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*.*

SUMMARY:

a. The work capacity decision of the Insurer dated 16 July 2013 is set aside.

b. The applicant is to be reinstated to his weekly payments at the rate applicable at 16 July 2013.

c. The payments are to be back-dated to 23 October 2013.

d. Such payments are to continue until such time as a further work capacity decision is made and comes into effect.

Introduction and background

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 16 July 2013. The applicant sought internal review and the Internal Review Decision (IRD) was issued on 11 September 2013. He then sought Merit Review and applied to the Authority on 24 September 2013. The Authority issued the Merit Review recommendation on 28 March 2014, 185 days later.[1] Following receipt of the Merit Review Service (MRS) recommendation, the applicant made application to this office on 3 April 2014. Accordingly I am satisfied that the application has been made within the designated time and on the correct form.

2. The applicant was injured on 21 June 2010. The applicant made an unsuccessful attempt to return to his pre injury duties. He is presently unemployed and was in receipt of weekly payments as required under the provisions of the *Workers Compensation Act* 1987 (1987 Act) up

[1] *Guideline* 10.14 of the *Guidelines for work capacity decision Internal Reviews by insurers and Merit Review by the WorkCover Authority (Review Guidelines)*, which came into effect on 1 October 2012, stated that "*The Authority shall write to the worker and insurer within 30-days of receiving the application advising of the outcome of the Merit Review."* By the time the current review was completed another version of the Guidelines had been gazetted (on 8 October 2013), making the 30 day deadline no more significant than any other a whimsically recalled historical curiosity.

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until the time the work capacity decision was issued and came into effect.

3. The applicant was in receipt of weekly payments immediately before 1 October 2012. Accordingly *Clause 8* of *Part 19H* of *Schedule 6* to the 1987 Act required the Insurer to conduct a work capacity assessment within 12 months of that date, later extended to 18 months by *Clause 17 of Schedule 8* to the *Workers Compensation Regulation* 2010 (the Regulation).

4. *Section 44A* of the 1987 Act provides that a work capacity assessment must be conducted in accordance with the *WorkCover Work Capacity Guidelines (Guidelines).*

5. The relevant version of the *Guidelines* came into effect on 1 October 2012. 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 in the weekly benefits payable to the injured worker then the Insurer is required to give proper notice to the worker (Section 54(2)(a) of the 1987 Act).

Submissions by the applicant

7. The applicant raised various matters in the Application for Procedural Review. 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 to the merits of the decision and are therefore not relevant to a procedural review.

Submissions by the Insurer

8. The Insurer made submissions that the application for review to WIRO was based upon merit issues and did not fall within the jurisdiction of the WorkCover Independent Review Officer. The Insurer also provided a

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useful chronology and copies of correspondence, such as the Fair Notice letter of 18 June 2013.

The Decision

9. The decision is dated 16 July 2013. Section 54(2)(a) of the 1987 Act requires 3 months notice be given when weekly payments are to be reduced or ceased. The decision states that payments of weekly compensation would cease effective from 23 October 213.

10. The decision does not advise of the date the work capacity assessment was made. The decision does not state that this is a requirement pursuant to *Clause 8* of *Part 19H* of *Schedule 6* to the 1987 Act. As such 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 line of reasoning for the decision.*

    My finding is that the *Guidelines* result in the Insurer being compelled to reveal the outcome of the assessment.

11. The decision does advise that the likelihood of the decision to change the applicant's weekly payment rate was discussed with him on 18 June 2013 and confirmed on 17 July 2013. This is intriguing given that the letter advising of the work capacity decision is dated 16 July 2013. Therefore, the letter advising that the decision was confirmed with the applicant was actually written a day prior to such confirmation taking place.

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12. *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 weekly payments cease. The decision does advise the applicant that his entitlements to reasonable and necessary treatment expenses will expire on 23 October 2014. The decision, however, fails to advise as to *Section 59A (3)* of the 1987 Act.

13. *Section 59A(3)* of the 1987 Act states that the applicant may, after the entitlement to compensation for medical expenses ends, become eligible for further payments for medical expenses if the applicant becomes entitled to compensation for weekly benefits at some stage in the future.

14. *Section 43* of the 1987 Act is referred to and it is stated that the Insurer may make decisions about *"current work capacity", "suitable employment", "the amount that a worker is able to earn in suitable employment",* and *"the amount of an injured workers pre-Injury weekly earnings or currently* (sic) *weekly earnings".* Both *"current work capacity" and "suitable employment"* are defined in section 32A of the 1987 Act. The decision fails to refer to section 32A. The definition of *"current work capacity"* means an applicant who cannot return to her pre-injury employment. That would not be obvious from the usual meaning of the phrase. That definition is qualified by the term *"suitable employment"*. That phrase bears little resemblance to a usual understanding of it. For example, *"suitable employment"* includes employment *"regardless of whether the work or the employment is available."*

15. The decision states that documents are enclosed which *"are the documents relied upon in making this decision".* Three documents are listed. The decision states that copies of the documents were provided.

16. *Guideline* 5.3.2 requires the Insurer to "*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".* By stating that "*documents that are relied upon in making this decision"* are enclosed would lead the applicant to the inevitable conclusion that only documents that assist the

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Insurer in reaching its conclusion were considered and that documents which do not support the Insurer's conclusion have been ignored. The applicant would be comforted that his conclusion was correct when he received the IRD. The IRD refers to other documents including various WorkCover medical certificates from Dr S dated 2012, Medical report from Dr P, psychological management plan, various job seeking logs, [the Insurer's] Initial/Vocational assessment, report of Dr S, report of Mr A C and documents which may not support the Insurer's decision and IRD. Clearly, the Insurer breached the *Guideline* by not advising of all the documents which were relied upon in making the decision. The Insurer sought to rectify this issue in the IRD however, the deficiency in the decision cannot be validated in this way.

17. *Guideline* 5.3.2 states that the Insurer must *"advise that any documents or information that have not already been provided to the worker can be provided to the worker on request to the Insurer".* The decision has failed to so advise the applicant.

FINDING

18. 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.

RECOMMENDATION

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

20. I recommend that the Insurer pay the applicant the weekly benefit to which he was entitled prior to 16 July 2013 until such time as he is properly transitioned. Those payments should continue from 23 October 2013 being the date on which they ceased.

21. Whether or not the applicant can now be transitioned is unknown. Clause 8(2) of Part 19H of Schedule 6 to the 1987 Act states *"The insurer who is liable to make weekly payments of compensation to an existing recipient of weekly payments must conduct a work capacity assessment of the worker no later than 12 months (or such longer period as may be prescribed by the regulations) after the*

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commencement of the weekly payments amendments." Clause 17 of Schedule 8 to the *Regulation* states 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."* This means that the assessment must be made by 31 March 2014. As this can no longer be achieved it is difficult to see how the applicant can now be transitioned. Clause 17 ceased to have effect on and from 1 April 2014.

22. 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 8 April 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.

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
19 May 2014