WiRO
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.

1. The injured worker is the applicant (applicant) for a review of the decision made by GIO General Ltd (the Insurer) which was sent by letter on 11 June 2013.

2. There is no dispute that the applicant was injured in the course of his employment on 5 January 2009. The applicant spent time in hospital and then in rehabilitation. After recuperating following the injury the applicant returned to suitable employment with the Employer in September 2010. The Insurer made weekly payments for the earnings differential as required under the provisions of the *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).

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8. The applicant has been in receipt of weekly payments for more than 130 weeks as at the date of the decision and therefore Section 38 of the 1987 Act applies.

9. The heading of the letter does not refer to section 54 of the 1987 Act. *Guideline* 5.4.2 requires the insurer to "*reference the relevant legislation".* It may not be necessary to refer to section 54 in the heading, although it would be preferable, but it should be referred to in accordance with *Guideline* 5.4.2 in the decision.

10. The decision of 11 June 2013 advises that the applicant would no longer be entitled to receive weekly benefits of compensation from 11 September 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.

11. The decision states that a work capacity assessment has been made. 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 the date of the assessment. 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.

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13. *Guideline* 5.4.2 requires the Insurer *"to state the impact of the decision on the worker in terms of their entitlement to weekly payments, entitlement to medical and related treatment expenses and return to work obligations".* Section 59A of the 1987 Act states that payment of treatment expenses cease 12 months after weekly payments cease. The decision is silent as to payment of medical expenses, which may suggest to the applicant that the decision has no bearing on treatment expenses. Such silence is in breach of the *Guidelines.*

14. The decision states that based on the work capacity assessment weekly payments will cease. No attempt to explain why this will occur is provided in the decision. The decision refers to "Subdivision 3" of the 1987 Act. It also refers to sections 38 and 43 of the "*Workers Compensation Legislative Amendments* 2012*".* There are 2 "Subdivision 3" headings in the 1987 Act. The proper name of the 2012 legislation is the *Workers Compensation Legislative Amendment Act* 2012 and the sections referred to in the decision are in Schedule 1 to that Act. They are not sections of the amending Act. Further, section 30C of the *Interpretation Act* 1987 provides that an amending Act "*is repealed on the day after all of its provisions have commenced".* The parts of the amending Act relevant to work capacity decisions did commence and that part of the amending Act was repealed. *Guideline* 5.4.2 requires the decision to *"reference the relevant legislation".* I doubt that any applicant could decipher these references in order to work out why payments are to cease.

15. 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 her can be provided on request to the Insurer. The Insurer has failed to so advise the applicant. The Insurer has not even stated that the documents referred to in the decision can be made available.

16. 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:

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"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

17. 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 and the *Workers Compensation Regulation* 2010*.*

RECOMMENDATION

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 11 June 2013 until such time as he is properly transitioned. Those payments should continue from 11 September 2013 being the date on which they ceased.

BRIAN HATCH
Delegate of the WorkCover Independent Review Officer

16 January 2014