WorkCover independent review office

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

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.[1]

2. The applicant was injured when volunteering as a surf life-saver on 4 February 1990 and suffered further injuries (to a different body part) in the course of her employment as a school teacher in the period from February 1991 to August 1994. Before both of those sets of injuries, the applicant had been injured in 1971, also in the course of employment as a school teacher. As a result of the totality of injuries, the applicant suffered incapacity, variously found to be total or partial for particular periods. In litigated proceedings, due to the status of the applicant as a volunteer surf life-saver at the time of the 1990 injury, the first respondent was named as "*WorkCover Authority as Administrator of the Emergency and Rescue Workers Compensation Fund*." It was never in dispute (and it remains undisputed) that the applicant is entitled to rely on the provisions of the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act* 1987 ("*Bush Fire, Emergency and Rescue Services Act*") for the purposes of the 1990 injury, the *Workers Compensation Act* 1987 for the injuries sustained between 1991 and August 1994 and the *Workers Compensation Act* 1926 for the injury sustained in 1971.

Apportionment of liability

3. In the Compensation Court of NSW on 9 August 1996 her Honour Truss, J made the following order:

   "14. I ORDER that the liability to pay weekly compensation awarded pursuant to sections 36[2] and 40[3] ***be apportioned as follows***:

   50 per cent   as against the first respondent.

[1] More correctly, a lead agent for a cluster of insurers. See "The Apportionment Problem," *infra*.
[2] Total incapacity.
[3] Partial incapacity.

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

20 per cent	as against the second respondent in respect of the injuries sustained in 1971[4]
30 per cent	as against the second respondent in respect of nature and conditions of employment from 1991 to August 1994.

4. As a result of the award of Truss, J, the applicant was in receipt of on-going weekly payments for partial incapacity under section 40 of the 1987 Act from 1996. On 7 August 1998 Truss, J varied her award to say that the applicant would receive the fixed amount of $443 per week from 7 March 1997 "to date and continuing," and therefore the applicant was still being paid weekly payments immediately before 1 October 2012.

5. It appears that an administrative arrangement had been arrived at between scheme agents of the WorkCover Authority, whereby the currently named insurer assumed the duty to make payments to the applicant, with a right of recovery against the Nominal Insurer for the 1990 injury and whichever insurer was on risk in 1971.

Relevant Legislation

6. The *Bush Fire, Emergency and Rescue Services Act* defines those to whom it applies in section 23:

   23 Definitions

   (a1) a surf life saver,

7. Clause 4 of Division 1 of Part 19H of Schedule 6 to the 1987 Act exempts certain claims and claimants from the operation of the 2012 amendments:

   4 Application of benefits amendments to other Workers Compensation Acts

[4] Note that this injury pre-dates the *Workers Compensation Act* 1987 and is thus covered by the *Workers Compensation Act* 1926.

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

> The benefits amendments do not apply for the purposes of the *Workers' Compensation (Dust Diseases) Act 1942* or the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987* and a reference in either of those Acts to a provision of the Workers Compensation Acts is a reference to the provision without regard to any amendment made by the benefits amendments.

This provisions clearly exempts volunteer surf life-savers[5] and is in no way compromised by the later clause 25 in the same Part 19H of schedule 6, which is worded thus:

> **25 Police officers, paramedics and firefighters**
>
> The amendments made by the 2012 amending Act do not apply to or in respect of an injury received by a police officer, paramedic or firefighter (before or after the commencement of this clause), and the Workers Compensation Acts (and the regulations under those Acts) apply to and in respect of such an injury as if those amendments had not been enacted.

Clause 25 exempts professionally employed fire-fighters, whereas clause 4 refers to volunteer bush fire-fighters. Since all surf life-savers were included in the definition in section 23 of the *Bush Fire, Emergency and Rescue Services Act* there was no need to include surf life-savers in clause 25.

8. Clause 15 of Schedule 8 to the *Workers Compensation Regulation* 2010 (the Regulation) exempts claims under the 1926 Act from the 2012 amendments:

> **15 1926 Act claims-weekly payments amendments not to apply**
>
> The amount of a weekly payment of compensation payable under Division 2 of Part 3 of the 1987 Act in respect of any period of incapacity that resulted from an injury received before

[5] By virtue of section 23, *Bush Fire, Emergency and Rescue Services Act.*

WorkCover independent review office

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

> the commencement of that Division is be determined as if the weekly payments amendments had not been made.

Purported transition by work capacity decision

9. The Insurer purported to transition the applicant by making a work capacity decision on 6 August 2013. **The future entitlement to weekly payments was said to reduce from $443 to "nil" from 12 November 2013**.[6] In a letter dated 26 September 2013 the Insurer purported to give notice of the outcome of an internal review of the work capacity decision. In the course of this letter the Insurer said this:

   "3. Due to the different parties involved for the different injuries sustained on different injury dates, the compensation court decided on 9 August 1996 that payments of [the applicant's] weekly entitlements are to be apportioned accordingly and [another insurer] now [the Insurer] is only liable to pay 30%.

   "7. When entitlements have been calculated for transition under the new legislation, [the applicant's] entitlement will be reduced to Nil as [the applicant's] current earnings are now more than the transitional amount."

10. Both the applicant and the merit review service seem to be under the misapprehension that this was an attempt to apply the 2012 amendments to the totality of the applicant's on-going weekly entitlements. This may be a very grave misapprehension, with unforeseen consequences for the insurer.

The apportionment problem

11. The documents received by this office included a letter from the Insurer to their legal advisers dated 25 September 2013[7] which says, relevantly:

   Shared Liability Claim

---

[6] But see letter from Insurer dated 25 September 2013, quoted at length in paragraph 11, *infra*.

[7] An unfortunate date, since it pre-dates by one day the letter to the applicant advising the outcome of a purported "internal review" of the work capacity decision.

WiRO
WorkCover independent review office

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

Please be advised that a Work Capacity Decision has been made on [the applicant's] claim for injuries sustained on 4 February 1990.[8] *Further to the decision being made [the applicant] will no longer be in receipt of weekly benefits payable by [the Insurer] from 13 November 2013.*

The Work Capacity Decision made on the claim of which [the Insurer] is liable is not covered by the previous awards ordered by the Compensation Court in 1996 and 1998.[9]

I confirm instructions as follows:

1. *Please contact the WorkCover Authority and the managers of [other insurers named] to advise them of changes to our claim.*
2. *Please advise the WorkCover Authority and [other insurers named] that [the Insurer] will no longer be paying weekly benefits to [the applicant] and* ***confirm that they will be responsible for payments of benefits commencing 13 November 2013.***[10]
3. *Please query if* ***both liable parties*** *are willing to settle the recoveries on this claim up to the 13 November 2013 (last request was from payments up to the 10 September 2013 and payments will cease on 13 November 2013 – total of 9 weeks of payments at $443.00/wk)*

   Total payable = $443.00 x 9 weeks = $3897.00

   WorkCover Liability
   50% x $3897.00 = $1948.50

   [other insurer named]
   20% x $3897.00 = $779.40

---

[8] This contradicts the Internal Review letter, which purported to confirm a decision to transition a claim for injuries sustained on 17 August 1994. It is, however, consistent with the letter of 6 August 2013 advising of the original work capacity decision.
[9] I can have no more idea of what this gibberish means than can the author. In so far as it might purport to exempt the Insurer from the force of the awards in place since 1996 and 1998, it is wrong.
[10] Emphasis added.

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

12. It is tolerably clear from this correspondence that the insurer believes the applicant is entitled to ongoing weekly payments from other insurers (“both liable parties”) after 13 November 2013. This would be news to the applicant, who was no doubt led to believe that all payments would come to an immediate end as at 12 November 2013. This would be understandable in light of the **highlighted** words in paragraph 9 above, which accurately reflect the contents of both the Work Capacity Decision letter dated 6 August 2013 and the Internal Review letter dated 26 September 2013.

13. Even the Insurer admits that the part of the award made to the applicant by the Compensation Court in 1996 and 1998 susceptible of transitioning to the 2012 amendments is only 30% of the total. It was therefore clearly erroneous and misleading for the Insurer to tell the applicant that her entitlements would reduce from $443.00 per week to Nil, since only $132.90 [11] of the weekly payment was subject to the legislative amendments.

My Reasons:

14. The applicant’s stated grounds for seeking procedural review mainly go to the issue of a purported transitioning of a claim not liable to be transitioned. As such, they are relevant and, in this case, persuasive.

15. Since procedural review requires a scrutiny of the decision-making 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[12] on the part of the Insurer may invalidate the decision.

16. 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. Examples of such breaches include the by now customary sentence in the work capacity decision letter purporting to tell the

[11] $443.00 x 30% = $132.90.
[12] 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.

WiRO
WorkCover independent review office

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

applicant that her entitlements to on-going medical treatment expenses "until 14 November 2014 will not be affected." Since this does not refer to nor explain section 59A(2), it is a clear breach of Guideline 5.4.2. There is such a plethora of other breaches of the Guidelines[13] that I need not go into further detail.

17. 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.

My Recommendation:

18. 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. Any such decision can affect no more than 30% of the applicant's weekly benefits as awarded by the Compensation Court of NSW.

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

20. Because the review process does not operate as a stay of the original decision, the applicant has not received weekly payments since 12 November 2013. Therefore it cannot be said that she "is receiving" compensation. This means that clause 21 of schedule 8 to the *Workers*

[13] Other highlights include: giving different dates of injury under the same claim number on different letters, and inventing a requirement for WIRO to deliver a decision "within 30 days." There is not and has never been any such requirement.

WorkCover independent review office

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

Compensation Regulation 2010 cannot apply. It follows that she 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.[14]

21. A very interesting question now arises, which might be dwelt upon by both the Insurer and the applicant with some purpose: If the Compensation Court has apportioned liability to make weekly payments to an injured worker who has a fixed entitlement of $443.00 per week on a 50%:30%:20% basis, is it possible that the injured worker's entitlement remains $443.00, even if the liability of one of the insurers to make payments is "reduced to nil"? It might be the case that such an injured worker can seek an award from the Workers Compensation Commission in the same amount but with apportionment between the remaining two insurers adjusted to make up for the missing 30%.

22. Noting the binding nature of these recommendations[15] 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
14 February 2014

[14] 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.*
[15] See section 44(3)(h) of the 1987 Act – recommendations made by the Independent Review Officer are binding on the insurer and the Authority.