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 work capacity decision of the Insurer dated 12 July 2013 is set aside.**

b. **The applicant is to be reinstated to his weekly payments at the rate applicable at 12 July 2013.**

c. **The payments are to be back-dated to 19 October 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 12 July 2013. The applicant sought internal review of the work capacity decision on 6 August 2013 and an internal review decision was made on 16 September 2013. He sought Merit Review of the decision on or about 26 September 2013 and the Authority issued the Merit Review recommendation on 24 June 2014, some 270 days later[1]. The applicant made application to this office on 14 July 2014.

2. I am satisfied that the applicant has made the application for review of the decision dated 12 July 2013 in the proper form and within time.

3. The applicant suffered injury to his lower back on 16 March 2006. He was employed as a mechanic/fitter. He was unable to return to his pre-injury employment. Presently the applicant is employed as a sales assistant with Vincentia Treasure Chest.

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[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 *27 September 2012* 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.*"

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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 27 September 2012. 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 main submission was that the Insurer did not follow the appropriate guidelines.

Submissions by the Insurer

9. The Insurer has provided submissions in response to the application in the form of a very useful chronology.

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The Decision

10. *Guideline 5.4.2* 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. *Section 59A(2)* of the 1987 Act states that treatment expenses and related expenses are no longer payable 12 months after weekly payments cease.

12. The decision **fails** to advise the applicant that his entitlements to medical expenses will cease twelve months after the cessation of his weekly payments.

13. 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* 5.4.2 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*.

FINDING

17. 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

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

19. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 12 July 2013 until such time as he is properly transitioned. Those payments should continue from 19 October 2013.

20. 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 12 July 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.

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