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 the Insurer on 23 October 2013.

2. The applicant was injured on 3 November 2011, sustaining injury to her right Achilles tendon while in the course of her employment as a School Learning Support Officer. Unable to return to her pre-injury duties on anything like a full-time basis, the applicant worked for 4 days in November 2013 and one day in February 2014 following which she remains off work. The applicant's claim for workers' compensation was accepted and the Insurer made weekly payments as required under the provisions of the *Workers Compensation Act* 1987 (1987 Act) for all relevant periods.

3. The applicant was *in receipt of compensation* by way of weekly payments "immediately before" 1 October 2012 and is *therefore* to be styled an "existing recipient of weekly payments" as that term is defined in the 1987 Act. 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 transitioning the applicant's claim to the amended weekly benefits provisions introduced in 2012.

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* came into effect on 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 a reduction or cessation of weekly benefits payable to the injured worker

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then the Insurer is required to give proper notice to the worker (Section 54(2)(a) of the 1987 Act).

7. On 23 October 2013 the Insurer wrote to the applicant advising the outcome of a work capacity assessment and the details of the consequent decision. *Inter alia*, the applicant was told the following:

- the "entitlement" to weekly benefits would "reduce " from $452.60 to $0.00 as from 29 January 2014;[1]
- the claim "must transition to the new benefits system in 2013;"
- "any entitlement you may have to payment of pre-approved reasonable and necessary medical and other expenses will be **limited for** up to 12 months after your entitlement to weekly payments cease;"[2]
- the transition amount of $948.50 "must be used for any worker who made their claim prior to 1 October 2012;"[3]
- the following instructive mathematical information appears on page three of the letter:

  "… your entitlement to weekly payments under the new benefits system has been calculated at the rate of $0.00:

  "Transitioned using the formula, where E = $959.20 as a Community Support Worker:

  "(AWE x 80%) – (E + D)
  "(948.50* .8) – ($959.20) = **$ - 200.40 no wage entitlement**."

Submissions by the applicant

[1] This is the correct notice period, but hard markers might have noted that the "reduction" to $0.00 is really a cessation or termination *manqué*.
[2] Section 59A is then correctly cited, but without reference to sub-section (2).
[3] See paragraph 3 above for the correct test of whether or not the transitional rate will apply.

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8. 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 or discretion exercised by the insurer.*" The applicant's submissions go the merits of her claim, that is, the judgement or discretion of the Insurer. Such matters are not relevant to a procedural review.

9. The applicant also alleged that the Insurer had misled the Merit Review Service by saying that she was back at work on full duties. While any such submission by the Insurer would certainly have been misleading, I do not have jurisdiction to review the conduct of the Insurer in the course of Merit Review and I disregard the submission accordingly.

10. The Insurer made no submissions.

The Decision

11. Section 54(2)(a) of the 1987 Act has been fully complied with and I find that the applicant was given adequate and proper notice of the "reduction" of weekly benefits to $0.00.[4]

12. *Guideline* 5.4.2 requires the decision to *"reference the relevant legislation."* This would require any interpretation of the legislation (including delegated legislation) to be accurate. It is clearly inaccurate to say (as this Insurer has said) that the claim "must transition to the new benefits system in 2013." What Clause 8(2) of Pt 19H of Schedule 6 to the 1987 Act requires is for the Insurer to conduct a work capacity assessment (for the purposes of transitioning a claim) "no later than 12 months (or such longer period as may be prescribed by the regulations) after the commencement of the weekly payments amendments." While the amendments commenced on 1 October 2012, the *Workers Compensation Regulation* 2010 says at Clause 17, Schedule 8 that "a period of 18 months is prescribed for the purposes of Clause 8(2) of Part 19H of schedule 6 to the 1987 Act." It follows that there was no requirement for the Insurer to conduct a work capacity assessment and for the claim to be transitioned "in 2013."

[4] See footnote 1 *supra*.

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13. The description of section 59A is close to being correct, except for the word "for" being used immediately following "limited." The Insurer should have told the applicant that her rights to ongoing medical expenses would be "limited *to*" no more than 12 months following cessation of weekly payments; whereas what appeared was "limited *for* up to 12 months" which might create the strong impression that what subsisted might be limited rights, rather than full rights for a period limited to 12 months. There should also have been a reference to sub-section (2) together with a referece to and explanation of sub-section (3).

14. The insurer erred in saying that the transitional amount must be applied to "any worker who made their claim prior to 1 October 2012." The transitional rate only applies to workers who were actually in receipt of weekly payments immediately before 1 October 2012, not all those who had made claims before that date.

15. The mathematical formula set out in paragraph 7 above is obscure unless it is explained that $948.5 x 80% = $758.80. This simple equation appears nowhere in the correspondence. Since $959.20 - $200.40 = $758.80, the applicant might have been able to make sense of the letter with considerable effort and by reading between the lines. The Insurer should do better than this and correctly spell out the full algorithm (including the constituent parts) for the many workers who do happen to be maths teachers, including this applicant.

FINDING

16. 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 and apply the 1987 Act and the *Workers Compensation Regulation* 2010.

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RECOMMENDATION

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

18. I recommend that the Insurer pay the applicant the weekly benefit to which she was entitled prior to 23 October 2013 until such time as she is properly transitioned. Those payments should continue from 29 January 2014, being the date on which they ceased.

19. An interesting question now arises as to whether the applicant (or any worker) can be transitioned. If Clause 17 of Schedule 8 to the *Regulation* is a *sunset clause*, there may be no power reposing in the Insurer to so act after 31 March 2014.

20. 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 applicant is not required to produce work capacity certificates for the period from 29 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.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
23 April 2014