensation in the sum of $220 per week up until the time the work capacity decision purported to come into effect.

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.

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 incorrect advice in respect of medical expenses and the failure of the Insurer to go back to WCC to terminate the award. The remaining submission, the requirement of future surgery is not relevant to a procedural review.

Submissions by the Insurer

9. The Insurer has made no submissions in response to the application.

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 *'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 *'any entitlement you may have to payment of pre-approved reasonable and necessary medical and other expenses, until the 1st of December 2013, will not be affected.'*

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

13. The present decision is incorrect as it 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.

14. *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.

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

16. *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*.

17. *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.

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

18. The evidence used by the Insurer to assist 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:

    - Workers Compensation Claim Form, dated the 5th of June 1998, submitted by D. [I];
    - Independent Medical Report, dated the 28th of July 1998, completed by Dr [Pe H];
    - Independent Medical Report, dated the 19th of October 2000, prepared by Dr [Ph H];
    - Certificate of Capacity, dated the 18th of February 2013, issued by Dr [G N];
    - Treating Doctor Report, dated the 25th of March 2013, provided by Dr [G N];
    - Industry Averages Report, dated the 28th of June 2013, prepared by [A];
    - Payslips from current employment with [T B C Pty Ltd], of various dates.

19. The substantive medical evidence by way of medical reports is up to 16 years old.

20. Clearly the medical evidence used by the Insurer does not comply with the *Guideline* referred to above.

FINDING

21. 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

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

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

23. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 1 December 2013 until such time as he is properly transitioned. Those payments should continue from 1 December 2013 being the date on which they ceased.

24. 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 1 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
3 September 2014