WIRO

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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 29 November 2013 is set aside.**

b. **The applicant is to be reinstated to her weekly payments at the rate applicable as at 9 March 2014.**

c. **The payments are to be back-dated to 9 March 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 29 November 2013. The decision advised the applicant that her weekly payments of compensation would be reduced to $201.75 on 9 March 2014. The applicant sought internal review and the Internal Review Decision (IRD) was dated 7 March 2014. She then sought Merit Review on or about 12 March 2014 and the Authority issued the Merit Review recommendation on 8 July 2014.

2. The applicant made application to this office on 29 September 2014. The Act requires the application to this office to be made within 30 days of receipt by the applicant of notice of "the Authority's decision."[1] The applicant asserts that she did not receive the merit review recommendation[2] until 9 September 2014. The Insurer made no submissions in response to the application, so I accept the history given by the applicant and assume that it is common ground that the Authority sent its variously described document to the wrong address in July and to the correct address in September, as alleged.

[1] Oddly, section 44(3)(a) of the *Workers Compensation Act* 1987 refers to the Authority making a "decision," whereas all other references are to a binding recommendation.
[2] See footnote 1, *supra*.

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3. I am therefore satisfied that the applicant has made the application for procedural review in the proper form and within time.

4. On 22 July 1999 the applicant sustained injury to her neck and right elbow as a result of a fall. The applicant has worked on reduced hours of approximately 22.5 per week for various employers in the intervening period. Currently she works with the Commonwealth Bank.

5. 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.

6. *Section 44A* of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines* (Guidelines).

7. The relevant version of the *Guidelines* came into effect on 11 October 2013. The *Guidelines* provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessments and decisions.

8. Once the Insurer has conducted a first 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

9. Section 44(1)(c) of the *Workers Compensation Act* 1987 (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 listed the following specific procedural grounds for review:

- The notice provided by the Insurer allowed 3 months and seven days, however if Christmas Day, Boxing Day, New Years Day and Australia Day are deleted by virtue of being public holidays (see

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section 76 of the *Interpretation Act* 1987), the notice given is only 3 months and three days, which falls below the required notice in the *Guidelines*.

- Weekly payment calculation should be specified as being under section 38(6) of the 1987 Act rather than merely section 38.
- The effects of sections 59A(2) and (3) were neither explained nor even mentioned.
- No mention is made of other documents being made available that have not already been provided on request to the Insurer per Guideline 5.3.2.[3]

Submissions by the Insurer

10. The Insurer has not provided submissions in response to the application.

The Decision

11. *Guideline 5.3.2* requires the Insurer to 'reference the relevant legislation' and '*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.'*

12. The decision informs the applicant that her entitlement to weekly payments of compensation changes on 9 February 2014. I accept the submission by the applicant that this is inadequate notice and in breach of the Guidelines for the reasons set out at paragraph 8 above. This is a demonstrable error.

13. In relation to the applicant's entitlement to continuing medical and treatment expenses, I also accept the applicant's submission at paragraph 8 above. Section 59A is not mentioned at any point in the decision. This is a demonstrable error.

14. The heading of the notice says that it is a ".. notice of reduction or cessation of wages under section 54 …". Given that the applicant is at

[3] Wrongly described by the applicant as *Guideline* 5.4.2.

work earning wages, in contradistinction to merely receiving weekly payments of compensation, the heading is misleading and wrong. The decision has no effect on the wages to be received by the applicant in the course of her current employment. This is a demonstrable error.

15. The decision contains the following alarming sentence:

    "The transitional rate for all claims made after 01/10/13 is $948.50."

    This goes beyond mere "demonstrable error." Here the Insurer is betraying an ignorance of the concept of transitioning a worker onto the new scheme. Clearly any claim made after 1 October 2013 would not need to be transitioned, so the transitional rate would not and could not apply.

16. Further, *Guideline* 5.3.2 notes that the insurer should advise the applicant 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. I accept the submission by the applicant that this Guideline was breached. This is therefore also a demonstrable error.

FINDING

17. 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

18. The work capacity decision of the Insurer dated 29 November 2013 is set aside.

19. The applicant is to be reinstated to her weekly payments at the rate applicable at 9 March 2014.

20. The payments are to be back-dated to 9 March 2014.

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21. 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
11 November 2014