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 6 August 2013 is set aside.

b. The applicant is to be reinstated to her weekly payments at the rate applicable at 6 August 2013.

c. The payments are to be back-dated to 14 November 2013.

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 6 August 2013. The decision determined to cease weekly payments. The applicant sought internal review. The Internal Review Decision (IRD) was issued on 1 October 2013. The applicant sought Merit Review by the Authority. The Merit Review decision was allegedly issued on 18 March 2014, but was not received by the worker until some 43 days later. I am satisfied that the application for procedural review dated 2 June 2014 was made within time and on the correct form.

2. The applicant sustained a back injury on or about 21 August 1998 and injury to her right and left index fingers and the middle finger of her right hand on or about 25 September 2002. Her employment was terminated in 2003 and despite various work trials and return to work programs devised with the assistance of the Insurer she has not returned to paid employment. The Insurer made weekly payments as required under the provisions of the *Workers Compensation Act* 1987 (1987 Act) for all relevant periods. The weekly payments appear to be in respect of the back injury in 1998, rather than the 2002 hand injury. In the course of the Internal Review decision the Insurer makes the following observation:

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> "[The applicant] has two concurrent claims managed by [the Insurer]. The evidence shows that [the applicant] is in receipt of weekly payments on the 1998 date of injury claim."[1]

3. The applicant was in receipt of compensation by way of weekly payments immediately before 1 October 2012 and is therefore able to be styled as an "existing recipient of weekly payments" as that term is defined in the 1987 Act.[2] 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.

Submissions by the parties

4. 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."* The applicant alleged that she was not told the date of any assessment of work capacity leading to the work capacity decision of 6 August 2013. This is a procedural matter and can be addressed.

5. The Insurer made no submissions.

The Decision

6. The decision pre-dates the versions of the Guidelines which came into effect on 12 August 2013 and 11 October 2013. Therefore it does not follow the *"Best Practice Decision-Making Guide"* which is referred to in *Guideline* 5.1 of the earlier version of the Guidelines. As such, this is a breach of the *Guidelines.* This breach cannot have been avoided because the *"Best Practice Decision-Making Guide"* has never existed. It would appear that the author of the *Guidelines* failed to make a simple inquiry as to whether that document existed before completing the *Guidelines*.

[1] This one fleeting reference is the only inkling given by the Insurer as to the basis of determining work capacity consequent upon the separate injuries.
[2] See clause 1, division 1, part 19H, schedule 6 to the 1987 Act.

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7. Here it might be apposite to note the approach of the High Court in *SZFDE v Minister for Immigration and Citizenship*[3] which affirmed the view of French, J (as he then was) at first instance in the Federal Court[4] that a failure to apply correct procedure (even, as in that case, to the extent of failing to provide a fair hearing) does not "depend on any finding of fault on the part of the decision-maker."[5]

8. The decision states that a work capacity assessment has been made. The decision does not state that this is a requirement 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* 5.4.2 requires. There is no evidence as to when the assessment was undertaken. The Insurer is required to make a decision "*as soon as practicable"* after the assessment is made: see Clause 23, Schedule 8, *Workers Compensation Regulation* 2010.

9. In this case the applicant does not know when the assessment took place. The applicant cannot know whether the decision was made "*as soon as practicable"* after the assessment. Since the applicant was not advised of the date of the assessment, this must be a breach of procedural fairness. I find that the applicant has raised an appropriate ground of review and it must be upheld.

10. *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".* 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 decision states that "*any entitlement you may have to payment of pre-approved reasonable and necessary medical and other expenses, until 14 November 2014, will not be affected."* This statement gives no information to the applicant about the effect of section 59A(2) on such entitlements beyond 14 November 2014. The effect of section 59A(2) of the 1987 Act has therefore been disguised, if not misrepresented.

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[3] (2007) 232 CLR 189.
[4] (2006) 154 FCR 365, at 391-2.
[5] See Pearson, L. – *'Fair is Foul and Foul is Fair': Migration Tribunal and a Fair Hearing* – Chapter 19 of Groves, M (Ed.) *Modern Administrative Law in Australia,* CUP, Melbourne 2014, at page 436.

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11. 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. This was not disclosed by the Insurer. This is in clear breach of the Guidelines.

FINDING

12. 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

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

14. Whether or not the applicant can now be transitioned is a vexed issue. Clause 8(2) of Part 19H of Schedule 6 to the 1987 Act states *"The insurer who is liable to make weekly payments of compensation to an existing recipient of weekly payments must conduct a work capacity assessment of the worker no later than 12 months (or such longer period as may be prescribed by the regulations) after the commencement of the weekly payments amendments*". The *Workers Compensation Regulation* 2010 Clause 17 of Schedule 8 states that *"A period of 18 months is prescribed for the purposes of clause 8 (2) of Part 19H of Schedule 6 to the 1987 Act".* This means that the assessment must be made by 1 April 2014. As this can no longer be achieved it is difficult to see how the applicant can now be transitioned.

15. I recommend that the Insurer pay the applicant the weekly benefit to which she was entitled prior to 6 August 2013 until such time as she is properly transitioned. Those payments should continue from 14 November 2013 being the date on which they ceased.

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16. 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 14 November 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
9 July 2014