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*.*

SUMMARY:

a. The work capacity decision of the insurer dated 27 September 2013 2014 is set aside.

b. The applicant is to be reinstated to his weekly payments at the rate applicable immediately prior to 5 January 2014 having regard to his earnings from various periods of employment.

c. The payments are to be back-dated to 5 January 2014

d. The 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 injured worker seeks procedural review of a work capacity decision made by the insurer dated 27 September 2013. This decision terminated applicant's weekly benefit 5 January 2014. An internal review conducted on 15 November 2013 confirmed the original decision. The applicant sought merit review. Following receipt of the Merit Review Service (MRS) recommendation dated 4 July 2014, the applicant made an application to this office dated 25 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 an injury to his lower back on 3 January 2007 in the course of his employment as a store assistant. A claim was made and liability was accepted. The applicant's employment with the Respondent was terminated on 4 January 2010. In May 2011, he found work as a store assistant with a different employer. The applicant continued to receive weekly benefits from his insurer.

4. The applicant's nominated treating doctor (NTD) had, at various times certified the applicant fit for 30 hours per week and then 24 hours per week. On 2 September 2013, the NTD completed a WorkCover Certificate of Capacity stating that the applicant was fit for 38 hours of work per week.

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5. 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 (1987 Act) required the Insurer to conduct a work capacity assessment.

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

7. 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.

8. Once the Insurer has conducted an assessment then the Insurer is required to make a work capacity decision[1]. Where that decision involves a reduction or cessation 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

9. The applicant made several submissions in relation to the merits of the decision. A procedural review may not consider matters of merit by virtue of the specific wording in section 44(1)(c) which circumscribes procedural review as follows:

> *a review only of the insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer in making the decision*

Submissions by the Insurer

10. The Insurer made two sets of submissions. Their first submission provided a chronology of the work capacity decision and review process in this matter. The second submission pointed out that several of the applicant's submissions were beyond WIRO's purview because they addressed the merits of the decision.

CONSIDERATION

[1] Schedule 8, Clause 22 of the *Workers Compensation Regulation* 2010

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11. *Guideline* 5.3.2 states the insurer must "*reference the relevant legislation".* The decision does not state that the work capacity assessment is required pursuant to Clause 8 of Part 19H of Schedule 6 to the 1987 Act. As such the legislation has not been properly referenced as required.

12. The decision states that a work capacity assessment was undertaken but not when it took place. It was only in the insurer's submissions that they advised the assessment was completed on 25 September 2013[2]. The Insurer is required to make a *"work capacity decision in respect of an existing recipient of weekly payments as soon as practicable after the first work capacity assessment of the worker is conducted"*[3]. If the date of the assessment is omitted, it is unclear to the applicant whether or not the decision was made "*as soon as practicable after the first work capacity assessment."*

13. *Guideline* 5.3.2 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(2) of the 1987 Act states that treatment expenses and related expenses are no longer payable 12 months after a worker ceases to be entitled to weekly payments of compensation. The applicant was advised that "under Section 59 of the Act[4], your entitlement to medical benefits is limited to a period of 12 months after weekly benefits cease."

14. In addition to referencing the incorrect section, the insurer failed to advise the effect of Section 59A(3) of the 1987 Act. This 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 and for such time as those weekly payments continue. This failure to disclose constitutes a further breach of the Guidelines.

15. *Guideline* 5.3.2 requires the insurer to "*explain the relevant entitlement periods*". The Insurer advised the applicant's entitlement to weekly benefits would be assessed under Section 38 of the 1987 Act because "Weekly benefits have been paid or are payable to you for more than 130 weeks." The decision states that the applicant did not qualify for

[2] Instead, the decision stated they "confirmed the decision with you on 25 September 2013" which is not the same as saying the assessment was undertaken on that date.
[3] Schedule 8, Clause 23 of the *Workers Compensation Regulation* 2010
[4] An unfortunate typographical error.

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weekly benefits by virtue of Section 38(3) (c), which states that the worker must be "assessed by the insurer as being, and as likely to continue indefinitely to be, incapable of undertaking further additional employment or work that would increase the worker's current weekly earnings". This is not a satisfactory explanation of Section 38. The applicant was not notified of the other elements required to successfully claim compensation under this Section, most notably Section 38(3)(b) which requires the applicant to continue working more than 15 hours per week on average and earn more than $168 per week (indexed).

FINDING

16. I find that the Insurer has failed to follow the procedures as set out in the legislation and the WorkCover Guidelines. Therefore the work capacity decision is invalid.

RECOMMENDATION

17. I recommend that the Insurer issue a new work capacity decision in accordance with the WorkCover Guidelines.

18. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled immediately prior to 5 January 2014 until such time as he is properly transitioned, having regard to his earnings from various periods of employment.

19. The applicant is not required to produce work capacity certificates for the period from 5 January 2014 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.

20. These recommendations are binding on the insurer: see section 44(3)(h) of the 1987 Act.

Jeffrey Gabriel
Delegate of the WorkCover Independent Review Officer
18 September 2014