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 27 November 2013 is set aside.**

b. **The applicant is to be reinstated to her weekly payments at the rate applicable at 27 November 2013.**

c. **The payments are to be back-dated to 7 March 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 27 November 2013. The decision stated that payments were to cease on 7 March 2014. The applicant sought internal review. The Internal Review Decision (IRD) was issued on 30 December 2013. The applicant sought Merit Review by the Authority on 29 January 2014. The Merit Review was issued on 9 May 2014.

2. Following the application being made for Merit Review, the Insurer made a further decision dated 25 February 2014 (second decision). The second decision found that the applicant had no capacity for work and that pursuant to section 38(6) of the 1987 Act the applicant was entitled to $758.80 being 80% of the transitional rate effective from 4 June 2014. The Authority asked the applicant whether she wished to continue with the Merit Review. The applicant wished to continue. The Merit Review found that the applicant was not entitled to continuing payments.

3. The applicant was injured on 7 April 2009. The injury was to her neck, right shoulder and wrists. She has suffered psychological sequelae. She returned to suitable employment with the same employer. The Insurer made weekly payments as required under the provisions of the *Workers Compensation Act* 1987 (1987 Act).

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

4. 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.

5. 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.

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 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**

7. 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 largely 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. One submission is that, during the course of merit review, the Insurer failed to provide the Authority with an Occupational Authority report dated 2 April 2014. While that may constitute procedural unfairness, this review is of the first decision on 27 November 2013 only and not of the Merit Review.

**Submissions by the insurer**

8. The Insurer made submissions. First, it submitted that the applicable set of *Guidelines* is the one which came into effect on 12 August 2014. That

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

is incorrect.[1] Secondly, that suitable employment was determined in accordance with section 32A of the 1987 Act. Thirdly, that entitlements were determined according to section 38 of the 1987 Act. Fourthly, that the effect of section 59A was explained. These matters will be dealt with in this decision.

**The Decision**

9. The decision states that a work capacity assessment was undertaken on 27 November 2013. The decision does not state that the assessment is required 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.

10. There does not appear to be any legislative requirement to notify the applicant of the outcome of the assessment. However, *Guideline* 5.3.2 stated 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 Insurer is required to send a fair notice letter and make a fair notice telephone call. That occurred on 31 October 2013. The Insurer sent 2 different letters which together cover most of what *Guideline* 5.2 requires. Why 2 letters were sent is not clear, but not relevant. *Guideline* 5.3.2 required the decision to *"reference the relevant legislation."* This would require any interpretation of the legislation (including delegated legislation) to be accurate. It is clearly inaccurate to say (as this Insurer has said in the fair notice letters) that the 2012 legislative amendments

[1] See paragraph 5 *supra.*

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

*"came into effect from 1 October 2012 for new claims and then 1 January 2013 for existing claims (with a date of notification before 1 October 2012)."* As a necessity an existing claim must have been notified prior to 1 October 2012, but the test is that the applicant was in receipt of weekly payments immediately before 1 October 2012.

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 provides that treatment expenses and related expenses are no longer payable 12 months after weekly payments cease. The decision states that *"Your entitlement to reasonable and necessary medical and related treatment will also continue pursuant to Sections 59A and 60 of the Workers Compensation Act 1987".* The legislation has not been properly referenced as required by *Guideline* 5.3.2. The correct reference is to section 59A(2) of the 1987 Act.

13. In addition, 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.

14. The Insurer's submission that it explained the effect of section 59A is perhaps best described as an inverted admission that it does not understand the section.

15. Guideline 5.3.2 requires the Insurer to *"detail any support, such as job seeking support, which will continue to be provided during the notice period".* The decision is silent as to any support which may be available.

16. The decision states that the applicant has a *"present inability to return to your pre-injury employment, you are able to work in suitable employment".* Reference should have been made to the definition of *"current work capacity"* in section 32A of the 1987 Act. That definition refers to and is qualified by the definition of *"suitable employment",* also in section 32A. The definition of suitable employment is an important concept in the 2012 amendments to the 1987 Act. It involves, *inter alia*,

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

having regard to *"the worker's age, education, skills and work experience"* while having no regard to *"the nature of the worker's pre-injury employment".* Few people relying on a normal education would realise that such a concept would be included in a simple phrase like suitable employment.

17. The decision states that *"Suitable employment you are able to work in, as defined by section 32A of the Workers Compensation Act 1987, includes the following".* Only 1 job is listed. The word *"includes"* suggests that more than 1 job should be listed. Again, *"suitable employment"* is not explained although reference is made to the correct legislation. Without the reference to *"current work capacity"* the definition of suitable employment would be of limited assistance in any event.

18. The applicant is advised that she is *"able to earn $[XXX] on average in the identified suitable employment, as defined by Section 35"* of the 1987 Act. The applicant is now left with a dilemma as to whether suitable employment is defined in section 32A or section 35. Perhaps the reference is to a definition of *"able to earn".* The applicant would search in vain for such a definition.

19. The applicant has received 154 weeks of compensation as at the date of the decision. The decision states that as a result weekly payments are to be assessed pursuant to section 38(7) of the 1987 Act. It is stated *"that for all existing claims"* the pre-injury average weekly earnings (PIAWE) is the transitional rate of $948.50. Reference is made to *"Schedule 6 Part 19H(2)"* of the 1987 Act. There is no Part 19H(2) of Schedule 6 of the 1987 Act. The Insurer should have referred to clause 1 (the definition of "*existing recipient of weekly payments*"), clause 2 (the transitional amount as indexed which is why the figure used is $948.50), and clause 9(3) (the deeming provision) of Part 19H of Schedule 6 of the 1987 Act.

20. The decision states that 154 weeks places the applicant in the *"after second entitlement period".* The entitlement periods should be explained and reference made to the definitions in section 32A of the 1987 Act. Without that reference the relevance of the number of weeks makes little sense. An applicant should be advised that the number of weeks of weekly payments is part of the legislative scheme and affects the rate at which payments are made.

Level 4, 1 Oxford Street, Darlinghurst NSW 2010
T: 13 9476
contact@wiro.nsw.gov.au
www.wiro.nsw.gov.au

21. The decision states that the required notice period is 3 months pursuant to section 54 of the 1987 Act plus 1 week to allow for delivery by post. The correct reference is to section 54(2) of the 1987 Act. Allowing 1 week for delivery may not always be appropriate. Section 76(1)(b) of the *Interpretation Act* 1987 allows for *"service"* by post to occur on the fourth working day after the day it is posted. A working day is a day other than *"a Saturday or Sunday, or a public holiday or a bank holiday in the place to which the letter was addressed"*: section 76(2)(a) and (b) of the *Interpretation Act* 1987. By way of example, the fourth working day after Thursday 2 April 2015 will be 10 April 2015, more than a week later due to Easter.

22. The decision states that it has considered all relevant documents. Only 3 are listed. The IRD lists 20 documents. 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".* The decision maker has clearly not considered all the evidence. This is a demonstrable error.

23. Guideline 5.3.2 requires the Insurer to *"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 only states that the applicant may request copies of the 3 documents listed.

24. The applicant is advised that she may request an internal review. The Insurer has not referred to section 44(1)(a) of the 1987 Act. This is a breach of *Guideline* 5.3.2 and the need to *"reference the relevant legislation."* The application for internal review is said to be required to be lodged *"strictly within thirty (30) days"* of receipt of the decision. That is not correct. Section 44(1)(a) of the 1987 Act does not set any time limit in which the application for internal review is to be made. *Guideline* 7.1.2 refers to *"timely lodgement"* and that the application should be lodged *"as soon as practicable after receiving the work capacity decision".* A time frame of 30 days may well be appropriate, but no assistance is given as to what may constitute *"timely lodgement."*

**FINDING**

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

25. 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**

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

27. I recommend that the Insurer pay the applicant the weekly benefit to which she was entitled prior to 27 November 2013 until such time as she is properly transitioned. Those payments should continue from 7 March 2014 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 7 March 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.

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