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 on 12 July 2013.

2. The applicant was employed as a Masseuse. She suffered injury to her hands and shoulders in the course of her employment and the commonly accepted date of injury is said to be 21 June 2002. After what is described as an unsuccessful return to pre-injury duties, the applicant's pre-injury employment was terminated in 2009. The applicant currently works in different employment on markedly lesser wages than her pre-injury employment.

3. The applicant had been in receipt of weekly payments of compensation from the Insurer at all relevant times and was an existing recipient of weekly payments immediately before 1 October 2012.

4. On 12 July 2013 the Insurer advised the applicant in writing of a work capacity decision. She was advised that her entitlement to ongoing weekly payments would be reduced to $85.26 on 19 October 2013.

5. Since the applicant was an existing recipient of weekly payments at the relevant time, the transitional amount of weekly payments in clause 2, division 1 of Part 19H of Schedule 6 to the 1987 Act is applicable. This was clearly and correctly explained by the Insurer.

6. The applicant requested an internal review of the work capacity decision which was completed 6 September 2013. The original decision was confirmed.

7. On 2 October 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. The applicant received the WorkCover merit review

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recommendation by email on 21 March 2014.[1] The recommendation varies the work capacity decision by reducing the applicant's weekly entitlement[2] to "nil."

8. On 8 April 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 *Workers Compensation Act* 1987 ("the 1987 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) Reports of a Dr M were relied upon by the Merit Review Service (MRS), despite an agreement between the parties that no reports by that doctor would be relied upon by the Insurer. The Insurer reluctantly sent the reports to RMS after receiving a specific request, but emphasized in the covering correspondence that the reports had not be relied upon in making the work capacity decision, in agreement with the applicant. As a result of these reports, the MRS reduced the weekly payments of the worker to "nil."

   (ii) During the assessment process the Insurer sought to contact the applicant, but since the applicant works full-time she was unable to speak with the Insurer within normal business hours. It was agreed by the parties that the applicant's son would speak with the Insurer. But since the son is not his mother, he sought permission from the insurer to tape or otherwise electronically record the conversations over the phone and for reasons which are undisclosed the insurer declined permission. (In the course of the MRS recommendation at paragraph 24 it is noted that it is "illegal to record a phone conversation without consent of all parties" without actually asking why consent was not forthcoming. Given that Insurance companies daily record telephone conversations with customers and non- customers alike "for

[1] A seemingly unhurried 170 days after receipt of the application. Cf: *Guideline* 10.14.
[2] A *non sequitur* which ought not be repeated.

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training purposes," it is unlikely that shyness was their reason for declining permission.)

(iii) The applicant says she did not receive the Insurer's reply to the application for Merit Review.

Submissions by the Insurer

10. The Insurer made the following submissions in response to the application for procedural review:

> Please find below [the insurer's] submission to [the] application for procedural review;
>
> A copy of the Merit Review Response from [the Insurer] was placed in the post on the same day the email was sent to Merit Review Services (10 October 2013), as [the applicant] had not indicated on the Merit Application form how she would prefer her correspondence. Unsure why there was a delay in receipt. Further copy of the correspondence was sent via express post.
>
> After the delay with the post, further requests from Merit Review Services via email to all parties were then responded to via email and including all parties. If [the applicant] did not receive the response or could not view the attachments, we were not aware. Copies of the email trail is attached (*sic*).
>
> I am unable to comment on the use of the medical report of Dr [M] by Merit Review Services. It was explained to [the applicant] and Merit Review Services that the decisions made by [the Insurer] did not rely on the report of Dr [M]. When Merit Review Services requested a copy of Dr [M]'s report, it was again explained that we have not relied on this report.
>
> The work capacity decision and subsequent internal review decision were based on [the applicant's] current circumstances at the time being she was and remains employed in suitable employment, she met the criteria under section 38(3) of the Workers Compensation Act 1987 (the 1987 Act) and when we applied the formula she had an entitlement to weekly payments

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> of compensation under section 38 of the 1987 Act but at a reduced amount.
>
> In relation to communicating with [the applicant] and/or her son, numerous attempts have been made to establish contact via phone and email without success. Part of this has been due to [the son] wanting to record the conversations without approval from the Insurer's staff. The Insurer continue[s] to be open to have a discussion with [the applicant] and/or [her son] but we have not heard anything further from either party.

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,[3] 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.

The Process of the Insurer

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

My Reasons:

14. The grounds upon which the worker seeks review are not specifically procedurally related, beyond the difficulty in arranging a telephone conversation with the Insurer. The obvious and very serious difficulties

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

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arising from the way the Merit Review was conducted cannot be subject to procedural review by this office.

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

16. Guideline 5.2 requires a "fair notice" call to be made by the insurer to the worker prior to a decision being made. Clearly some contact was made, but the failure of the Insurer to speak to the son, who sought to do no more than record the conversation for the purposes of replaying it to his mother, is in my view sufficient to vitiate the assessment and decision-making process.

17. 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:

18. For the reasons set out above I recommend that the Insurer make another work capacity decision, in accordance with the legislation and *Guidelines*.

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. The applicant should have her payments restored from the date they were reduced by the Insurer, being 19 October 2013.

20. I am aware that payments may have ceased in accordance with the MRS recommendation dated 21 March 2013 and if this is the case then clause 21 of schedule 8 to the *Regulation* cannot apply and the former payments may be resumed immediately. If payments have not ceased then the Insurer may need to give that notice prior to any increase, although there is in my view considerable room for the view that clause 21 is *ultra vires* the 1987 Act, being in direct conflict with section 33.

21. 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.

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Wayne Cooper
Delegate of WorkCover Independent Review Officer
7 May 2014