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 seeks procedural review of a work capacity decision made by the Insurer.

2. The applicant was employed as a school teacher and suffered injury to his right knee in the course of that employment on or about 26 November 1999. He never returned to full duties and was ultimately retired, medically unfit, in 2001. There is no dispute about the injury having occurred in the course of employment. The Insurer paid weekly benefits for all relevant periods under the *Workers Compensation Act* 1987 (1987 Act) and therefore the applicant was an existing recipient of weekly payments of compensation immediately prior to 1 October 2012.

3. On 18 June 2013 the Insurer advised the applicant in writing of a work capacity decision which had been made on that date. He was advised that his entitlement to ongoing weekly payments of workers compensation would "terminate"[1] from 24 September 2013 since he was found to have "no entitlement"[2] under section 38 of the *Workers Compensation Act* 1987 (1987 Act). He was also told the following things:

- It was noted that the applicant has received weekly payments for considerably longer than 130 weeks.[3]

- "As a result of your work capacity assessment,[4] a decision has been made that you are no longer entitled to weekly payments under the new

[1] That term appears in the heading.
[2] So just to be clear, there is no entitlement, even though on internal review (see *infra*), the insurer found that in case there is an entitlement it is "reduced to nil." If there is any confusion, section 59A(2) might, or might not, be relevant.
[3] 740.4 weeks, as at 18 June 2013. Bizarrely, this became 754.2 weeks in a letter dated only 61 days later on 16 August 2013 advising the outcome of internal review. They cannot both be right, in which case this constitutes a demonstrable error (see note 13, *infra*).
[4] No date or range of dates was given for any "assessment" - Cf: Schedule 8, clauses 22-23 *Workers Compensation Regulation* 2010, and Schedule 6, Part 19H, clauses 6 and 9 of the1987 Act.

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Section 38 of the *Workers Compensation Act* 1987. This decision is effective from 24 September 2014."

- "Any entitlement you may have to payment of pre-approved reasonable and necessary medical and other expenses, until 24 September 2014, will not be affected."[5]

4. On 16 August 2013 the Insurer wrote to the applicant advising that an Internal Review had upheld the original decision. This letter made no reference whatsoever to the effect of the decision on medical benefits and did not refer to any date of assessment. Interestingly, it did say this:

- "Following a review of the decision dated 18/6/2013 and the reasons/information you have submitted in support of your request for the review, we have made the decision to maintain our original work capacity decision to reduce your weekly payments to nil."[6]

5. The applicant applied to the WorkCover Authority for a Merit Review of the Insurer's decision and the application was received on 11 September 2013. The decision of the Merit Review Service, dated 6 January 2014[7] upheld the Insurer's decision.

6. On 13 January 2014, the applicant requested the Independent Review Officer to undertake a review of the decision of the Insurer pursuant to Section 44(1)(c) of the 1987 Act. I am satisfied that the applicant has made that application within the time provided by that section and on the correct form.

The Applicant's Stated Grounds for Procedural Review

7. The applicant's grounds for pursuing procedural review are:

[5] An antenantiosis, where a statement is made by the denial of its opposite, possibly done in this case to reassure the applicant that all would be well for the foreseeable future, rather than explaining the full effect of the work capacity decision – see s 59A(2),(3).
[6] See note 2 *supra*.
[7] Some 117 days after receipt of the application, in clear breach of *Review Guideline* 10.14 which at the time the application was lodged required a decision to issue "within 30 days." The purpose of this Guideline is unclear, since there is no known remedy for breach and in the version published on 8 October 2013 the "30 days" was changed from a requirement to a suggestion.

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(i) He believes that neither the original decision, nor the WorkCover NSW Merit Review Service dealt with all of the necessary information available to them in making their decisions;

(ii) Nor does he believe that he was given procedural fairness leading up to the decision being made in that he was offered a face-to-face meeting to "present his information," but subsequently this offer was withdrawn;

(iii) He appears to be unimpressed with the Merit Review decision;

(iv) He believes that as a disabled person he has been discriminated against by the Merit Reviewer; and

(v) He refers to a "reply" he apparently sent to the Merit Review Service in response to their decision, which he says "clearly" mentions various pieces of information which both the Insurer and WorkCover allegedly overlooked.

Submissions by the Insurer

8. The Insurer was invited to make submissions but declined to do so.

Legislation

9. Section 44(1)(c) of the 1987 Act limits the scope of procedural review to a review only of:

> the insurer's procedures in making the work capacity decision and not of any judg[e]ment or discretion exercised by the insurer in making the decision.[8]

Therefore while it remains the case that no discretion is unreviewable,[9] the Insurer's discretion when making a work capacity decision appears only to be reviewable in the course of merit review or Judicial review.

The procedures to be followed by the Insurer are set out in *WorkCover*

[8] Judgement is misspelt in the Act as "judgment."
[9] See *Padfield v Minister of Agriculture, Fisheries and Food.* [1968] AC 997

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Work Capacity Guidelines and *WorkCover Review Guidelines*.[10] Both sets of *Guidelines* are said to be delegated legislation and therefore must be complied with in order for a work capacity decision to be validly made.[11] Given the overall beneficial nature of the 1987 Act and the serious consequences to workers if decisions are made incorrectly, strict compliance with the *Guidelines* is required.

Process of the Insurer

10. The decision reached by the Insurer was certainly within the range of available decisions, and was upheld by the merit review service. The applicant has been paid for more than 130 weeks, and therefore section 38 is the applicable section of the Act to calculate entitlement. Being an existing recipient of weekly payments immediately prior to 1 October 2012, the applicant is subject to the transitional rate in Schedule 6, Part 19H, clause 2 of the 1987 Act. However, such considerations are of no interest on procedural review where the main relevant consideration is not *why* a decision is made, but *how* it is made.[12]

My Reasons:

11. The applicant's stated grounds for seeking procedural review mainly go to the merits of the case and are not appropriate for procedural review. Despite this the second point raised by the applicant is not a good sign, given that it seems the insurer offered to have a meeting in person with the applicant and then either failed to schedule such a meeting or unilaterally cancelled the meeting. The conduct of the Merit Review Service is not subject to the scrutiny of the WorkCover Independent Review Officer and accordingly nothing raised by the applicant in relation to merit review is of relevance.

12. Since procedural review requires a scrutiny of the decision-making

[10] A short-hand name for *Guidelines for Work Capacity Decision Internal Reviews by Insurers and Merit Reviews by the Authority.*
[11] They contain what some describe as "soft" law. See seminar paper Kerr, D – *Challenges facing Administrative Tribunals – The complexity of legislative schemes and the shrinking space for preferable decision making* – Council of Australasian Tribunals, 18 November 2013.
[12] For a related and recent discussion of the distinction see *Minister for Immigration and Citizenship v Li* (2013) 297 ALR 225 per Gageler, J at 253.

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processes of the Insurer, including an examination of compliance with legislation and *Guidelines*, rather than a consideration of submissions made by either party, the review process may proceed despite the absence of relevant submissions from either party. Any demonstrable error[13] on the part of the Insurer may invalidate the decision.

13. There are in my view breaches of the *Guidelines* and the 1987 Act which are sufficient to invalidate the work capacity decision made by the Insurer.

- The work capacity decision letter made no reference to the true impact of the decision on the applicant's entitlement to medical and related treatment expenses. The only reference was a statement ostensibly seeking to reassure the applicant that his entitlements would remain unaffected until a date in 2014. It did not say that the effect of the decision is that 12 months after the last payment of weekly benefits, the entitlement to medical benefits would automatically come to an end under section 59A(2). Similarly there was no reference to section 59A(3). This is the point of the distinction between a termination or finding of no entitlement on the one hand and an existing entitlement being said to "reduce to nil" on the other.[14] It is possible for an insurer to argue that a worker retains an imaginary "entitlement" of $0.00 per week, in which case it would be arguable that the operation of section 59A(2) might be postponed indefinitely.

- The same can be said of the letter advising the outcome of internal review, which made no reference to medical benefits. However this letter muddied the waters considerable by introducing the wording "reduced to nil" in place of the previously expressed "termination" and "no entitlement."

- Neither letter referred to section 59A(2) and/or (3).

[13] For a recent examination of "demonstrable error" see *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] NSWSC 1792 (11 December 2013) at paragraphs 39-56.
[14] See notes 2 and 6 *supra*.

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- Collectively this constitutes four errors on the part of the Insurer, since each instance of failure to explain the impact of the decision and reference the legislation is duplicated.

- There is no indication of the date on which the assessment was conducted. While this was not a requirement of the *Guidelines* at the date of the work capacity decision, it has subsequently been added to the 8 October 2013 iteration.[15] Despite this it constitutes an unfairness to the applicant, since the Insurer is required to make a decision "as soon as practicable" after a work capacity assessment[16] and absent being told of the date of assessment the applicant cannot know whether or not this has been done.

- The insurer gave two differing estimates of the number of weeks of weekly payments received by the applicant[17] which must call into question the attention to detail of the Insurer in this case. Guideline 2.4 requires the Insurer to have "a tailored approach" to work capacity assessments, stating as follows:

> 2.4 Work capacity assessments should be tailored to the worker. An understanding of the worker's circumstances and their injury ensures the right approach at the right time.

It might fairly be thought that an insurer which variously tells an applicant in two letters dated 61 days apart that they have received 740.4 weeks of payments and then 754.4 weeks of payments (and without noting the obvious discrepancy) has failed to properly consider the "the worker's circumstances" as required by Guideline 2.4

14. In the Internal Review letter dated 16 August 2013 the Insurer helpfully provided a list of reports which the applicant "might not have previously seen." Interestingly, one of these was a medical report dated 6 August 2013; that is to say, post-dating the work capacity decision by no less than 49 days. There is nothing in the *Guidelines* which permits an insurer to obtain medical reports to support its own decision after the

[15] In the *Guidelines* gazetted on 8 October 2013 such an omission would be a breach of the dodecalogue now appearing in the newly numbered *Guideline* 5.3.2.
[16] See cl 23, schedule 8 of the *Regulation*.
[17] See footnote 3, *supra*.

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event. This is a clear breach of the rules of natural justice[18] as well as beyond the range of allowable "additional information" which may be obtained in the course of internal review by virtue of *Guidelines* 7.1.3 and 7.4. It is a feature of both of those *Guidelines* that any such additional information must be obtained "from the worker."

15. 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 1987 Act and the *Guidelines* which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

Immediacy of Entitlement

16. A worker who has satisfied the provisions of the 1987 Act has an immediate entitlement to compensation. In *Speirs v Industrial Relations Commission (NSW)* (2011) 81 NSWLR 348 Giles, JA (Allsop, P and Hodgson JA agreeing) reviewed the various references to entitlement in the 1987 Act and arrived at the following conclusion [at paragraph 85]:

> [I]n my opinion 'entitled to' in the definition in s 240(2) of the [1987 Act] does not mean entitlement established by a determination of the Workers Compensation Commission or the District Court, or by decision of the Board. The entitlement is **a right subsisting in law** when there has been injury satisfying s 4 and s 9A of the [1987 Act]. It may be recognised and given effect without tribunal or court determinations, as will commonly be the case.

Since the immediate entitlement to compensation is a right subsisting in law, it is hard to see on what basis clause 21 of Schedule 8 to the *Workers Compensation Regulation* 2010 presumes to impose a three month "notice period" prior to a worker receiving an increase in payments

[18] Since the applicant had no opportunity to even see the report prior to a decision being made it follows that he certainly had no opportunity to make submissions about it or to obtain his own reports in reply.

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to which they would otherwise be immediately entitled. By "otherwise" I mean that anyone other than an existing recipient is entitled to an increase in benefits without the preclusion period in clause 21. I note also that section 33 of the 1987 Act requires compensation to be paid "during the incapacity" rather than at some later date. There is no Henry VIII clause making reference to an amendment to section 33 of the 1987 Act and it follows that clause 21 must be *ultra vires* to the extent that it conflicts with the section.

My Recommendation:

17. For the reasons set out above I recommend that the Insurer undertake another work capacity assessment and, if it arises, make another work capacity decision, according to the *Guidelines* as gazetted by the Authority and according to the relevant legislation.

18. Since the applicant was an existing recipient as at 1 October 2012, he remains entitled to receive his pre-transition rate of weekly benefits until such time as he is validly transitioned under the Act. This cannot happen until a valid notice under section 54 is issued. Accordingly he remains entitled to his former weekly payments until he is validly transitioned and a section 54 notice issues and the relevant period of notice therein has expired.

19. Because the review process does not operate as a stay of the original decision, the applicant has not received weekly payments since 24 September 2013. Therefore it cannot be said that he "is receiving" compensation. This means that clause 21 of schedule 8 to the *Workers Compensation Regulation* 2010 cannot apply. It follows that he may be restored to the correct pre-transition amount forthwith and back-dated to the date when the last payment was made, since there is no need for the effluxion of any notice period.[19]

[19] To the extent that clause 21 of schedule 8 of the *Regulation* conflicts with section 9 ("A worker ... shall receive compensation") and section 33 ("compensation... shall include a weekly payment ***during the incapacity***") it is *ultra vires*.

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20. Noting the binding nature of these recommendations[20] I recommend that the Insurer takes my views into account, and I recommend that the Insurer immediately gives effect to them.

Wayne Cooper
Delegate of WorkCover Independent Review Officer
12 February 2014

[20] See section 44(3)(h) of the 1987 Act – recommendations made by the Independent Review Officer are binding on the insurer and the Authority.