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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 16 October 2013 is set aside.

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

c. The payments are to be back-dated to 24 January 2014.

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 16 October 2013. The decision was made to cease weekly payments with the last date for payment to be 24 January 2014. The applicant sought internal review on 1 November 2013. The internal review decision (IRD) was sent to him on 3 December 2013. The applicant sought merit review by an application received by the Authority on 16 January 2014. A recommendation was issued on 3 April 2014. On 22 May 2014 the applicant sought procedural review by this office. The time frame for seeking procedural review is 30 days: section 44(3)(a) of the *Workers Compensation Act* 1987 (1987 Act). The 30 days runs from the time when the applicant receives the Merit Decision in the approved form. That form did not exist as at 3 April 2014, and it does not appear that the Merit Decision was served again in the approved form. I am satisfied that the application is therefore not time-barred, since time cannot run until the decision is received in the approved form.

2. There is no dispute that the applicant suffered an injury to his back on 18 October 2000 and again on 14 March 2002. He was employed as an aircraft maintenance mechanic. The applicant returned to work on suitable duties with the same employer. His condition deteriorated and his employment was terminated in April 2004. Since that time he has had

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suitable employment with other employers although more recently he has not been working due to a deterioration in his condition. The Insurer made weekly payments as required under the provisions of the 1987 Act.

3. The applicant was in receipt of compensation by way 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 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. The relevant version of the *WorkCover Work Capacity Guidelines (Guidelines)* is the one dated 4 October 2013, published on 8 October 2013, and which came into effect on 11 October 2013. The *Guidelines* provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessments and decisions.

5. 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 or cessation of the weekly benefits payable to the injured worker then the Insurer is required to give proper notice to the worker (see section 54(2)(a) of the 1987 Act).

Submissions by the applicant

6. The applicant made submissions 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 went to the merits of the case, that is, the very object of judgement or discretion of the Insurer excluded by section 44(1)(c) and therefore could not be relevant to this review.

Submissions by the Insurer

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7. The Insurer made no submissions. Despite this I have noted the submissions made by the Insurer to the Merit Review Service as recorded in the Merit Review Decision.

The Decision

8. The decision has a covering letter. The letter states that the applicant can request a review of the decision by completing the attached form and by providing *"any further information in support of your request."* The decision also states that the applicant should attach *"any new or additional information relevant to the work capacity decision"* when applying for review. These statements convey the impression that an applicant must provide further evidence or information in order to make an application for internal review. That is misleading. The applicant may request an internal review pursuant to section 44(1)(a) of the 1987 Act whether or not further evidence or information is available or submitted. The applicant is only required to provide "*grounds"* in an application for internal review as required by *Guideline* 6.2.2, *Review Guideline* 6.2 and section 44(2) of the 1987 Act.

9. The applicant is also not told that there is no explicit time frame in which to apply for Internal Review. Section 44(1)(a) of the 1987 Act is silent as to a time limit. That section has also not been referred to in the decision as required by *Guideline* 5.3.2. *Guideline* 7.1.2 states that the application should be made as soon as practicable after receiving the decision.

10. Only 8 documents are listed in the decision under the heading *"Evidence Considered." 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 only referring to 8 documents it is probable that not all evidence in the possession of the insurer has been considered. This is confirmed by the IRD referring to 28 documents. It is therefore likely that when making the original work capacity decision the Insurer over-looked evidence which did not support the decision reached.

11. *Guideline* 5.3.2 also states that the work capacity decision notice must advise the applicant that any documents or information that have not

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already been provided to the applicant can be provided by the Insurer upon request. The Insurer has failed to so advise the applicant.

12. *Guideline* 5.3.2 requires the Insurer to *"clearly explain the line of reasoning for the decision."* As the decision maker did not have regard to all relevant documents before them it is an inevitable conclusion that there is a fundamental error in the reasoning of the decision and a breach of *Guideline* 5.3.2.

13. The decision states that the assessment was completed on 16 October 2013. The Insurer was required to make an assessment pursuant to Clause 8 of Part 19H of Schedule 6 to the 1987 Act. This has not been referred to as required by *Guideline* 5.3.2. 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.*

14. My finding is that the *Guidelines* result in the insurer being compelled to reveal the outcome of the assessment which would also reveal the date of the assessment.

15. The decision sets out what a work capacity decision is by setting out section 43(1)(a) to (f) of the 1987 Act, but without referring to that section. The definition of *"suitable employment"* is set out, but on a different page, and by reference to *"Section 32A of the Act".* Which Act is not specified. That definition relies on the definition of *"current work capacity"* which is also defined in section 32A. The importance of that definition is that it refers to an applicant not being able to return to his pre-injury employment but being able to return to *"suitable employment".*

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16. Section 43(1)(d) states that a work capacity decision may be a *"decision about the amount of an injured worker's pre-injury average weekly earnings or current weekly earnings*" (PIAWE). In a matter such as this where the applicant is to be transitioned the PIAWE is the transitional rate. The decision sets out the transitional rate. An applicant might be flummoxed by being told the Insurer can "make a decision about" PIAWE, only then to be told that it is a figure defined and set out in the legislation.

17. The decision fails to properly refer to the legislation in relation to the transitional amount. Reference is made to *"Schedule 12 Division 2, clause 9(3) of the Workers Compensation Bill 2012."* An applicant may not know that a bill is proposed legislation at the time it is presented to Parliament, that is, it is not law. If the applicant is able to find the bill he may not understand whether he should take note of the bill as presented to the Legislative Assembly, or as amended by the Legislative Council. An applicant may not understand that once the Legislative Assembly had approved the amendments that the bill is passed, and requires Royal Assent. Once the relevant part of the Act commenced, clause 9(3) became clause 9(3) of Part 19H of Schedule 6 to the 1987 Act. An applicant should not be expected to understand the intricacies of the legislative process.

18. The decision states that clause 9(4) of Part 19H of Schedule 6 to the 1987 Act *"provides that the extent of weekly payments made to date are relevant for the purposes of determining which 'entitlement period' your claim falls into for the purposes of calculating the rate at which payments are to be made."* The applicant is advised that as he has received over 260 weeks of weekly payments that sections 38 and 39 of the 1987 Act apply, and he is not entitled to further weekly payments. The Insurer is unaware that section 39 of the 1987 Act in relation to 260 weeks does not apply to weekly payments made before 1 October 2012, the commencement of the 2012 amendments, pursuant to Clause 13, Part 19H of Schedule 6 to the 1987 Act. The applicant should be told that section 38 of the 1987 Act applies to him and not section 39 of the 1987 Act. The applicant should be referred to section 32A of the 1987 Act and the definition of "*second entitlement period"* as his entitlement is in the period after the second entitlement period.

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19. *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 applicant is advised of that. He has not been told that section 59A(3) of the 1987 Act states that the applicant may become eligible for further payments for medical expenses, after the entitlement to compensation for medical expenses ends, if the applicant becomes entitled to compensation for weekly benefits at some stage in the future. This entitlement was not disclosed by the Insurer and the non-disclosure constitutes a further breach of *Guideline* 5.3.2.

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 16 October 2013 until such time as he is properly transitioned. Those payments should continue from 24 January 2014 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 applicant is not required to produce work capacity certificates for the period from 24 January 2014 to date by virtue of the operation of section 44B(2) of the 1987 Act. These

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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
12 June 2014