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 application for procedural reviewed is dismissed.

Introduction and background

1. On 10 November 2011 the applicant was injured in the course of her employment as an Aged Care Worker. Having suddenly taken the full body-weight of a patient when bedding slipped, the applicant had an immediate onset of pain in the right shoulder. She noticed that the pain worsened overnight and the condition did not improve.

2. Consequently the applicant made a claim for weekly payments of compensation which was accepted. She was an "existing recipient" of weekly payments (as that term is understood in the legislation) immediately prior to 1 October 2012. Payments continued until the Insurer sought to transition the applicant to the new system introduced in 2012.

3. The applicant was advised by letter dated 11 December 2014 that the Insurer had made a work capacity decision which would have the effect of terminating her ongoing weekly payments of compensation in March 2015.

4. This correspondence appears to be the third in what might retrospectively appear to be a series of propaedeutical notes, the earlier two of which (dated 24 March 2014 and 7 July 2014) had the anantapodotonic quality of implying but leaving unsaid certain necessary information which was supplied only at the third attempt. In the application for procedural review and the recommendation of the merit review service there is no reference to either of the earlier decisions, leading me to the conclusion that they were not implemented. Despite this, copies of the earlier decisions were supplied by the applicant. While the decisions are of interest historically, they have no relevance for current purposes.

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5. On 9 March 2015 the applicant sought internal review of the decision dated 11 December 2014. I note this is well outside 30 days for the purposes of clause 30(2) of Schedule 8 to the *Workers Compensation Regulation* 2010.

6. The Insurer advised the applicant of the outcome of internal review by letter dated 2 April 2015, however this was not received until 9 April 2015.

7. The applicant applied for merit review by the Authority on 11 May 2015. They delivered a recommendation on 10 June 2015 finding that the applicant had no work capacity and that she has an ongoing entitlement to payments of weekly compensation at 80% of the transitional rate.

8. The applicant then made application to this office dated 8 July 2015. Noting that the applicant cannot be paid at any higher rate than already determined by the merit review service, the application to this office might be best understood in the context of paragraphs 20-22 of the merit review recommendation, which suggested to the applicant that she should make such application in the event that she wished to have "the procedures of the Insurer in making a work capacity decision reviewed."

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

10. Section 44A of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).

Submissions by the applicant

11. 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."*

12. The applicant has requested a procedural review.

13. As part of the application for procedural review the applicant made the following observation:

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> Following a Merit Review by WorkCover dated 10 June 2015, my benefits were reinstated. I do not disagree with this decision. However, upon inquiry with the insurer … I was told that because I did not respond within 30 days following their 11 December 2014 decision, I was not entitled to back pay to March 2015 (when they ceased payments). It is this decision which forms the basis of this request for a review.

Submissions by the Insurer

14. The Insurer provided submissions dated 23 June 2015 in response to the application. The Insurer's submissions addressed the issue raised by the applicant above thus:

> As a stay of decision applied under Clause 30[1] [the applicant] should have continued to receive weekly compensation payments from 9 March 2015, when the Application for Internal Review was received,[2] until the Merit Review was determined as the Authority accepted her application for Merit Review and the Authority proceeded with their merit review decision. As this did not occur,[3] [the applicant] will be paid by 24 July 2015.
>
> The reason for non-payment of weekly compensation payments is due to the pending receipt of the Centrelink Clearance Form.
>
> [The applicant] will be paid at the rate prior to 9 March 2015 which is $778.32 per week (being $972.90 x 80%) and from 1 April 2015 will be paid $788.32 per week (being $985.40 x 80%).

The Decision

[1] A cryptic reference to clause 30 of Schedule 8 to the *Workers Compensation Regulation* 2010 – see paragraph 5, *supra*. Astute readers may note that the clause could not possibly apply, for the reason appearing in paragraph 5, *supra*.
[2] An interesting observation, since the notice period under section 54(2)(a) was not due to expire until ten days later.
[3] It seems probable that "this" in the present context refers to payment continuing beyond 9 March 2015.

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15. The Insurer seems to have adequately dealt with the concerns raised by the applicant in relation to the weekly payments. This is despite having no understanding of how the stay in clause 30 of Schedule 8 to the *Workers Compensation Regulation* 2010 (the Regulation) operates. There is no stay of a work capacity decision for the duration of internal review if a worker applies for internal review more than 30 days after receipt by the worker of the original decision – see clause 30(2). That is precisely what happened in this case.

16. The restoration of payments from the date of cessation (rather than the date of application for internal review) is necessary for the reasons set out by Deputy President Roche of the Workers Compensation Commission of NSW in the decision of *Rawson v Coastal Management Group Pty Ltd* [2015] NSWWCCPD 3 (20 January 2015) at paragraphs 81-82:

> 81[…]As its decision was that Mr Rawson had "no current work capacity" and as that expression is defined to mean "a present inability arising from an injury such that the worker is not able to return to work, either in the worker's pre-injury employment or in suitable employment" (s 32A), **it seems that the insurer has decided that the phrase "present inability" dictates that a work capacity decision can only apply from the date it is made. That is patently incorrect.**
>
> 82 **The expression "present inability" relates to the time from which the weekly compensation is sought and requires a decision about a worker's "current work capacity" that applies at and from that time, even though the work capacity decision may not be made until a later time. Any other interpretation leads to workers being denied compensation because of the insurer's delay in making the work capacity decision.** In the present claim, an assessment of Mr Rawson's "current work capacity" had to be made from the date on which the new provisions applied to him, that is, from 17 September 2012, having regard to the available evidence. The fact that the work capacity decision was not made until September 2014 does not change that fundamental requirement

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17. It follows that in the present case the applicant is clearly entitled to be paid for *all relevant periods the subject of the claim* determined by the merit review service. The stay would only be relevant retrospectively if the applicant had been unsuccessful in having the original decision varied by merit review. Further, the stay could only have operated from the date of application for merit review, due to the applicant having only applied for internal review after the effluxion of 30 days following receipt of the original decision.

18. The applicant highlighted conduct by the Insurer which might be thought questionable, including an allegation being made by the Insurer that the applicant had falsified a medical report – a claim which the doctor himself later refuted in writing. That and other issues raised by the applicant occurred either well after the original work capacity decision, or before it. While interesting, such observations are of no relevance for current purposes.

Finding

19. While the reasons given for the original decision were overturned by the merit review service, the procedures adopted by the insurer were correct and in accordance with the legislation. There being no procedural error, the recommendations of the merit review service remain binding on the insurer.

RECOMMENDATION

20. The application for procedural review is dismissed.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
14 August 2015