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.

SUMMARY:

a. The work capacity decision of the Insurer dated 14 June 2013 is set aside.

b. The applicant is to be reinstated to her weekly payments at the rate applicable at 14 June 2013.

c. The payments are to be back-dated to 21 September 2013.

d. The 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 has applied for procedural review of a work capacity decision made by the Insurer on 14 June 2013. The decision was made to cease weekly payments with the last date for payment to be 20 September 2013. An internal review decision was sent to the applicant on 11 September 2013 and the applicant sought merit review by an application received by the Authority on 14 October 2013. A recommendation was issued on 31 March 2014, being 168 days later. On 28 April 2014 the applicant sought procedural review by this office. I am satisfied that the application is within time and on the correct form.

2. There is no dispute that the applicant was injured in the course of her full-time employment with the insured on 15 May 2007. The applicant sought to return to work on restricted duties with the same employer. This attempt was described as "unsuccessful" by the WorkCover Merit Review Service (MRS), which went on to find that the Insurer made weekly payments as required under the provisions of the *Workers Compensation Act* 1987 (1987 Act) for "all subsequent periods." This contrasts strikingly with the work capacity decision made by the Insurer on 14 June 2013 which includes the following observation:

> "You have a current work capacity and are currently working for a period of not less than 15 hours per week."

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3. Despite these conflicting reports it is clear that the applicant was in receipt of compensation by way of weekly payments immediately before 1 October 2012.[1] Accordingly 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's claim. Clause 17 of Schedule 8 to the *Workers Compensation Regulation* 2010 (the Regulation) required the transitioning process to be completed "within 18 months" of 1 October 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* is the one published on 27 September 2012 which applied to all claims from 1 January 2013.[2] 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[3] then the Insurer is required to give proper notice to the worker (see, relevantly, section 54(2)(a) of the 1987 Act).

Submissions by the applicant

7. The applicant raised several issues 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."*

[1] The applicant commenced work with another employer on 15 October 2012 and had received weekly payments of compensation immediately prior to 1 October 2012. The insurer [somewhat oddly] suggested that this employment had commenced in August 2012. This error is particularly odd since the employment was subsidized by the Insurer.
[2] To add to the confusion, they are said on their face to "come into effect on 1 October 2012."
[3] Or cessation of weekly benefits.

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8. With the exception of the misdescription of a date for the commencement of subsequent employment which appeared in a report by a rehabilitation provider, every objection raised in the application goes to the merits of the decision. The incorrect date itself is immaterial for any relevant purpose, and I find that none of the grounds sought to be relied upon by the applicant are procedural in nature.

Submissions by the Insurer

9. The Insurer made the following submissions:

    - [the Insurer] notes [the applicant] is seeking a review of the information considered and relied upon as part of both the Work Capacity decision dated 14/6/2013 and the Merit Review Decision dated 31/03/2014. The question of suitability of employment and capacity for some type of employment is based on the merits of the decision.

    - Accordingly, we consider a merit based review is outside the jurisdiction of the WorkCover Independent Review Officer, who is limited to undertake a procedural review only.

    The Insurer is correct in its first submission and misguided in the second. True it is that this office can only conduct a procedural review, but this does not mean that any such review is dependent on specific grounds being identified in an application form. Procedural error may be found despite neither party being seized of it.

The decision

10. The decision states that weekly payments will cease on 20 September 2013 pursuant to section 54 of the 1987 Act. The correct reference is to section 54(2)(a) of the 1987 Act. Therefore legislation has not been properly referenced.

11. The Insurer reproduces the requirements found within section 38(3)(b) & (c) of a return to work for not less than 15 hours per week and earnings of at least $155 per week (sub-section (b)) and an

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assessment that the worker is incapable of undertaking further additional employment or work that would increase the worker's weekly earnings (sub-section (c)). This is unarguably correct.

12. The insurer then goes further and asserts the following:

> "… the impact of section 38(3)(c) is that, it is not enough for a worker to be working at least 15 hours per week, we must also be satisfied that you are working and earning to your maximum capacity.
>
> "We have determined that you are not working and/or earning to your maximum potential and therefore in accordance with Section 38 of the *Workers Compensation Act* 1987 ongoing weekly entitlement to weekly payments is nil."

Both of these statements are arguable and incorrect. Being capable of performing further additional work resulting in greater remuneration is a very different concept to working to "maximum potential" or "maximum capacity." This is a distinction with a very considerable difference. A person might be earning $155 per week for 15 hours work, but be capable of earning $300 per week for the same 15 hours work at a more highly-skilled job. This would not satisfy the description of "further additional employment or work" but would clearly be evidence of higher earning potential. The test has therefore been misleadingly stated and incorrectly applied.

13. The Insurer refers to section 43(1)(b) and (c) of the 1987 Act in relation to "*a decision about what would constitute suitable employment for you and the amount you would be able to earn in that suitable employment*." "Details" are said to follow. What does not follow is any reference to section 32A or the lengthy definition therein of "suitable employment." No explanation is forthcoming of how to resolve the seeming conflict between the definition at paragraph (a)(ii), which requires an Insurer to "have regard to" the worker's "work experience" *inter alia*, and paragraph (b)(iii) which seemingly requires the Insurer to disregard "the nature of the worker's pre-injury employment" as though the former somehow excluded the latter.

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14. Guideline 5.4.2[4] required the Insurer to reference the legislation and explain the relevant entitlement periods. Insurers are also required to clearly explain the line of reasoning for their decision. Inherent in such *Guidelines* is a requirement for accuracy as well as coherence.

FINDING

15. I find that the shortcomings identified at paragraphs 10, 12-14 *supra* individually and collectively constitute sufficient breaches of the *Guidelines* to justify setting aside the original work capacity decision.

RECOMMENDATION

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

17. I recommend that the Insurer pay the applicant the weekly benefit to which she was entitled prior to 14 June 2013 until such time as she is properly transitioned. Those payments should continue from 21 September 2013 being the date on which they ceased.

18. 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 21 September 2013 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
26 May 2014

[4] As it was then numbered. Subsequent editions of the *Guidelines* have renumbered this Guideline as 5.3.2.

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