WiRO
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 7 July 2014 is set aside.**

b. **The applicant is to be reinstated to her weekly payments at the rate applicable immediately prior to 11 October 2014.**

c. **The payments are to be back-dated to 11 October 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 7 July 2014. The decision advised the applicant that her weekly payments of compensation would cease on 11 October 2014. The applicant sought internal review and Internal Review Decision (IRD) was dated 28 August 2014. The original decision was not disturbed. She then sought Merit Review on or about 15 September 2014. The Merit Review Service of the WorkCover Authority issued their findings and recommendations on 17 October 2014.

2. The applicant made application for a procedural review to this office on 23 October 2014. I am satisfied that the applicant has made the application for procedural review in the proper form and within time.

3. The applicant suffered injury to the neck in the course of her full-time employment as a Process Worker on 12 November 2008. About five months later the employment was terminated, although the Insurer accepted liability for weekly payments for all relevant periods. In late 2010 the applicant returned to work, this time as a sewing machinist on reduced hours of between 18-24 hours per week. As at the time of making the work capacity decision the applicant was in receipt of weekly payments of compensation.

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4. As the applicant was in receipt of weekly payments immediately before 1 October 2012. Accordingly *Clause 8* of *Part 19H* of *Schedule 6* to the 1987 Act required the Insurer to conduct a work capacity assessment.

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

Submissions by the applicant

6. 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 made submissions which are relevant to procedural review. In summary they appear to be the following:

- The work capacity decision of the Insurer is procedurally incorrect and wrong in law in that:

  - At the bottom of page six the Insurer advises the applicant that she fails to satisfy the criteria for payment under section 38(3) because (a) she has not returned to work for 40 hours per week and (b) she currently earns in excess of $168 per week;[1]

  - In making the representation above, the Insurer has "incorrectly explained the application of the law and has not fulfilled its obligations to the worker who is in a vulnerable position of being both not familiar with the workers compensation laws and secondly having very little English. The […] Vocational report tested [the applicant's] English literacy and found her reading skills to be deficient and equivalent to grade 3 of primary school which the Insurer would have been aware of."

  - "Clause 2.2 of the WorkCover Work Capacity Guidelines requires decisions to be considerate of the worker's and employer's primary language, cultural background and literacy skills. Words used in the work capacity decision, where simpler alternative words could have been used include: 'constitute,' 'demonstrated,'

[1] The applicant is correct to note that neither of these criteria form any part of the test.

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‘sedentary,’ ‘legislative,’ ‘deductible, ‘continuation’ and ‘terminating.’”

- “Clause 2.3 of the WorkCover Work Capacity Guidelines requires decisions to be soundly based. The decision that the requirements of s 38(3) are not met because the worker is earning more than $168 per week is not soundly based and is wrong. The Insurer also did not advise that the figure of $168 per week was indexed.

- The insurer has also not fully explained the application of the entitlement periods on page 6 of the work capacity decision.

- At the top of page 7 of the work capacity decision the Insurer purports to explain that the requirements of section 38(3) have ***not*** been met because: “*You are not assessed as being, and as likely to continue indefinitely to be, incapable of undertaking any additional employment or work*[2] *that would increase your current weekly earnings.”*[3]

- Further the Insurer considered that the reason the worker’s current employment as a tailor/sewing machinist was not “suitable employment” was because she complained of experiencing pain after work. This might be more properly understood to be evidence that the Insurer found the worker unable to undertake additional hours of work, however the Insurer instead made the bizarre decision to disregard this employment altogether in the consideration of suitable employment because of the post-work pain and preferred to find that she could work as a cashier, a role of which she has no experience.

Submissions by the Insurer

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

The Decision

[2] Peculiarly, a distinction where there is apparently thought to be a meaningful difference, without this being demonstrated.
[3] How a person with a reading age of 8 is expected to comprehend this sentence in unknown.

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

9. I find the submissions of the worker compelling and of themselves sufficient grounds to render the work capacity decision invalid. In addition, the Insurer also claimed that the Nominated Treating Doctor "agreed" that the applicant could do full time work, without specifying with whom the doctor was supposed to have agreed. If agreement was supposedly with the IME, they should have said so. Interestingly, when the Insurer listed the "relevant documents" considered in the course of making the work capacity decision, they listed a report by the IME, a vocational assessment and a functional capacity assessment, without making any mention of the Nominated Treating Doctor or citing any reports or certificates produced by that doctor. This would also be a breach sufficient to set aside the decision.

10. By far the most egregious breach appearing in the decision is on page 5 and might be quoted in full:

    > *Your current employment as a Tailor has demonstrated that you have not located employment that allows you to earn minimum wage which is $16.87 per hour, this option has not been used as the Suitable Employment Option in the decision as you have reported that you experience increased pain after work.*

    It is hard to know where to start. Since the minimum requirements of section 38(3) were at the relevant time (i) 15 hours work and (ii) $168 per week, even a person with a mathematical literacy of the average 8 year old would be able to divide $168 by 15 and come up with an hourly rate of $11.20. Nowhere is a "minimum wage of $16.87 per hour" referred to in the legislation and if it were a requirement, then 15 hours of work would result in a minimum payment of $253.05 per week, much greater than $168. Further, the suggestion that a worker cannot be engaged in suitable employment because they "experience pain after working" is novel and might render the concept of suitable employment completely irrelevant in the case of anyone who reports pain symptoms after working.

11. It is clear that the considerations discussed in paragraph 10 *supra* are irrelevant to the conduct of a work capacity assessment and subsequent decision-making process. They also demonstrate that the Insurer has little idea of the correct criteria to be used in determining whether or not a worker has complied with section 38(3).
12. The legislation has been misconstrued and misapplied in this matter and inadequately and inappropriately explained. Clause 5.3.2 of the

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Guidelines has been breached, in addition to those earlier identified by the applicant.

FINDING

13. 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

14. The work capacity decision of the Insurer dated 7 July 2014 is set aside.

15. The applicant is to be reinstated to her weekly payments at the rate applicable immediately prior to 11 October 2014.

16. The payments are to be back-dated to 11 October 2014.

17. 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
8 December 2014