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 is the applicant for a review of a work capacity decision made by a scheme agent of the Workers Compensation Nominal Insurer ("Insurer").

2. The applicant suffered injury to his right shoulder on or about 20 November 1993 in the course of his employment as a measurement crew operator with the Insured.

3. The applicant remained employed with the Insured and eventually as a result of technical improvements in 2007 he returned to his pre-injury area of employment in the measurement crew. The worker was in receipt of weekly payments of make-up pay from the Insurer.

4. On 13 May 2013 the Insurer advised the applicant in writing of a work capacity decision. He was advised that his entitlement to ongoing weekly payments of workers compensation would be terminated on 21 August 2013.

5. The applicant was advised that the '*formal 12 moth entitlement'* to medical and treatment expenses would cease on 21 August 2014.

6. The applicant requested an internal review of the Insurer's decision on 12 June 2013. That review was responded to by the Insurer in writing on 12 July 2013. The review confirmed the original work capacity decision.

7. On 28 July 2013 the applicant made an application to the WorkCover Authority of New South Wales for a merit review of the Insurer's work capacity decision. That merit review application was received within the 30 day period. A WorkCover merit review was completed and a Statement of Reasons issued on 13 September 2013. The merit reviewer upheld the original decision of the Insurer.
8. On 21 January 2014 the applicant requested the Independent Review Officer to undertake a review of the decision of the Insurer pursuant to

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Section 44(1)(c) of the *Workers Compensation Act* 1987 ("the1987 Act"). I am satisfied that the applicant has made the application within the time provided by that section and on the correct form.

Applicant's Stated Grounds for seeking Procedural Review

9. The applicant's grounds for seeking procedural review are as follows:

(i) The guiding principles have not been provided appropriately;
(ii) The insurer failed to advise the applicant he would require recent medical assessments;
(iii) The insurer has failed to demonstrate an understanding of the applicant's injury when there is no agreement on what is the injury;
(iv) The applicant has not been provided with an injury management plan.

Submissions by the Insurer

10. The Insurer made no submissions in response to the application.

Legislation

11. 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.

Therefore while it remains the case that no discretion is unreviewable[1], the Insurer's discretion when making a work capacity decision appears only to be reviewable in the course of merit review or Judicial review.

12. The procedures to be followed by the Insurer are set out in the *WorkCover Work Capacity Guidelines* and *WorkCover Review Guidelines*. Both sets of *Guidelines* should be complied with in order for a work capacity decision to be validly made.

[1] *See Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997*

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13. The relevant version of the *Guidelines* is the one dated 28 September 2012 and which applied to all claims from 1 January 2013. That publication provides that the *Guidelines* provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessment.

The Process of the Insurer

14. The work capacity decision reached by the Insurer appears to be within the range of available decisions and was upheld by the merit review service.

15. The important consideration on procedural review is not why a decision is made, but how it is made.

My Reasons:

16. The grounds upon which the applicant seeks to rely can be dealt with shortly. Grounds (ii) and (iii) are not procedural grounds. Grounds (i) and (iv) are discussed later in this decision.

17. The Insurer has made no submissions about compliance with the relevant statutory provisions and guidelines.

18. Since procedural review requires a scrutiny of the decision-making processes of the Insurer, including 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 on the part of the Insurer may invalidate the decision.

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

20. One issue which faced the Insurer in making its work capacity decision is the requirement contained in Clauses 5 and 5.1 of the *Guidelines*. That was in the following terms:

"Clause 5

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Work capacity decisions should be made in line with the Best Practice Decision-Making Guide."

and then:

"Clause 5.1

When making a work capacity decision the insurer should follow the Best Practice Decision Making Guide."

21. That Guide did not exist and has never existed or been published by WorkCover.

22. I find the Insurer has failed to follow the procedure as set out in the *Guidelines* in making the work capacity decision of 12 June 2013 as it did not (and through no fault of its own) comply with the requirements of Clauses 5 and 5.1.

23. *Guideline 5.4.2* states that the work capacity decision notice must advise the applicant that any documents or information that have not already been provided to him can be provided on request to the Insurer. The Insurer has failed to so advise the applicant.

24. Further the applicant was advised in the decision that he would be provided with a new injury management plan by 17 May 2013. I have not been provided with any documents to establish that this has been done. One ground of appeal from the worker is a request for that injury management plan. On the documents before me I cannot establish whether the Insurer complied with that commitment.

25. The above *guideline* also requires the Insurer to state the impact of the decision on the worker in terms of his entitlement to medical and related treatment expenses. In a convoluted manner the Insurer has advised the applicant of a *'formal 12 month entitlement period'* which ceases on 21 August 2014 and that they will be in touch when that entitlement period finishes to advise what will happen to the applicant's claim at that stage.

26. The decision fails to advise the applicant that his entitlement to medical and related treatment expenses ceases as at 21 August 2014 in

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accordance with *Section 59A* of the 1987 Act unless specific circumstances can be met.

27. I find that the work capacity decision is accordingly not effective and the weekly payments amendments do not as yet apply to the applicant.

My Recommendation:

28. For the reasons set out above I recommend that the Insurer make another work capacity decision, according to the *Guidelines*.

29. 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. The applicant should have his payments restored from 21 August 2013.

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

Tracey Emanuel
Delegate of WorkCover Independent Review Officer
14 February 2014