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 for a review of a work capacity decision made by a scheme agent of the Workers Compensation Nominal Insurer ("Insurer").

2. The applicant suffered injury to her feet on or about 24 March 2006 in the course of her employment as a process worker with the Insured.

3. As a result of the injury the applicant was unable to return to her pre-injury employment with the Insured. The applicant was able to find alternative employment in February 2011 working 25 hours per week. The applicant has been paid weekly payments for all relevant periods and therefore was an existing recipient immediately prior to 1 October 2012.

4. On 20 May 2013 the Insurer advised the applicant in writing of a work capacity decision. She was advised that her entitlement to ongoing weekly payments would be reduced to $277.89 per week from 27 August 2013 under Section 38 of the *Workers Compensation Act* 1987 (the 1987 Act).

5. At the time of the work capacity decision the applicant was working 25 hours per week in suitable duties and based upon payslips was assessed to have an earning capacity of $472.75 per week.

6. The applicant was advised that in accordance with Section 43(1)(d) her pre-injury earnings were based upon the transitional rate of $938.30 per week. As she had received in excess of 130 weeks of weekly compensation her new payment rate was calculated as:

   $750.64(80% of the transitional rate) less $472.75 (actual earnings) = $277.89 (new weekly benefit)

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7. The applicant was also informed that the Insurer would continue to approve reasonable and necessary treatment expenses as defined by Section 60 of the 1987 Act. However, under section 59 of that Act, her entitlement to medical benefits is limited to a period of 12 months after weekly benefits cease.

8. The applicant requested an internal review of the Insurer's decision. That review was responded to by the Insurer in writing on 19 July 2013. The review confirmed the original work capacity decision.

9. On 20 August 2013 the applicant made an application to the WorkCover Authority of New South Wales for a merit review of the Insurer's work capacity decision. That merit review application was received within the 30 day period. A WorkCover merit review was completed and a Statement of Reasons issued on 8 November 2013. The merit reviewer overturned the original decision of the Insurer. The merit reviewer reduced the applicant's entitlement to weekly benefits to nil in accordance with Section 38 of the 1987 Act.

10. On 3 December 2013 the applicant requested the Independent Review Officer to undertake a review of the decision of the Insurer pursuant to Section 44(1)(c) of the 1987 Act. I am satisfied that the applicant has made the application within the time provided by that section and on the correct form.

Applicant's Stated Grounds for seeking Procedural Review

11. The applicant's ground for seeking procedural review was that she was dissatisfied with the decision reached by the Insurer.

Submissions by the Insurer

12. The Insurer made submissions dated 9 December 2013 in response to the application.

Legislation

13. Section 44(1)(c) of the 1987 Act limits the scope of procedural review to a review only of:

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> The insurer's procedures in making the work capacity decision and not of any judg[e]ment or discretion exercised by the insurer in making the decision.

Therefore while it remains the case that no discretion is unreviewable[1], the Insurer's discretion when making a work capacity decision appears only to be reviewable in the course of merit review or Judicial review.

14. The procedures to be followed by the Insurer are set out in the *WorkCover Work Capacity Guidelines* and *WorkCover Review Guidelines*. Both sets of *Guidelines* should be complied with in order for a work capacity decision to be validly made.

15. The relevant version of the *Guidelines* is the one dated 28 September 2012 and which applied to all claims from 1 January 2013. That publication provides that the *Guidelines* provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessments.

The Process of the Insurer

16. The decision reached by the Insurer was certainly within the range of available decisions. This is despite that fact that the Insurer's original decision was overturned by the merit reviewer who reduced the applicant's payments to nil.

17. The important consideration on procedural review is not why a decision is made, but how it is made.

My Reasons:

18. The ground upon which the applicant seeks to rely is not a ground which is of a procedural nature.

19. The Insurer has made submissions about compliance with the relevant statutory provisions and guidelines which have been considered.

20. Since procedural review requires a scrutiny of the decision-making processes of the Insurer, including examination of compliance with legislation and *Guidelines* rather than a consideration of submissions made by either party, the review process may proceed despite the

[1] *See Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997*

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absence of relevant submissions from either party. Any demonstrable error on the part of the Insurer may invalidate the decision.

21. There are in my view breaches of the *Guidelines* sufficient to invalidate the work capacity decision made by the Insurer.

22. One major difficulty which faced the Insurer in making its work capacity decision is the requirement contained in Clauses 5 and 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:

"Clause 5.1

When making a work capacity decision the insurer should follow the Best Practice Decision Making Guide."

23. That Guide did not exist and has never existed or been published by WorkCover.

24. I find the Insurer has failed to follow the procedure as set out in the *Guidelines* in making the work capacity decision of 20 May 2013 as it did not (and through no fault of its own) comply with the requirements of Clauses 5 and 5.1.

25. *Guideline 5.4.2* states that the work capacity decision notice must state the impact of the decision on the worker in terms of their entitlement to medical and related treatment expenses. The notice advises the applicant that her entitlement to medical benefits is limited to a period of 12 months after weekly benefits cease. In this particular instance the applicant's entitlement to weekly benefits have been reduced not terminated. The Insurer has failed to properly explain the impact of its decision to the applicant.

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26. The above *Guidelines* 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.

27. I find that the work capacity decision is accordingly not effective and the weekly payments amendments do not as yet apply to the applicant.

My Recommendation:

28. For the reasons set out above I recommend that the Insurer make another work capacity decision, according to the *Guidelines*.

29. Since the applicant was an existing recipient as at 1 October 2012, she remains entitled to receive her pre-transition rate of weekly benefits until such time as she is validly transitioned under the Act. The applicant should have her payments restored from 27 August 2013.

30. Noting the binding nature of these recommendations I recommend that the Insurer takes my views into account, and I recommend that the Insurer immediately gives effect to them.

Tracey Emanuel
Delegate of WorkCover Independent Review Officer
20 January 2014