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 28 August 2014 is set aside.

b. The applicant is to be reinstated to her weekly payments at the rate applicable immediately before 7 December 2014.

c. The payments are to be back-dated to 7 December 2014.

d. Such payments are to continue until such time as a further work capacity decision based on the binding recommendation of the Merit Review Service of the Authority 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 28 August 2013. The decision advised the applicant that her weekly payments of compensation would be discontinued from 7 December 2014. The applicant sought internal review but the original decision was affirmed. She then sought Merit Review and the Authority issued a recommendation on 12 November 2014. The applicant was successful on Merit Review, the Authority having made findings that the applicant was still entitled to be paid under section 37(3) and recommended that the Insurer calculate ongoing payments accordingly. The applicant subsequently made application to this office on 1 December 2014.

2. The applicant suffered a back injury on or about 15 February 2013. Following spinal surgery in May 2013 the applicant remained employed on suitable duties until 24 September 2014. Her employer at that time advised that due to the ongoing nature of her physical restrictions the applicant could no longer be provided with suitable duties. She has not worked since. It may very well be a mere coincidence that the ongoing provision of suitable duties by the employer became "impossible" less

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than four weeks after the Insurer's work capacity decision dated 28 August 2014.

Submissions by the applicant

3. 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 has made submissions, including alleging that the employer artificially and fraudulently inflated her hours of work so as to minimise her compensation entitlements and that the Insurer had not provided a copy of a vocational report dated 22 July 2014, produced by [IT]. In addition, the following was also sent in response to documents produced by the Insurer:

> In the documents that you sent me attached to wiro review. A copy of the questions answered by Doctor S the treating doctor for [the applicant]. Dr S printed out the original copy from his records 30/6/14 where he crossed out the entire column "Critical functions of the role," and wrote [the applicant] can only work to her current work capacity. This document has been altered by [IT] and is [an] incorrect representation of Dr S. The doctor is now aware the document has been altered that you are using. WIRO has asked me to make the insurer aware of this problem with [IT]. I have rang you twice today and you have been unavailable, please call me to resolve this problem.

4. The above was sent to both this office and the Insurer via email on 11 December 2014. The Insurer purported to seek further clarification from the applicant, but the allegation seems straightforward enough. Further, in a subsequent email the applicant made this only slightly cryptic statement:

> We are still seeking answers over the interview on 22 May that never occurred at Tuggerah by [IT].

No specific submission is made by the applicant, but inferentially it might be concluded that a report or other document prepared by someone acting in the interests of the Insurer has made reference to an interview or similar event which the applicant denies ever took place.

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Submissions by the Insurer

5. The Insurer has provided submissions in response to the application. Relevantly, they include the following:

    - In response to a complaint that a report was both inaccurate and out of date, the Insurer said:

        - "[We] contend that the report is not out of date and is in fact less than six months old. Making it valid evidence of your vocational capacity."[1]

        - "It is noted that your submission in relation to seeking a copy of a report needs to be conveyed to your case manager for actioning and is thus outside of this procedural review."[2]

        - "[The Insurer] note[s] that this is the first time that these concerns have been raised in relation to this report and should be raised with your case manager to address with the rehabilitation provider and again are outside of the jurisdiction of the procedural review."

    - In response to a complaint that the Insurer has dictated to the employer that the applicant is only able to "look for work as a commercial cleaner (light), railway assistant," the Insurer said:

        - "[We] again contend that this is outside of the jurisdiction of the procedural review. It is noted that the vocational options were identified as suitable based on your previous experience and were also agreed to by your nominated treating doctor."[3]

[1] This "less than six months old" rule appears nowhere in the legislation or Guidelines. The Insurer has thus made a grammatically unsound and legally baseless assertion.
[2] A novel submission in light of Guideline 5.3.2, which requires an insurer to advise a worker 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." Clearly this issue is not outside the scope of procedural review.
[3] "Agreed to" is an intriguing choice of words, scarcely redolent of independent conclusion by the doctor. That the response completely overlooks the main complaint, namely that the Insurer is purporting to dictate what work the applicant can do as though she has no say in the matter herself, is of no assistance to the Insurer.

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The Decision

6. The decision by the Insurer was overturned on merit review. A binding recommendation was made by the Authority. The parties are fully aware of the terms of that recommendation.

7. The submissions made by the applicant are not without substance in some respects. The Guidelines certainly require an insurer to provide copies of documents if requested. It is no answer to say that this is an issue which should have been raised earlier or with a particular (and different) employee of the Insurer.

8. More importantly, some of the allegations made by the applicant have not been addressed at all. In response to the assertion that a critical document was altered by the vocational report provider (described above as "[IT]") the Insurer did no more than ask precisely which document the applicant was referring to when the applicant had already precisely identified both the author and contents of the document and described the way in which it had been changed. This is of particular significance since the relevant document forms the basis on which the Insurer concludes that the applicant has a certain level of work capacity, based on the alleged "agreement" of the treating doctor. If the document has been altered in the way alleged, the relevance of the report of the party which made the alleged alteration would be seriously brought into question.

9. The applicant appears also to be suggesting that the same body which may have altered the document confected an alleged "interview" which did not in fact occur on 22 May 2014.

10. The gravity of the allegations made in paragraphs 3,4,8 and 9 above might have induced a more thorough response than appears in the dismissive, somewhat offhand responses given by the Insurer which are partially reproduced in paragraph 5 above. I need not draw specific conclusions based on either the allegations or the responses, since it is obvious that the Guidelines have been breached in a material respect by the failure (not to say the refusal) of the Insurer to comply with Guideline 5.3.2 which clearly requires an Insurer to provide copies of documents to workers upon request.

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FINDING

11. 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 have been breaches of the Guidelines which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

RECOMMENDATION

12. The work capacity decision of the Insurer dated 28 August 2014 is set aside.

13. The applicant is to be reinstated to her weekly payments at the rate applicable immediately before 7 December 2014.

14. The payments are to be back-dated to 7 December 2014.

15. Such payments are to continue until such time as a further work capacity decision based on the binding recommendation of the Merit Review Service of the Authority is made and comes into effect.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
6 January 2015