WiRO
WorkCover independent review office

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

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 has applied for a procedural review of a work capacity decision made by the Insurer on 18 June 2013 (the decision). The decision was sent under cover of a letter of the same date (the covering letter).

2. There is no dispute that the applicant was injured in the course of his employment. The applicant says he was first injured on 23 January 1987. The Insurer suggests a different date but the actual date is not at all relevant for my consideration as it is not in dispute that the applicant has received in excess of 130 weeks of weekly payments compensation. The Insurer made weekly payments as required under the provisions of the *Workers Compensation Act* 1987 (1987 Act).

3. The applicant has not been in employment since at least 2004.

4. The applicant was in receipt of compensation by way of weekly payments as at 1 October 2012. Clause 8 of Part 19H of Schedule 6 to the 1987 Act requires the Insurer to conduct a work capacity assessment for the purpose of facilitating the application of the amended weekly benefits to the applicant.

5. Section 44A of the 1987 Act provides that a work capacity assessment is an assessment of the injured worker's current work capacity and must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).

6. The relevant version of the *Guidelines* is the one published on 27 September 2012 which applied to all claims from 1 January 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 payments payable to the injured worker then the Insurer is required to give proper notice to the worker (Section 54 of the 1987 Act).

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

8. As the applicant has been in receipt of weekly payments for more than 130 weeks as at the date of the decision it follows that Section 38 of the 1987 Act applies.

9. The decision states that a work capacity assessment was conducted on 2 May 2013. The insurer is required to make a decision "as soon as practicable" after the assessment is completed: see clause 23, schedule 8*, Workers Compensation Regulation* 2010. There does not appear to be any legislative requirement to notify the applicant of the outcome of the assessment. However, *Guideline* 5.4.2 states that the written notice of a decision must;

    - *state the decision and give brief reasons for making the decision;*
    - *outline the evidence considered in making the decision, noting the author, the date and any key information. All evidence considered should be referred to, regardless of whether or not it supports the decision;*
    - *clearly explain the reasoning for the decision.*

    My finding is that the *Guidelines* result in the insurer being compelled to reveal the outcome of the assessment.

10. In this case the applicant knows the actual date of the assessment. The Insurer made a Fair Notice call on 29 May 2013 and a follow up letter was sent on the same day.(*Guideline* 5.2) The applicant was aware that the assessment was taking place, and that the decision was made "as soon as practicable" after the assessment.

11. *Guideline* 5.4.2 requires the Insurer in the Notice pursuant to section 54 of the 1987 Act *"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 are no longer payable 12 months after a worker ceases to be entitled to weekly payments of compensation. The Insurer refers correctly to the fact that medical payments cease after 12 months, but does so in the covering letter. This does not comply with *Guideline* 5.4.2 as the covering letter is not the decision as *Guideline* 5.4.2 requires. The decision, however, states that "*medical or related expenses will continue in accordance with the provisions of the Act*." *Guideline* 5.4.2 requires the insurer to "*reference the relevant legislation".* Neither the covering letter nor the decision refer to section 59A(2) of the 1987 Act. The decision does not

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

make it clear that such payments will cease 12 months after weekly benefits cease. The two different explanations as to the effect on medical payments must confuse an applicant. I find that the *Guidelines* are breached.

12. The decision states that "*You have been found to have 22% whole person impairment of the lumbar spine by Dr M R. However, this has not reached the threshold for you to be considered as a seriously injured worker."* The decision has failed to refer to section 32A of the 1987 Act (as required by *Guideline* 5.4.2) which defines the meaning of "*seriously injured*". An applicant should be told in the decision that the definition of "*seriously injured*" means 30% WPI. *Guideline* 5.4.2 requires the Insurer to "*clearly explain the reasoning for the decision"* and this has not occurred.

13. Perhaps more importantly, there is no reference to section 39(2) of the 1987 Act, which might be of critical importance to a worker with an assessment exceeding 20% WPI.[1] This omission is made the more egregious by the insurer's pejorative categorisation of the 22% WPI assessment as being inadequate to qualify the applicant as a "*seriously injured worker*" for the purposes of Division 2 of Part 3. Had the insurer not laboured so tirelessly to rub salt into this already gaping wound, the very existence of the 22% assessment might have gone both unremarked and unnoticed.

14. *Guideline* 5.4.2 requires the decision to "*detail any support, such as job seeking support, which will continue to be provided during the notice period".* The decision is silent as to any support which may be provided or available.

15. *Guideline* 5.4.2 also states 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.

FINDING

16. I find that the Insurer has failed to follow the procedures as set out in the WorkCover *Guidelines* which is required by Section 44A of the 1987 Act.

[1] Or it might not – there may be some room for the school of thought that an ability to exceed 260 weeks of entitlements (for which the counting does not commence until 1 January 2013) is of little value to a worker who falls at the hurdle of 130 weeks, for which the counting commenced at a much earlier date.

WiRO
WorkCover independent review office

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

The Insurer has also failed to follow the 1987 Act and the *Workers Compensation Regulation* 2010.

RECOMMENDATION

17. I recommend that the Insurer conduct a new work capacity assessment and make 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 prior to 18 June 2013 until such time as he is properly transitioned. Those payments should continue from 30 September 2013 being the date on which they ceased.

19. Since the applicant is not currently in receipt of weekly payments, clause 21 of schedule 8 of the *Regulation* cannot apply and payments may resume immediately. The worker is not required to produce work capacity certificates for the period from 30 September 2013 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(h) of the 1987 Act.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer

22 January 2014