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 5 May 2014 is confirmed.**

b. **The applicant is to be reinstated to her weekly payments at the rate applicable prior to 13 August 2014.**

c. **The payments are to be back-dated to 13 August 2014 in accordance with clause 30 of the *Workers Compensation Amendment (Existing Claims) Regulation* 2014.**

d. **Such payments are to continue until the date of receipt of this recommendation.**

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 5 May 2014. The decision reduced the applicant's weekly payments to nil effective from 13 August 2014. The applicant sought internal review and the Internal Review Decision (IRD) was dated 6 June 2014. She then sought Merit Review from the Authority on 26 June 2014 and they delivered a decision dated 22 July 2014 confirming the work capacity decision. The applicant then applied for procedural review on 28 July 2014.

2. I am satisfied that the applicant has made the application for Procedural Review in the proper form and within time.

3. The applicant suffered injury to her right shoulder on 11 August 2012 in the course of her employment with the employer. As at the time of the work capacity decision the applicant was in receipt of weekly payments of compensation.

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

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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 a first 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 included:

   i. Failure to advise the worker of the potential outcome of the review;
   ii. Failure to advise the worker when the decision was to be made;
   iii. Failure to advise the writer (sic) what information was considered that did not support the decision;
   iv. Failure to advise the worker of what support would continue during the notice period and thereafter;
   v. Failure to adequately explain how to claim for medical expenses;
   vi. The legislation surrounding the decision has been mentioned but has not been sufficiently explained in terms that can be understood and comprehended by the worker; and
   vii. Failure to identify or obtain sufficient evidence to make a logical, rational and reasonable work capacity decision.

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9. Other submissions put forward by the applicant are considered to be submissions which are not relevant to a procedural review.

Submissions by the Insurer

10. The Insurer made submissions in response to the application which were received by this office on 6 August 2014 and have been duly considered.

The Decision

11. The decision of the Insurer complied with the *Guidelines* and the legislation. The correct notice period was given. The entitlement periods were set out and explained. The legislation was referenced where required. The applicant was advised of the date of the work capacity assessment and the totality of the evidence relied upon in reaching the decision and was given an explanation of the content of all documents consulted. The effect of section 59A was correctly explained.

12. There are no procedural errors identifiable in the decision.

13. In dealing with the applicant's submissions:

i. **Failure to advise the worker of the potential outcome of the review;**
The decision advises the applicant '*[the Insurer] also explained the likelihood of this decision to you and invited you to provide further information. I note that you have provided further information to [the Insurer] as discussed in our fair notice telephone call of 10/02/2014 and letter dated 11/02/2014.'*

ii. **Failure to advise the worker when the decision was to be made;**
The decision advises the applicant '*During that telephone call, I advised you that a work capacity assessment of your weekly payments was commenced on 5/02/2014……This assessment was completed on 22/04/2014 resulting in a work capacity decision being made.'*

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iii. **Failure to advise the writer (sic) what information was considered that did not support the decision;**
The Insurer specifically states that the evidence provided by the applicant subsequent to the work capacity assessment was considered in making the decision. The evidence provided by the applicant would be in support of her own case. The decision comments upon all evidence relied upon.

iv. **Failure to advise the worker of what support would continue during the notice period and thereafter;**
The Insurer advised that *'Rehab Co will continue to provide job seeking support and vocational counselling as required to assist you to seek suitable employment. Rehab Co will continue to provide you with face to face job seeking sessions. Rehabilitation services will continue until 12/08/14. Please contact [the Insurer] if you consider you require job seeking assistance beyond this date. [The Insurer] will also continue to provide you with reasonable and necessary return to work and rehabilitation support. As part of your obligations under Workers Compensation legislation, you are expected to fully participate in all activities related to your return to work.'* The Insurer has complied with the relevant *Guideline*.

v. **Failure to adequately explain how to claim for medical expenses**;
The Insurer is not required to explain to the applicant how to claim medical expenses. The Insurer has correctly advised the effect the decision will have on the worker's entitlement to reasonable and necessary medical expenses as a result of Sections 59A and 60 of the 1987 Act.

vi. **The legislation surrounding the decision has been mentioned but has not been sufficiently explained in terms that can be understood and comprehended by the worker;**
The Insurer has adequately explained the legislation. In particular Sections 49 and 59A of the 1987 Act.

vii. **Failure to identify or obtain sufficient evidence to make a logical, rational and reasonable work capacity decision.**
The Insurer has relied upon relevant evidence including Certificates of Capacity from Dr A, the applicant's nominated treating doctor.

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14. On 3 September 2014 the *Workers Compensation Amendment (Existing Claims) Regulation* 2014 (the Amendment Regulation) was published. Clause 26 of the Amendment Regulation provides that Part 2 "takes effect on and from 1 October 2012."

15. Clause 30 of the Amendment Regulation, which is in part 2 and therefore is deemed to have been in effect since 1 October 2012, is in the following terms:

30 Stay of work capacity decisions

(1) A review under section 44 (Review of work capacity decisions) of the 1987 Act of a work capacity decision made in respect of an existing claim operates to stay the decision that is the subject of the review and prevents the taking of action by an insurer based on the decision while the decision is stayed.

(2) This clause applies to an internal review under section 44 (1) (a) of the 1987Act only if the application for internal review is made by the worker within 30 days after the worker receives notice from the insurer of the work capacity decision to be reviewed.

(3) The stay under this clause operates from the time the application for review is made until the worker is notified of the findings of the review (or the application for review is withdrawn).

(4) This clause applies despite section 44 (4) of the 1987 Act, which is deemed to be amended to the extent necessary to give effect to this clause.

16. It must follow that the applicant is entitled to the full benefit of the Amendment Regulation and therefore the Insurer should restore the applicant to the payments being received immediately prior to the payments ceasing or being reduced as a result of the original decision and the subsequent internal review decision.

FINDING

17. I find that no procedural error occurred in this matter.

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RECOMMENDATION

18. I recommend that the Insurer pay the applicant the weekly benefit to which she was entitled prior to 13 August 2014 in accordance with clause 30 of the Amendment Regulation until the date of receipt of this recommendation.

19. This recommendation is binding on the Insurer: see section 44(3)(h) of the 1987 Act.

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