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 applicant, an injured worker, has applied for procedural review of a work capacity decision (the decision) made by the Insurer on 4 July 2013.

2. There is no dispute that the applicant was injured in the course of her employment on 20 August 2001. The applicant returned to work with the employer on suitable duties in 2003. In 2007 those duties were withdrawn and she was required to return to full duties. She felt she could not cope with these duties because the work would aggravate the injury. The applicant eventually resigned in 2009. 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

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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(2)(a) of the 1987 Act).

7. The applicant raised certain matters in the Application for Procedural Review. 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[2] or discretion exercised by the insurer".* The issues raised by the applicant go to the merits of her matter which are matters for the judgement and discretion of the insurer. They are therefore not relevant to this review.

8. The Insurer was required by Section 54(4) of the 1987 Act to give the applicant notice personally or by post. This notice was given by post. By virtue of the postal service rule in Section 76(1)(b) of the *Interpretation Act* 1987, the Insurer was required to give the applicant 3 months plus 4 working days, not including the day of posting, for postal service of the notice. Therefore in order to comply with the requirements of Section 54(2)(b) a notice posted on 4 July 2013 would not permit the reduction or cessation of weekly payments until the expiry of three months and four *working* days, not including the day of posting. The decision states that the cessation of benefits will take effect on 10 October 2013. "*Working day"* is defined in section 76(2) of the *Interpretation Act* 1987 as:

> **working day** means a day that is not:
> (a) a Saturday or Sunday, or
> (b) a public holiday or a bank holiday in the place to which the letter was addressed.

9. Assuming that the decision was sent on 4 July 2013, 3 months falls on Friday, 4 October 2013. The next 3 days are Saturday, Sunday and Monday being the Labour Day public holiday pursuant to section 4(i) of the *Public Holidays Act* 2010. Monday is 8 October 2013 which only allows 3 working days after the day of posting the letter in order to get to 10 October 2013. As such, there has been a failure to give appropriate notice by one day. Strict compliance with this section is required particularly as section 54(1) of the 1987 Act makes cessation or

[1] Or cessation of weekly benefits.
[2] Judgement is given the wrong spelling "judgment" in the Act.

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reduction of payments without the appropriate notice an offence (*Maximum penalty: 50 penalty units*). A penalty unit is defined in section 17 the *Crimes (Sentencing Procedure) Act* 1999 as $110.

10. The Insurer has exacerbated this error by stating in the decision that the applicant's weekly payments at the current rate "*must cease within 3 months of this decision – please refer to: Section 54(2)(a)"* of the 1987 Act. Had the applicant consulted the section to which she was referred she might have been surprised to find that it says precisely the opposite of what she had been told. In fact section 54(2)(a) states that the three months is a minimum notice period, not a maximum payment period. This is a breach of *Guideline* 5.4.2 and the need to *"reference the relevant legislation".*

11. The decision states that the applicant has been in receipt of weekly payments for more than 130 weeks as at the date of the decision and therefore Section 38 of the 1987 Act applies. The decision states that the number of weeks is 490, well in excess of 130 weeks. The Internal Review Decision which is dated 20 August 2013, less than 7 weeks later, states that the applicant has been paid for 663.4 weeks. A discrepancy of 3 years and 4 months creates an impression that the Insurer does not know the number of weeks for which payments have been made, and it follows that a reasonable person in the position of the applicant might even query the accuracy of the statement that payments had been made "for more than 130 weeks." In any event either the original decision is incorrect or the internal review is incorrect. The applicant could not possibly accept both propositions.

12. The decision states that a work capacity assessment has been made. The decision does not state that this is a requirement pursuant to Clause 8 of Part 19H of Schedule 6 to the 1987 Act. As such the legislation has not been properly referenced as *Guideline* 5.4.2 requires. 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. The Insurer advised the applicant *"about the pending Work Capacity Assessment by phone call and letter on 13/06/2013"* according to the Internal Review Decision of 20 August 2013. 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:

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- *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 does not know when the assessment took place. The Insurer made a Fair Notice call on 13 June 2013. There was a follow up letter as required by *Guideline* 5.2. The applicant was only told that a work capacity assessment was "pending". I take this to mean that the assessment had not been completed or not begun. The decision was made on 4 July 2013 and the applicant could infer that the decision was made "*as soon as practicable"* after the decision. What is not clear is whether the applicant was told in the course of the Fair Notice call and letter the "*potential outcome of this review and detail the information that has led the insurer to their current position"* as required by *Guideline* 5.2.

14. *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 and related expenses are no longer payable 12 months after a worker ceases to be entitled to weekly payments of compensation. The decision states that "*any entitlement you may have to payment of pre-approved reasonable and necessary medical and other expenses, until 10 October 2014, will not be affected".* This statement gives no information to the applicant about the effect of section 59A(2) on such entitlements beyond 10 October 2014. The effect of section 59A(2) of the 1987 Act has therefore been disguised, if not misrepresented.

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15. In addition, section 59A(3) of the 1987 Act states that the applicant may, after the entitlement to compensation for medical expenses ends, become eligible for further payments for medical expenses if the applicant becomes entitled to compensation for weekly benefits at some stage in the future. This was not disclosed by the Insurer.

16. The decision states that an applicant *"who is assessed as having current work capacity is only entitled to weekly benefits beyond the second entitlement period, ie 130 weeks, if:"* Section 38(3)(b) and (c) of the 1987 Act are then set out. While section 38 of the 1987 Act is referenced, the decision does not refer to Section 38(3)(b) and (c). Section 32A of the 1987 Act defines "*current work capacity"* and "*second entitlement period"* but the decision fails to refer to that section. These 2 terms have a specific definition in the 1987 Act which makes it essential that they are referenced. These are, therefore, breaches of *Guideline* 5.4.2 and the need to *"reference the relevant legislation".*

17. *Guideline* 5.4.2 requires the decision to set out brief reasons, outline the evidence, and explain the reasoning for the decision. See paragraph 12 above. The decision states that "*we have reviewed and considered the following information"* and then sets out some documents. No reasoning is given, clearly or otherwise. What evidence the documents provided is not set out. No suggestion is given that some evidence may have not supported the decision. The applicant is left completely in the dark as to how the Insurer came to its decision.

18. *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 further copies of documents already provided can be made available. 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 she has the opportunity to peruse such other documents. Documents are to be provided as required by *Guideline* 5.4.2, which has not been referred to.

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19. *Guideline* 5.4.2 requires the Insurer to "*detail any support, such as job seeking support, which will continue to be provided during the notice period".* The decision is silent as to any support which may be available.

FINDING

20. 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

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

22. I recommend that the Insurer pay the applicant the weekly benefit to which she was entitled prior to 4 July 2013 until such time as she is properly transitioned. Those payments should continue from 10 October 2013 being the date on which they ceased.

23. 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 15 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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Delegate of the WorkCover Independent Review Officer
6 February 2014

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