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 8 May 2014 is set aside.**

b. **The applicant is to be reinstated to his weekly payments at the rate applicable at 15 August 2014.**

c. **The payments are to be back-dated to 15 August 2014.**

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 8 May 2014. The applicant sought internal review from the Insurer which made a decision dated 19 June 2014. He then sought Merit Review on or about 7 July 2014 and the Authority issued the Merit Review recommendation on 25 July 2014. The applicant made application to this office on 31 July 2014.

2. I am satisfied that the applicant has made the application for review of the decision dated 8 May 2014 in the proper form and within time.

3. The applicant suffered injury to his neck and back on 15 January 2008. The applicant was unable to return to his pre-injury duties of a jockey and has subsequently found part time work as a cleaner.

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).*

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6. The relevant version of the *Guidelines* came into effect on 11 October 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 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 only submission relevant to procedural review is that the decision of Racing NSW does not comply with the Work Capacity Guidelines.

Submissions by the Insurer

9. The Insurer has provided submissions in response to the application which were received by this office on 7 August 2014. The submissions were given due consideration.

The Decision

10. *Guideline 5.3.1* requires the Insurer to '*provide the worker and other relevant parties with plain language communication regarding the work capacity decision'.* This includes being considerate of the nature of the worker's circumstances, communicating a clear message, presenting concise information and adapting communication style to meet the worker's needs.

11. *Guideline 5.3.2* 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'.*

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12. The decision states *'Under Section 59A of the Workers Compensation Act 1987 you are entitled to claim medical and related expenses necessarily and reasonably incurred for a period of 12 months from the date of the last payment of weekly compensation (see further clarification later in the body of this letter) '.*

13. The further clarification provided later in the decision states *'Your entitlement to continuing compensation for treatment, service or assistance is prescribed by Section 59A of the Workers Compensation Act 1987. Specifically Section 59A(2) states "If weekly payments of compensation are or have been paid or payable to the worker, compensation is not payable under this Division in respect of any treatment, service or assistance given or provided more than 12 months after the worker ceased to be entitled to weekly payments of compensation". Section 59A (3) states "If a worker becomes entitled to weekly payments of compensation after ceasing to be entitled to compensation under this Division, the worker is once again entitled to compensation under this Division but only in respect of any treatment, service or assistance given or provided during a period in respect of which weekly payments are payable to the worker".*

14. This 'clarification' provided by the Insurer is merely an extraction of the relevant section from the *Workers Compensation Act* 1987. It does not explain to the applicant in plain language the effect the decision has on his medical and treatment expenses.

15. The decision at no stage simply advises the applicant that his entitlement to reasonably necessary medical and treatment expenses will cease on 15 August 2015.

16. The Insurer has failed to comply with the Guidelines.

17. The Insurer has advised the applicant of Section 59A(3). However the Insurer has not attempted to explain the effect of that section. Rather the Insurer has quoted the relevant section of the 1987 Act. *Section 59A(3)* has the effect 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.

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18. The Insurer has failed to comply with the relevant *Guidelines*. The Insurer has advised the applicant of the legislation rather than clearly communicating the effect of the legislation.

19. Guideline 5.3.2 states that the decision is to 'detail any support, such as job seeking support, which will continue to be provided during the notice period.' The Insurer has failed to advise the applicant.

20. *Guideline* 5.3.2 also 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'.*

21. The decision advises the applicant *'you have already been provided with copies of the documentation upon which we rely however, you are entitled to request further copies should they not remain in your possession'*. This statement places a condition upon the request for documentation that is not contained in the Guidelines. The Insurer has failed to comply with the *Guideline*.

22. On 3 September 2014 the Workers Compensation Amendment (Existing Claims) Regulation 2014 (the Amendment Regulation) was published. Clause 30 of the Amendment Regulation, which is in part 2 and 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.

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(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.

23. 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 as a result of the original decision.

FINDING

24. 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

25. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 15 August 2014 until such time as he is properly transitioned. Those payments should continue from the date on which they ceased.

26. The applicant is not required to produce work capacity certificates for the period from 15 August 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.

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