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*.*

1. The injured worker has applied for procedural review of a work capacity decision (the decision) made by the Insurer on 26 June 2013.

2. There is no dispute that the applicant was injured in the course of his employment on 16 January 2002. After the injury the applicant returned to work until 2010. Since that time the applicant has not worked. The Insurer made weekly payments as required under the provisions of the *Workers Compensation Act* 1987 (1987 Act).

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

4. 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*)*.

5. 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.

6. 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 benefits payable to the injured worker[1] then the Insurer is required to give proper notice to the worker (Section 54 of the 1987 Act).

[1] Or cessation of weekly benefits.

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7. *Guideline* 5.4.2 requires the Insurer to reference the legislation. The heading of the Notice refers to section 43 of the 1987 Act. The correct reference is to section 54(2)(a) of the 1987 Act. As such the legislation is not properly referenced.

8. The applicant has been in receipt of weekly payments for more than 130 weeks. The decision then refers to "section 38." The decision does not identify section 38 as being in the 1987 Act. An applicant is unlikely to know that the 1987 Act is being referred to.

9. The decision states correctly that 3 months notice is required prior to reducing benefits as a result of a work capacity decision. The decision refers to *"section 54".* The correct reference should be to section 54(2)(a) of the 1987 Act. The more pressing issue for an applicant is that the decision does not state which legislation is being referred to. As such, the legislation has not been properly identified.

10. The Internal Review Decision (IRD) of 15 August 2013 also deals with the 3 month notice period. The IRD states that weekly payments will cease "*effective from 2/10/13".* The decision stated that payments would cease on 3 October 2013. The IRD then gives a cryptic reason for the change of date by stating: "*Please be advised that the date has been amended from the original date of 1/7/13 in accordance with Section 54(3)(b) and WorkCover Guidelines."* In which Act section 54(3)(b) may be found is not revealed. The relevance of 1 July 2013 is also not revealed. Importantly, the relevance of section 54(3)(b) is not revealed. Assuming it is from the 1987 Act it does not appear to have any relevance. Precisely which *Guidelines* are being referred to is also not revealed. Section 44(1)(c) of the 1987 Act restricts the Independent Review Officer to reviewing the decision. In this case the IRD has purported to alter the decision[2] and the IRD needs to be reviewed in that light.

11. As the IRD purports to alter the decision the issue arises as to the 3 month notice required pursuant to section 54(2)(a) of the 1987 Act. It is arguable that the IRD has become a fresh decision and as such the 3 month period cannot elapse until 21 November 2013, being 3 months

[2] And to that extent, replace it.

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plus 4 working days after the date of the IRD, for delivery of the notice: see section 76(1)(b), *Interpretation Act* 1987.

12. The decision does not state that a work capacity assessment has been made. The insurer is required to make a decision "*as soon as practicable"* after the assessment is made: 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 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.

13. In this case the applicant cannot know whether an assessment has taken place. The Insurer made a Fair Notice call on 4 June 2013. There was no follow up letter as required by *Guideline 5.2.* The applicant was told that a Work Capacity Decision was likely to be made but it does not appear that the applicant was told that a Work Capacity Assessment was being undertaken. The Insurer is required by Schedule 6, Part 19H, Division 2, Clause 8(2) of the 1987 Act to undertake an assessment. It is not clear that an assessment was undertaken. The Merit Review Decision states in paragraph 11 that an assessment was undertaken. I do not know the basis upon which the Merit Review Decision made that statement. I note that the Internal Review Decision by the Insurer states that :

    > "*In accordance with Schedule 12, Part 19H, Division 2(8)(1) we are required to undertake a work capacity assessment for the purposes of facilitating the application of the of the weekly*

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benefit amendments to a worker in line with the Workers Compensation Amendment Act 2012."

This statement does not say that an assessment has been undertaken, merely that the Insurer is required to do so. The Act referred to does not exist. There is a *Workers Compensation Amendment Act* 2008 (now repealed) and a *Workers Compensation Legislation Amendment Act* 2012. The 2012 Act had a schedule 12, but it has been repealed. A legal scholar would make short work of determining what has happened to that schedule; some practising lawyers could do the same, but with more time and effort. An applicant with education to age 10 in another country and in another language, who has worked as a labourer and handy-man in Australia would, on the face of it, have no ability to understand what has happened and why.

14. Even where an assessment has taken place, the applicant cannot know whether the decision was made *"as soon as practicable"* after the assessment.

15. The decision states that "*You have a current work capacity (Section 43(1)(a)).*" Section 43(1)(a) is not the correct section to refer to. Also, the legislation in which section 43(1)(a) is to be found is not referenced. *"Current work capacity*" is a term defined in section 32A of the 1987 Act. That section has not been referred to. These are breaches of *Guideline* 5.4.2 and the need to *"reference the relevant legislation".*

16. The above mistake is repeated under the heading "*Reasons for this decision".* The decision states *"Your work capacity (in accordance with section 43(1)(a)).*"

17. The decision states that "*You have suitable employment options (Section 43(1)(b)).*" Section 43(1)(b) is not the correct section to refer to. Also, the legislation in which section 43(1)(b) is to be found is not referenced. *"Suitable employment*" is a term defined in section 32A of the 1987 Act. That section has not been referred to. These are breaches of *Guideline* 5.4.2 and the need to *"reference the relevant legislation".*

18. The above mistake is repeated under the heading "*Reasons for this decision".* The decision states *"Your ability to work in suitable employment (in accordance with section 43(1)(b)).*"

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19. The decision states that the decision to cease weekly benefits:

> "*has been made because: Any other decision of [the Insurer] that affects your entitlement to weekly payments of compensation, including a decision to discontinue the amount of weekly payments of compensation payable on the basis of any decisions referred to above(Section 43(1)(f)).*"

Guideline 5.4.2 requires the Insurer to "*clearly explain the line of reasoning for the decision".* The Insurer appears to have sleep walked into referring to section 43(1) of the 1987 Act. There appears to be no thought as to its relevance which is shown by this paraphrasing of section 43(1)(f). The way that section 43(1)(f) has been abused in the decision makes it, at best, impenetrable and, at worst, nonsensical.

20. *Guideline* 5.4.2 requires the Insurer *"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 decision correctly refers to the 12 month period, but refers to section 59. *Guideline* 5.4.2 requires the insurer to "*reference the relevant legislation".* The decision does not refer to section 59A(2) of the 1987 Act which is the relevant subsection.

21. To add confusion to medical expense payment, the Internal Review Decision states that the "*decision only relates to your entitlement to weekly benefits and does not affect other entitlements that you may be entitled to under the Act."* The IRD purports to alter the decision and the IRD needs to be viewed in that light.

22. Section 59A(3) of the 1987 Act also states that the applicant will, after compensation for medical expenses ends, become eligible for further payments for medical expenses if he becomes entitled to compensation for weekly benefits at some stage in the future. Again, the legislation is not properly or fully explained.

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23. *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 the applicant can be provided on request to the Insurer. The Insurer has failed to so advise the applicant. The Insurer states that it has provided copies of all documents relied upon. The Insurer does not state that there are no other documents. The insurer's statement suggests to an applicant that there are no other relevant documents. An applicant may well disagree if he has the opportunity to peruse such other documents.

FINDING

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

RECOMMENDATION

25. I recommend that the Insurer conduct a new work capacity assessment and make a new work capacity decision in accordance with the WorkCover *Guidelines*.

26. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 26 June 2013 until such time as he is properly transitioned. Those payments should continue from 3 October 2013 being the date on which they ceased according to the decision, or 2 October 2013 according to the IRD.

27. 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 2 or 3 October 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.

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