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 17 June 2013 is set aside.**

b. **The applicant is to be reinstated to her weekly payments at the rate applicable at 17 June 2013.**

c. **The payments are to be back-dated to 24 September 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 17 June 2013. The applicant sought internal review and the Internal Review Decision (IRD) was issued on 4 September 2013. She then sought Merit Review In or about October 2013 and the Authority issued the Merit Review recommendation on 21 March 2014 at least some 141 days later.[1] Following receipt of the Merit Review Service (MRS) recommendation, the applicant made application to this office on 21 May 2014.

2. We note in the submissions made on behalf of the worker that it is stated that the applicant did not receive the Merit Review Service recommendation dated 21 March 2014 until 16 May 2014. No explanation for the delay in receipt is provided. It is submitted that given the date that the applicant received the MRS recommendation the applicant was in time in applying to this office for a procedural review.

[11] *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 27 September 2012, states that "*The Authority will write to the worker and insurer as soon as practicable and preferably within 30-days of receiving the application advising of the outcome of the merit review."*

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3. In any event *Section 44 (3)* of the *Workers Compensation Act* 1987 (*the* 1987 *Act)* requires the applicant to make an application for review to the Independent Review Officer within 30 days of receipt of a decision in the form *approved by the Authority*. We note that at the time of the decision by the Authority there was no such approved form therefore, time did not commence. I am satisfied that the applicant has made the application for review in the proper form and within time.

4. The applicant was injured on 18 February 2003. The applicant was unsuccessful in returning to work to her pre-injury duties and is not currently employed. The applicant was in receipt of weekly payments of compensation up until the time the work capacity decision purported to come into effect.

5. 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.

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

7. The relevant version of the *Guidelines* came into effect on 27 September 2012.[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.

**8.** 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**

[2] The same date as the *Review Guidelines*, see footnote 1 *supra*.

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9. 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."* Some of the applicant's submissions go to the merits of the decision and are therefore not relevant to a procedural review. The remainder are considered in the decision below.

**Submissions by the Insurer**

10. The Insurer has made submissions in response to the application received by this office on 2 June 2014. The submissions include a chronology which is most helpful.

**The Decision**

11. The WCD is dated 17 June 2013. *Section 54(2)(a)* of the 1987 Act requires 3 months' notice be given when weekly payments are to be reduced or ceased. In paragraph 2 of the decision it states that payments of weekly compensation would cease effective from 24 September 2013. In the same paragraph the applicant is advised that weekly benefits will continue until 23 September 2013. Later in paragraph 6 of the decision it states that the decision will result in a discontinuation of the applicant's weekly benefit effective 22 September 2013. These statements are inconsistent.

12. *Guideline* 5.4.2 states that the insurer must advise the applicant when the decision will take effect. From the above statements the applicant would be confused as to what date her weekly payments of compensation would cease as a result of the work capacity decision.

13. *Guideline* 5.4.2 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".*

14. *Section 59A(2)* of the 1987 Act states that treatment expenses and related expenses are no longer payable 12 months after weekly payments cease.

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15. The present decision advises the applicant that any entitlement to reasonable and necessary medical expenses will expire on 24 September 2014. The decision **fails** to advise the applicant of *Section 59A (3)* of the 1987 Act.

16. *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.

17. At page 2 of the work capacity decision the Insurer relies upon various medical reports and certificates. It is crucial to note that on this page the Insurer has concluded 'we have determined you have a current work capacity'.

18. The emphasis here is on the word ***current***. A review of the medical evidence relied upon is as follows:

    - Medical report of Dr K dated 4/11/**2010**;
    - Medical report of N S dated 25/11/**2010**;
    - Medical report of Dr I A dated 17/2/**2011**;
    - WorkCover NSW medical certificate issued 21/9/**2009**;
    - WorkCover NSW medical certificate issued 9/11/**2011;**
    - Faxed 'response' Dr N dated 30/4/**2012;**
    - Work Capacity Assessment dated 25/3/2013;
    - Certification re: WCA from Dr N dated 4/3/2013 and 17/4/2013; and
    - WorkCover NSW Certificate of Capacity dated 20/5/2013 from Dr N certifying no capacity for work.

19. The reports of Dr K, Mr S, Dr A and the WorkCover certificate dated 21/9/2009 assess the worker as fit for light suitable duties. These were all medical reports obtained on behalf of the applicant by her solicitor in previous Commission proceedings. The most recent medical evidence being the WorkCover Certificate of Capacity dated 20/5/2013 and a fax from Dr Nakhle to CGU dated 24/5/2013 certify the applicant to have no capacity for work.

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20. The only evidence obtained by the Insurer was the Work Capacity Assessment dated 25/3/2013 with the certification from Dr Nakhle who changed his opinion in more recent certifications.

21. After reviewing and considering the above evidence the insurer made the following observation:

> *"Although the current WorkCover NSW Certificate of Capacity dated 20/05/2013 certifies you as having no capacity for work & fax response received by CGU from Dr Nakhle on 24/5/2013 indicates that you are in too much pain to work, we consider that the balance of the medical information as detailed above supports that you have a current capacity to work."*

22. The medical evidence the Insurer is relying upon to justify its assessment that the applicant has current work capacity is in excess of three years old. There was no current Work Capacity Certificate or medical report used to base the work capacity assessment upon. It might be borne in mind here that a worker may only rely on a work capacity certificate for a period "not exceeding 28 days" by virtue of section 44B(3)(b). It would be anomalous if an employer could rely on the same document for a longer period than the worker in whose interests it was created.

23. *Guideline* 2.3 requires that the Insurer's decision should be *"timely, informed and evidence based."* The medical evidence used by the Insurer was over three years old and clearly does not comply with the Guideline.

24. *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**

25. Under the legislation the Insurer can make an assessment of the applicant's work capacity and then a decision about that work capacity, but they must comply with the legislation, the Regulation and the *Guidelines* in order to produce a procedurally correct result. In the current instance there has been more than one breach of the *Guidelines*

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which are to be treated as delegated legislation. Accordingly the work capacity decision must be found to be invalid.

**RECOMMENDATION**

26. I recommend that the Insurer conduct a new work capacity assessment and make a new work capacity decision in accordance with the WorkCover *Guidelines*. This should be done with current, updated medical evidence.

27. I recommend that the Insurer pay the applicant the weekly benefit to which she was entitled prior to 17 June 2013 until such time as she is properly transitioned. Those payments should continue from 24 September 2013 being the date on which they ceased.

28. 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 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.

Tracey Emanuel
Delegate of the WorkCover Independent Review Officer
30 June 2014