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*.*

SUMMARY:

a. The work capacity decision of the Insurer dated 12 June 2014 is set aside.

b. The applicant is to be reinstated to his weekly payments at the rate applicable as at 19 September 2014.

c. The payments are to be back-dated to 19 September 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 12 June 2014. The applicant was advised that his weekly payments of compensation would cease on 19 September 2014. The applicant sought internal review and the Internal Review Decision (IRD) was dated 29 July 2014. He then sought Merit Review on or about 25 August 2014 and the Authority issued the Merit Review recommendation on 18 September 2014. The applicant made application to this office on 15 October 2014.

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

3. The applicant had previously sought procedural review of a work capacity decision dated 23 May 2013. The applicant was successful and the work capacity decision was set aside by an earlier recommendation of this office [1]. The facts and circumstances concerning the background to the claim are encompassed in the aforementioned recommendation and need not be repeated.

Submissions by the applicant

[1] Reported and numbered as 1914.

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4. 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 provided 7 pages of submissions together with in excess of 30 attachments all of which have been read and considered.

Submissions by the Insurer

5. The Insurer has provided submissions in response to the application including a response to the applicant's submissions. Likewise, these submissions have been read and considered.

The Decision

6. The relevant WorkCover Work Capacity Guidelines referable to making this work capacity decision came into effect on 11 October 2013.

7. The Insurer advises at page 7 of the decision *"we have determined your average weekly earnings based on payslips from"* [named employer] *"for pay periods in this financial year 30/6/2013 to 7/6/2014 (49 weeks) to be $191.63 gross per week working an average of 12.8 hours a week. We have determined your* ***current average weekly earnings*** *using your gross earnings for this financial year of $9,390.00 divided by 49 weeks. We have then determined how many hours on average you work per week by dividing $191.63 by your current hourly rate of $15.00. We note you had a period of no capacity for work relating to your injury from 10/04/14 to 27/04/14 however you have now returned to work. Based on this information, we note that you are currently working less than 15 hours per week."*

8. It should be noted that at page 5 of the applicant's submission he disputes that the Insurer has used the correct wage information for the nominated financial year. That is not an issue for this review. This review goes to the procedure followed by the Insurer and its compliance with the 1987 Act and relevant *Guidelines*.

9. At page 8 of the decision the applicant is advised *"You have been paid in excess of 130 weeks of weekly payments. You have a capacity for work and have been working an average of 12.8 hours per week. As you are working less than 15 hours per week on average, you do not meet the requirements of Section 38(3)(b) of the Workers Compensation Act 1987 in order to have an ongoing entitlement to weekly payments."*

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10. The requirement set out in *Section 38(3)(b)* of the 1987 Act is *"the worker has returned to work (whether in self-employment or other employment) for a period of not less than 15 hours per week and is in receipt of current weekly earnings (or current weekly earning together with a deductible amount) of at least $155 per week."*

11. The decision of the Insurer refers to *"average weekly earnings"* and *"how many hours on average you work each week"* whereas *Section 38* of the 1987 Act refers to *"current work capacity"* and *"current weekly earnings."*

12. *Guideline 2.3* requires the Insurer's decision should be *"timely, informed and evidence based."*

13. The insurer has calculated the applicant's working hours by averaging the hours worked on a weekly basis over the preceding year. The Insurer has based its calculation upon the incorrect premise by using the *average* rather than *current* earnings and hours. It is the applicant's *current* work capacity which is being assessed.

14. The method of calculation used by the Insurer produces a flawed conclusion. If, for example, a worker performed duties for 10 hours per week for six months and then graduated to 15 hours per week for the next six months, using the above calculation method would mean it is statistically impossible for the worker to reach an "average" figure of 15 hours per week – even though that was the correct number of hours he was working at the relevant time of making the decision. Furthermore, if a worker were consistently performing 15 hours per week and were to take leave (whether paid or unpaid leave) throughout the year, again, it would be statistically impossible for him to reach 15 hours per week as an "average," since he never exceeds the 15 hours and his total weeks (including those with zero hours) are wrongly used as the denominator in the misconceived equation. It is also inconsistent with and contrary to section 40 (see *infra* at paragraph 17).

15. We note that in the aforementioned calculation the Insurer concedes that the applicant had a three week period of incapacity in April 2014 however there was no allowance for this in their ensuing calculation.

16. The method of calculation adopted by the Insurer in this decision is more akin to calculating a worker's PIAWE.

17. Section 40 of the 1987 Act states the following:

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40 Entitlement after second entitlement period not affected by certain circumstances

(1) A worker who receives weekly payments under section 38 does not cease to be entitled to weekly payments under that section by reason only that the worker occasionally, but not during more than 4 weeks in the first period of 12 consecutive weeks immediately after the worker first received weekly payments under that section, or in any subsequent consecutive period of 12 weeks:

(a) has worked more hours during a week, or

(b) has worked fewer hours during a week (even if the number of hours worked is less than 15), or

(c) has received higher current weekly earnings, or

(d) has received lower current weekly earnings (even if the earnings are less than $155 per week),

than the hours worked, or the current weekly earnings received, at the time of making the application for payments under section 38.

(2) A reference in subsection (1) to hours of work does not include hours of leave approved by the employer.

18. *Section 40* of the 1987 Act refers to *"consecutive period of 12 weeks."* From this section the more appropriate calculation is over a 12 week period.

19. Using up-to-date wage material for a period closer to the decision being made would be in keeping with *Sections 38 and 43* of the 1987 Act which refer to Insurer's making a decision about a *"worker's current work capacity."* This would also be consistent with *Guideline 5.1* which notes that work capacity decisions will be made at many points throughout the life of a claim and *2.3* which requires the decision to be timely, informed and evidence based.

20. The method of calculation used in this case is procedurally incorrect. A logical corollary of this is that the decision must be invalid, since it is based on an inappropriate and legally incorrect method of calculation.

FINDING

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21. 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 has been a breach of the *Guidelines* which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

RECOMMENDATION

22. The work capacity decision of the Insurer dated 12 June 2014 is set aside.

23. The applicant is to be reinstated to his weekly payments at the rate applicable at 19 September 2014.

24. The payments are to be back-dated to 19 September 2014.

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

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
20 November 2014