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 made by a licensed specialised insurer (the Insurer) on 30 September 2013.

2. There is no dispute that the applicant was injured in the course of his employment on 15 February 2007. After the injury the applicant returned to suitable employment in 2008 and 2009. He has not worked since December 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 The relevant version of the *Guidelines* is the one which came into effect on 12 August 2013 and which were superseded by *Guidelines* which became effective on 11 October 2013. The *Guidelines* state that they 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(2)(a) of the 1987 Act).

[1] Or cessation of weekly benefits.

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Submissions by the applicant

7. The applicant made 3 submissions in his application. The first is in relation to the insurer not quoting the legislation, Guidelines or following the right procedures. These matters will be dealt with in this decision. The other matters are with respect to the merits of the matter. Since this is a procedural review pursuant to section 44(1)(c) of the 1987 Act, the merits of the matter are not relevant. A procedural review looks at how the decision was made, it does not review the judgement or discretion exercised by the Insurer.

Submissions by the Insurer

8. The Insurer made submissions. The first is with respect to procedural provisions. These will be dealt with in this decision. Other matters go to the merits. One matter is that the decision was originally sent on 27 August 2013. In late September the applicant advised that he had not received it. It was sent again on 30 September 2013. The Insurer has doubts as to the veracity of the applicant in this regard. That is not a matter for a procedural review. The decision subject to this procedural review is the one dated 30 September 2013.

The work capacity decision

9. *Guideline* 5.3.2 requires the Insurer to reference the legislation. The heading of the Notice sent on 30 September 2013 is "*Work Capacity Decision".* The body of the decision refers to section 54(2)(a) of the 1987 Act which allows for a 3 month notice period but it should also be referenced in the heading. A decision is made pursuant to section 43 of the 1987 Act and it is preferable to refer to it in the heading. Section 43 is referred to in the body of the decision, but as "*section 43 of the Act."* Exactly *which* Act is not specified.[2] As such the legislation is not properly referenced.

[2] Insurers ought be mindful that there are two relevant substantive Acts, being the 1987 Act and the *Workplace Injury Management and Workers Compensation Act* 1998 (the 1998 Act) and, relevantly, at least one amending Act (being the *Workers Compensation Legislation Amendment Act* 2012, now largely repealed).

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10. The decision states correctly that notice of 3 months is required prior to reducing benefits as a result of a work capacity decision. The decision refers to 54(2)(a) of the 1987 Act. The decision states that benefits will cease on 30 December 2013, 3 months after 30 August 2013. *Guideline* 6 states that for delivery of documents service is taken to have been received "in *the case of a postal address, on a day 7 days after the document is posted."* Section 76(1)(b) of the *Interpretation Act* 1987 states that service by post is "*taken to have been effected on the fourth **working** day after the letter was posted". Guideline* 6 is no doubt well meaning, but it is in conflict with Section 76(1)(b) of the *Interpretation Act* 1987. By way of illustration, a Notice sent on 24 August 2013 which allowed a further 7 days after 24 December 2013 to 31 December 2013 would breach Section 76(1)(b) of the *Interpretation Act* 1987 as 25 and 26 December 2013 are public holidays, and 28 and 29 December are Saturday and Sunday and 1 January 2014 is also a public holiday. The fourth working day after 24 December 2013 is 2 January 2014. The same problem occurs at Easter with 2 public holidays and Saturday and Sunday. Section 76(2) of the *Interpretation Act* 1987 defines "*working day".* As this Notice was posted sufficient notice was not provided.

11. The Insurer attempted to correct this notice problem in the Internal Review Decision (IRD) dated 6 November 2013. The IRD states that weekly payments will not be paid beyond 6 January 2014 which is 3 months and 1 week as this *"represents the prescribed 3 month notice period from the date of the Work Capacity Decision plus a period of 1 week to allow for this correspondence to reach you by post."* The relevance of the IRD reaching the applicant 1 week after the date it is sent is not explained. This attempt to remedy the notice period cannot succeed. The only remedy is to issue a fresh decision.

12. The decision states that all claims "*lodged*" before 1 October 2012 are required *"to be transitioned to the new arrangements in accordance with strict legislative provisions and guidelines".* The date of lodgement is not relevant. The legislation requires workers to be transitioned who were *"existing recipients of weekly compensation"*. That term is defined in clause 1, Part 19H, of Schedule 6 to the 1987 Act. What is relevant is being in receipt of weekly payments immediately before 1 October 2012.

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13. The decision states that a work capacity assessment has been made on 24 July 2013. The decision does not state that this is a requirement pursuant to Clause 8 of Part 19H of Schedule 6 to the 1987 Act. It is stated that the assessment is made "*under Section 44A of the Act".* Which Act is being referred to is not said. The legislation has not been properly referenced as *Guideline* 5.3.2 requires. There does not appear to be any legislative requirement to notify the applicant of the outcome of the assessment. However, *Guideline* 5.3.2 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.

14. Section 38(3) of the 1987 Act is relied upon by the Insurer. The decision states that special requirements *"now exist for the continuation of weekly payments beyond 130 weeks".* While this is correct the decision does not state that the applicant has been paid for more than 130 weeks. Had the decision done so then it would be required to refer to section 32A of the 1987 Act and the definition of "*second entitlement period".* The decision then refers to being able to earn at least $155 per week. That figure comes from section 38(3)(b) of the 1987 Act. That figure is indexed on 1July each year and the current figure is $168. The legislation has therefore not been properly referenced.

15. The decision states that the applicant has a *"current work capacity". "Current work capacity*" is a term defined in section 32A of the 1987 Act. That section has not been referred to. Current work capacity is partly defined by reference to "*suitable employment*". That phrase is also defined in section 32A of the 1987 Act. These are breaches of *Guideline* 5.3.2 and the need to *"reference the relevant legislation".* These terms

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are unlikely to adhere to what would be their normal meaning in common parlance.

16. *Guideline* 5.3.2 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 the *"work capacity decision does not affect your entitlement to claim for medical and related treatment necessarily and reasonably incurred. This entitlement continues for 12 months from the date of your last entitlement to weekly compensation payment of weekly compensation."* The applicant could not know which of these statements is correct: that medical and related expenses are not affected, or that such expenses are only for 12 months from the date weekly payments cease. *Guideline* 5.3.2 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. The decision fails also to refer to section 59 of the 1987 Act as being the section which has the relevant definitions for treatment and related expenses.

17. Section 59A(3) of the 1987 Act also states that the applicant will, after the entitlement to compensation for medical expenses ends under section 59A(2), become eligible for further payments for medical expenses if the applicant becomes entitled to compensation for weekly benefits at some stage in the future and for such time as weekly payments continue. Again, the legislation is not properly or fully explained.

18. *Guideline* 5.3.2 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 refers to a number of documents but no list of documents relied upon is given. It is not possible to know what documents the Insurer holds, and which may not have been considered. The decision does not state that copies of documents are available or that evidence has been

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considered "*regardless of whether or not it supports the decision"* as required by *Guideline* 5.3.2.

19. *Guideline* 5.3.2 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 this matter.

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 he was entitled prior to 30 September 2013 until such time as he is properly transitioned. Those payments should continue from 6 January 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 6 January 2014 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(3)(h) of the 1987 Act.

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Delegate of the WorkCover Independent Review Officer
4 March 2014

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