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 15 December 2014 is set aside.**

b. **The applicant is to be reinstated to her weekly payments at the rate applicable prior to 22 March 2015.**

c. **The payments are to be back-dated to 22 March 2015.**

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 sought procedural review of a work capacity decision made by the Insurer on 15 December 2014. For reasons appearing in recommendation number 7115 the original decision was set aside.[1]

2. The Insurer subsequently sought judicial review of that recommendation by the Supreme Court of NSW and on 23 November 2015 the decision in *The Trustees of the Sisters of Nazareth v Simpson* [2015] NSWSC 1730 was handed down by Davies, J. The orders of the Supreme Court were as follows:

   (1) An order in the nature of certiorari quashing the decision of the WorkCover Independent Review Officer made on 8 May 2015;

   (2) An order in the nature of mandamus remitting the application to the Worker Compensation Independent

[1] See recommendation 7115 dated 8 May 2015.

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Review Officer for determination in accordance with this judgment.[2]

3. His Honour noted that his decision would normally only result in an order for certiorari, quashing the earlier recommendation, however the plaintiff sought an order in the way of mandamus, requiring the making of a further procedural review recommendation.

4. This recommendation is made in accordance with the above orders.

5. Section 44A of the *Workers Compensation Act* 1987 (the 1987 Act) provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines). This was reaffirmed by his Honour at paragraphs 36-41 of the judgment. Relevantly, his Honour said:

> 36. A narrow reading of the "insurer's procedures" would result in the enquiry being only concerned with procedural fairness. I do not think that is what the legislation means. If that was the focus of the enquiry I should have expected that s 44(1)(c) would refer to procedural fairness. However, the procedures certainly include procedural fairness.
>
> 37. Other aspects of the procedures which ought to be followed are identified in the Guidelines reproduced above. Contrary to the Plaintiff's submission, I do not think that the procedures are confined to matters which are preparatory to the making of the decision. The Guidelines suggest otherwise. For example, clause 5.3 requires notification to the worker of the outcome of a work capacity decision. A failure to notify would be a procedural failure which would necessarily post-date the decision.
>
> 38. Nor do I think that, simply because something is contained within the reasons that are given or ought to be given, it can be considered to be outside the insurer's procedures. Under the Guidelines the insurer is obliged to provide reasons for its decision. Clause 5.3.2. of the Guidelines sets out the approach the insurer should take to its reasons. A failure to do so seems to me to be a failure in the procedures adopted.

[2] The name change to Workers Compensation Independent Review Office resulted from statutory amendment in October 2015.

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> 39. Analogously, judicial review (which s 44 seems designed to minimise or eliminate as far as possible) enables the supervising court to quash a decision where no reasons or inadequate reasons are given. I accept that that analogy can only be carried so far because s 44(1)(c) expressly excludes from the review "any judgment or discretion exercised by the insurer in making the decision". That may provide a limitation on an enquiry into the adequacy of reasons provided that reasons are provided. Such an approach would be consistent with the fact that a merit review must already have taken place. Any issue of inadequate reasons will either have been overcome by the reasons given by the Authority when it provides its review or will be dealt with by an application for judicial review as s 43(1) allows. In that way the process in s 44(1)(c) differs from judicial review where ordinarily there is no merit review at all.
>
> 40. I do not think a broad principle can be laid down in relation to whether the procedural review can examine in any way the reasons provided by the insurer for its decision. Rather, I consider that an examination must be made of the Independent Reviewer's criticisms of what the insurer has done in any particular case to decide if that matters complained of form part of any judgment or discretion exercised. However, the procedural review is not only concerned with matters which pre-date the decision, and it cannot be said that it does not extend to the reasons.
>
> 41. Ground 1 fails.

6. 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.*" His Honour has clarified *supra* that the words "procedures in making the work capacity decision" are not limited to activities preceding in time the creation and distribution by the insurer of the notice to the worker.

7. His Honour further clarified the effect of a procedural review on the recommendations of the Authority following merit review. At paragraphs 23-24 his Honour said:

> 23. It is only after a merit review by the Authority that the worker may refer a work capacity decision for review to the Independent Review Officer under s 44(1)(c) and that is "as a

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> 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".
>
> 24. This has the odd result that although there has been a merit review by the Authority, the Independent Review Officer, who finds some defect in the insurer's procedures, can make a recommendation which **has the effect of overturning the merit review by the Authority** although there was no error in that review. (Emphasis added.)

The Decision

8. The procedural review undertaken by this Office in May 2015 identified two shortcomings which were thought at the time to be fatal to the validity of the work capacity decision: first, a weekly earning capacity of $459.20 was nominated by the insurer, without that figure being explained as referable to any particular job or any particular hours worked; secondly there was no (or no proper) explanation of section 59A(3). Both of these were addressed by his Honour thus:

> 42. The two matters identified by the Independent Reviewer which were said to be non-compliance with the Guidelines were (1) a failure to explain how the figure of $459.20 was derived and calculated, and (2) a failure to inform the worker that she may again become entitled to medical and treatment expenses if she became entitled again to weekly payments.
>
> 43. The relevant part of the insurer's decision said this:
>
> Your entitlement to weekly payments is determined by s 38 of the Act as you have received more than 130 weeks of weekly benefits.
>
> Under s 38 of the Act, an injured worker who is assessed by the insurer as having current work capacity is only entitled to weekly compensation if:
>
> a) The worker has applied to the insurer in writing for continuation of weekly payments, and
>
> b) The worker has returned to work in some employment for a period of not less than 15 hours per week and is in receipt of current weekly earnings of at least $173 per week, and

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c) The worker is assessed by the insurer as being incapable of undertaking further additional employment that would increase the worker's current weekly earnings.

> [The Insurer] has determined that you are currently capable of working 20 hours per week in suitable employment and earning up to $459.20.
>
> As you are not currently employed, you are not entitled to ongoing payments of weekly compensation under s 38 of the Act as you do not meet the special requirements set out in this section.
>
> **3 Reason(s) for the decision**
>
> …
>
> You have the capacity to work up to 20 hours per week in light employment.
>
> …
>
> Your nominated treating doctor (Dr C) has issued you certificates of capacity which indicate that you are capable for four hours per day five days per week with the restriction of no repetitive lifting, no lifting more than 2 kgs with your right arm and no lifting above your chest height.
>
> In a functional capacity evaluation report dated 27/06/14 by Interact Injury Management, it has been assessed that you are capable of working in life employment for up to four hours per day three days per week with a graded return to work.
>
> An earning capacity assessment dated 27/06/14 by IIM indicates that you could work as either a:
>
> Community support worker (aged care)
>
> Retail sales assistant
>
> Receptionist
>
> Based on the above vocations which have been identified as suitable employment (as defined by s 32 of the Act), you are deemed to be capable of earning up to $459.20 (for 20 hours) per week.

44. It may be accepted that nowhere did the insurer explain how the figure of $459.20 was calculated. An examination of the report from Interact Injury Management does not identify how that figure was obtained.

45. What the insurer was required to assess was whether the worker had current work capacity as defined in s 32A (a present inability to return to her pre-injury employment but an

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ability to work in suitable employment) and in accordance with the requirements of s 38(3). The amount that the worker could earn in suitable employment was irrelevant to the determination of current work capacity. All that had to be ascertained was whether she was able to work in suitable employment. The insurer provided sufficient and adequate reasons for determining that she was able to work in suitable employment.

46. The reason the decision went against the worker was that she did not comply with s 38(3)(b), that is, the requirement that she had returned to work for a period of not less than 15 hours per week and be in receipt of current weekly earnings of at least $155 per week.

47. It was not necessary for the insurer to calculate or estimate what she could earn in suitable employment. There was no obligation on the insurer, therefore, to provide any basis for its calculation or to say how it had derived that figure. It was irrelevant to the matters which needed to be determined. I note in that regard that the merit review by the Authority, although coming to the same substantive decision and despite finding on not identical grounds that the worker was able to return to work in suitable employment, did not specify what she might have earned in such employment.

48. Since the amount the worker could earn in suitable employment was irrelevant to the determination of her current work capacity, there was no failure on the insurer's part as asserted by the Independent Reviewer. Nothing in the Guidelines required it. By the reviewer's regarding that matter as a failure by the insurer, the reviewer has made an error of law on the face of the record, and has taken into account an irrelevant consideration.

9. It is perhaps unfortunate that the Authority merely filed a submitting appearance in the proceedings. Had a contradictor appeared his Honour might have been referred to the decision of Roche, D-P in *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWWCCPD 55 in which the learned Deputy President reaffirmed the principle that any work which is said to be suitable for an injured worker must be "real" work in an identifiable job (at paragraphs 51-60). It would follow as a corollary to that requirement that an insurer must be able to identify performable duties and an hourly, daily or weekly payment rate. This is particularly

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the case in light of section 43(1)(b) and (c), which identify elements of a work capacity decision as including "a decision about what constitutes suitable employment for a worker"(43(1)(b)) and "a decision about the amount an injured worker is able to earn in suitable employment"(43(1)(c)).

The effect of procedural unfairness

10. The Supreme Court was unequivocal on the effect on a decision of procedural unfairness (in contradistinction to mere procedural breach or irregularity). At paragraph 55 his Honour said:

> 55. Procedural error which amounts to procedural unfairness will amount to an error of law and would ordinarily justify the setting aside of a decision. However, other procedural breaches may not have the same effect.

11. The insurer in the present case included the following paragraph in a letter to the worker dated 15 December 2014:

> - In a surveillance report by P C&A Investigations dated 11/12/14 (video footage included), you are seen over a number of days to be freely able to use your right arm to conduct day to day activities, including reaching both backwards and forwards, carrying, grasping and lifting an infant to your shoulder. Given this, you are capable of working in light employment.

12. This must be in breach of Guideline 5.2 which, under the heading "Fair Notice Provisions" requires the insurer (at bullet-point three) to advise the worker, "at least two weeks prior to the work capacity decision," to

> - advise the potential outcome of this review and **detail the information that has led the insurer to their current position**. (Emphasis added.)

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13. Given that the surveillance report was not obtained until 11 December 2014 and it forms part of the decision making reasoning in a decision dated 15 December 2014, it is not possible that the worker was advised of the report or its contents "at least two weeks prior to the decision being made." This has the effect of being both a clear breach of Guideline 5.2 and a procedural unfairness of the type capable of invalidating the decision and requiring it to be set aside. The worker should have been allowed to make submissions addressing the report and the video contents.

FINDING

14. I find that the Insurer has committed a breach of the Guidelines and this has resulted in procedural unfairness sufficient to set aside the decision made on 15 December 2014.

RECOMMENDATION

15. The work capacity decision of the Insurer dated 15 December 2014 is set aside.

16. The applicant is to be reinstated to her weekly payments at the rate applicable prior to 22 March 2015.

17. The payments are to be back-dated to 22 March 2015.

18. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
23 November 2015