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 14 May 2013 is set aside.

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

c. The payments are to be back-dated to 21 August 2014.

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

1. The applicant seeks procedural review of a work capacity decision made by the Insurer on 14 May 2013. The decision stated that payments were to cease on 21 August 2014. The applicant sought internal review. The Internal Review Decision (IRD) was issued on 4 July 2013. The applicant sought Merit Review by the Authority. The application for merit review was received by the Authority on 28 November 2013. The Merit Review recommendation was issued on 15 May 2014. Application was subsequently made to this office on 29 May 2014. The Authority expressed the view that, since the IRD was issued by the Insurer outside the 30 day time limit, the Merit Review could take place pursuant to section 44(3)(a) and (b) of the *Workers Compensation Act* 1987 (1987 Act). The application to this office is within the time limits prescribed by the 1987 Act and on the correct form.

2. The applicant injured his lower back on 12 March 2010. He returned to suitable employment with the same employer. That employment ended in March 2012. Since that time the applicant has not been in paid employment. The Insurer made weekly payments as required under the provisions of the *Workers Compensation Act* 1987 (1987 Act).

3. The applicant was in receipt of compensation by way of weekly payments immediately before 1 October 2012. Accordingly Clause 8 of

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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 assessment 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 27 September 2012, which came into effect on 1 January 2013. The *Guidelines* provide instructions and guidance to Insurers regarding the appropriate and consistent application of work capacity assessments and decisions.

5. Where the work capacity 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. 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 made no submissions.

Submissions by the insurer

7. The Insurer made no submissions.

The Decision

8. The assessment was completed on 26 March 2013, although the "fair notice" letter (as required by Guideline 5.2) was not sent until 22 April 2013. There does not appear to be any legislative requirement to notify the applicant of the outcome of the assessment. However, *Guideline* 5.4.2 states that the decision must:

    - *state the decision and give brief reasons for making the decision;*

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- *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 which would involve showing the date of the assessment.

9. *Guideline* 5.4.2 requires the Insurer to reference the legislation. The applicant is advised that his payments will cease on 21 August 2013 being 3 months notice with time allowed for mail delivery. The decision does not state that such notice is required pursuant to section 76(1)(b) of the *Interpretation Act* 1987. Reference is made to section 54. Which Act or other legislation is not revealed. The correct reference is to section 54(2)(a) of the 1987 Act. Proper advice is important as failing to provide the proper notice is an offence pursuant to section 54(1) of the 1987 Act punishable by 50 penalty units (currently $5,500).

10. The applicant is advised that he has been paid weekly payments for more than 130 weeks. The relevance of 130 weeks is kept secret by the Insurer. The Insurer should advise the applicant that 130 weeks is at the end of the *"second entitlement period"* as defined in section 32A of the 1987 Act.

11. The applicant is advised that his entitlement is determined in line with section 38. Which Act is not revealed, but the applicant is fit for suitable duties and is not currently working and as such pursuant to section 38(3) has no entitlement to weekly payments. Without reference to the 1987 Act the applicant could have no comprehension of what he has been told in the decision.

12. The decision states that the applicant has a *"current work capacity"* pursuant to section 38(3). Which Act or other legislation this section may be found within is not revealed. There is no attempt to tell the applicant that *"current work capacity"* is a term defined in section 32A of the 1987 Act. That term does not relate easily to how a person would regard the term in everyday usage. That term means an inability to return to pre-

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injury employment but with an ability to work in *"suitable employment."* That term is also defined in section 32A and bears even less relationship to common usage than *"current work capacity."* It includes the concept that no regard is to be had to *"whether the work or the employment is of a type or nature that is generally available in the employment market."*[1]

13. The applicant is told that he has suitable employment options. The term is not defined as set out above, but reference is made to section 43(1)(b). That reference would be of no assistance to the Applicant, particularly as no reference is made to the 1987 Act.

14. The decision states that the applicant's pre-injury average weekly earnings are determined to be $938.30 pursuant to section 43(1)(d). Again, which Act or other legislation is not revealed and even if it were revealed it would be of little assistance to the applicant. The decision later states that his *"average weekly earnings are determined to be $938.30",* and that is known as the *"transitional rate".* This rate is said to apply to all claims lodged prior to 1 October 2012. That is wrong. The transitional rate applies to claims where the person is in receipt of weekly payments immediately before 1 October 2012.[2] Reference is then made to the *Workers Compensation Legislation Amendment Act* 2012. An applicant would be totally confused to see that schedules 1 to 7 and 9 to 12 of that Act have been repealed. An applicant should not be expected to have expert knowledge of the intricacies of New South Wales legislation to understand that the repealed schedules are now part of the 1987 Act. Reference is made to Clause 9, part 19H, Schedule 6 of the 1987 Act. The proper reference is to Part 19H of Schedule 6 to the 1987 Act and to clause 1 (the definition of *"existing recipient of weekly payments")*, clause 2 (the transitional amount as indexed), and clause 9(3) (the deeming provision) of Part 19H of Schedule 6 of the 1987 Act.

15. The applicant is advised that medical and related treatment under section 60 of the 1987 Act will continue but is limited to 12 months after weekly payments cease pursuant to section 59 of the 1987 Act. The correct reference is to section 59A(2) of the 1987 Act. In addition,

[1] Whether "work" as a unicorn groom or a poultry dentist qualifies for this description is unknown.
[2] By necessity the claim must have been lodged prior to 1 October 2012, but no payments may have been made.

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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 and for such time as those weekly payments continue. This was not disclosed by the Insurer.

16. *Guideline* 5.4.2 requires the Insurer to *"detail any support, such as job seeking support, which will continue to be provided during the notice period."* The decision states that the applicant *"will be provided with the following support to assist in your return to work:"* Nothing more is stated. It seems that no support will be forthcoming.

FINDING

17. 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

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

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

20. 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 August 2013 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.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
1 July 2014