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(C) OF THE *WORKERS COMPENSATION ACT 1987.*

1. The injured worker is the applicant for a review of the decision made by the Insurer.

2. The applicant was injured in the course of his employment on 17 August 2011 when he suffered injury to his lumbar spine. He suffered various periods of partial or total incapacity thereafter. There is no dispute about the injury having occurred in the course of employment.

3. In March 2013 the Insurer completed an assessment of the work capacity of the applicant and purported to issue a notice of a work capacity decision pursuant to Section 43 of the *Workers Compensation Act 1987* ("1987 Act") on 14 March 2013.

4. The Insurer also purported to give the applicant notice of the cessation of his entitlement to weekly benefits. This information was contained within the same letter to the applicant dated 14 March 2013. Despite this, the decision was said to "take effect from 11 March 2013."

5. In the course of the same letter the Insurer also advised the applicant that any entitlement he had to payment for medical expenses would cease from 31 December 2013[1].

6. On 23 April 2013 the Insurer wrote to the applicant advising of the outcome of an internal review of the decision dated14 March 2013. The internal review upheld the original decision.

7. A WorkCover Merit Review was completed and a Statement of Reasons issued on 16 July 2013. The Reviewer upheld the determination of the Insurer.

[1] This was purportedly justified by "section 59" although it is clear that the reference could only be to section 59A(2), which says that payments for medical treatment cease 12 months after the cessation of weekly benefits. Accordingly the earliest date for this would be 11 March 2014 if the notice given were valid, but it may not arise at all in light of paragraph 10 below.

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8. On 31 July 2013, the applicant requested the Independent Review Officer to undertake a review of the decision of the Insurer pursuant to Section 44(c) of the *1987 Act*. I am satisfied that the applicant has made that application within the time provided by that section.

9. In response to a request from the WIRO office the insurer advised that the applicant was paid weekly benefits for the following periods at the following rates:

17/08/2011 – 19/08/2011 = $373.78 (Total Incapacity)
20/08/2011 – 25/08/2011 = $498.38 (Total Incapacity)
26/08/2011 – 21/09/2011 = $1619.75 (Partial Incapacity) – applicant was fit for 12 Hours p/w
22/09/2011 – 09/12/2011 = $2616.53 (Partial Incapacity) –applicant was fit for 24 hours p/w
25/01/2013 – 07/02/2013 = $1090.26 (Partial Incapacity) – applicant was fit for 8 hours p/w
08/02/2013 – 06/03/2013 = $1795.50 (Partial Incapacity) – applicant was fit for 12 hours p/w
07/03/2013 – 21/03/2013 = $797.94 (Partial Incapacity) – applicant was fir for 18 hours p/w
22/05/2013 – 22/05/2013 = $138.10 (Total Incapacity)
23/05/2013 – 30/05/2013 = $392.50 (Partial Incapacity) – applicant was fit for 20 hours p/w

Interestingly, payments for weekly benefits were still being made as recently as 30 May 2013, despite the applicant being advised that his entitlements had ceased as of 11 March 2013. The Insurer also advised that a total of $21,534.17 has been paid to date under section 60.

10. The applicant was not in receipt of weekly benefits (sometimes styled "weekly payments") either immediately before or as at 1 October 2012 and therefore cannot be regarded as an "existing recipient" for the purposes of Schedule 6, Part 19H Division 1 of the 1987 Act which defines an "existing recipient of weekly payments" thus:

> ***existing recipient of weekly payments*** means an injured worker who is in receipt of weekly payments of compensation immediately before the commencement of the weekly payments amendments

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It is known that the applicant received no weekly payments between 10 December 2011 and 24 January 2013 inclusive. On any reading of the section, he was clearly not in receipt of weekly payments "immediately before" the commencement of the relevant amendments, which occurred on 1 October 2012.

Applicant's Stated Grounds for seeking Procedural Review

11. (a) the applicant alleges that the Insurer is trying to rehabilitate him back into his pre-injury employment, for which he believes he remains unfit;

(b) the applicant alleges there are "irregularities in the report of WorkCover" (which I take to be a reference to the Merit Review), including a reference in the Merit Review to a doctor who he says "downgraded" him following a return to work in January 2013;

(c) the applicant asserts that another doctor told a physiotherapist that he (the applicant) was "faking," as a result of which the applicant changed doctors.

The Legislative Framework

12. The legislative framework which governs the entitlement to and the transition from the previous benefits is complex and must be difficult for an injured worker without legal assistance to navigate through and to understand its impact. In the current matter it seems that the Insurer has also encountered difficulties.

13. Since the applicant was not an existing recipient as at 1 October 2012, he cannot be transitioned across to the new system using the transitional rates. He had been in receipt of weekly benefits for a combined total of more than 13 weeks but less than 130 weeks as at the date of the work capacity decision[2] which means that the relevant approach to take to the assessment of compensation payable to this applicant would have been to apply the formulae appearing in section 37.

14. It is known that the applicant was being compensated for partial incapacity due to an inability to work beyond hours ranging variously

[2] Either 11 March 2013 or 14 March 2013, depending on a reading of the correspondence.

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from 8 to 24 per week. For all weeks in which he was capable of earning $155 or more for 15 hours or more of work, the correct formula to apply would be assessed under section 37(2) and for weeks when he could not earn $155 or work 15 hours (or at all) the relevant rate would be in section 37(3). Section 37 is set out hereunder:

37 Weekly payments in second entitlement period (weeks 14–130)

(1) The weekly payment of compensation to which an injured worker who has no current work capacity is entitled during the second entitlement period is to be at the rate of:

(a) (AWE × 80%) − D, or

(b) MAX − D,

whichever is the lesser.

(2) The weekly payment of compensation to which an injured worker who has current work capacity and has returned to work for not less than 15 hours per week is entitled during the second entitlement period is to be at the rate of:

(a) (AWE × 95%) − (E + D), or

(b) MAX − (E + D),

whichever is the lesser.

(3) The weekly payment of compensation to which an injured worker who has current work capacity and has returned to work for less than 15 hours per week (or who has not returned to work) is entitled during the second entitlement period is to be at the rate of:

(a) (AWE × 80%) − (E + D), or

(b) MAX − (E + D),

whichever is the lesser.

:

15. Without going into an examination of the medical evidence or in any way looking at the merits of the case, which is beyond the scope of procedural review, it follows that this applicant remains eligible to be paid according to section 37.

Process of the Insurer

16. The Insurer erred in treating the applicant as though he were an existing recipient. As a result, the wrong legislative test was applied to his entitlements when working on reduced hours. This means that the

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procedure on which the Insurer's decision was based was fundamentally and irrevocably flawed.

17. Otherwise, as far as the process undertaken by the Insurer in reaching the work capacity decision is concerned, I am satisfied that there was no breach of procedural fairness and that the rules of natural justice were fully complied with. The Insurer had regard to a report by an Independent Medical Examiner who examined the applicant on 11 February 2013 and a short report from his former doctor. It is true that neither of those doctors supported the applicant's claim, but that of itself is not grounds for rejecting their reports as unsuitable.

My Reasons:

18. The grounds upon which the applicant seeks to rely can be dealt with shortly.

(a) The insurer has a statutory obligation to attempt to rehabilitate injured workers. Whether or not this is a suitable case for such efforts is a matter for Merit Review, not Procedural Review.

(b) The contents of the Merit Review decision by WorkCover are not a relevant consideration in the course of Procedural Review.

(c) While it is certainly true that the applicant seems to have fallen out withhis treating doctor, who accuses the applicant of becoming abusive at their last appointment, it was certainly appropriate for the Insurer to obtain material from that doctor on the basis that he was the applicant's last known treating doctor. There was no element of unfairness involved in this process.

19. Despite this, it is obvious that the decision of the Insurer cannot stand, since it is based on a misapplication of the legislation.

20. In addition to the misapplication of the transitional provisions to the applicant, I believe that section 54 of the 1987 Act has been breached in any event and so the applicant would have been entitled to succeed on procedural review for grounds of *no proper notice* or *inadequate notice*.

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21. The applicant had been paid continuously between 17 August 2011 and 9 December 2011. Clearly this was in excess of 12 weeks. Following 9 December 2011 payments were not required until 25 January 2013 when payments resumed, again on the basis of a partial incapacity arising from the same injury. From the latter date until the date of the letter of 14 March 2013 approximately seven weeks had elapsed. Payments continued for a further week until 21 March 2013 and then the applicant returned to work on full hours. Then from 22 May 2013 until 30 May 2013 (inclusive) the applicant was paid for further partial incapacity. No payments have been made since that date. Accordingly I find that section 54 of the 1987 Act would have applied and proper notice under section 54(2)(a) would have required the Insurer to give the applicant no less than 3 months notice of a decision to cease any entitlement to weekly benefits.

22. In the letter to the applicant dated 14 March 2013 the Insurer advised that the applicant's entitlement to weekly payments of compensation would cease from 11 March 2013. Section 54 requires that workers in the position of this applicant should be accorded three months clear notice prior to having their payments changed. The Insurer was required (Section 54(4) of the 1987 Act) to give the applicant notice personally or by post. By virtue of the postal service rule (Section 76(1)(b) of the *Interpretation Act* 1987*)* , this would have required the Insurer to give the applicant 3 months plus 4 working days for postal service of the notice.

23. Therefore in order to comply with the requirements of Section 54 of the 1987 Act a notice posted on 14 March 2013 would not permit the reduction or cessation of weekly payments until the expiry of three months and four working days (not including the day of posting) which would set an earliest possible date of 21June 2013.

24. The question which arises is whether strict compliance with the provision of the proper notice is required such as to render a non compliant notice invalid. In my view strict compliance is required for three reasons:

    (a) The effect of a Work Capacity Decision to reduce weekly benefits payable to the injured worker has the potential to impact on that worker's ability to meet financial obligations and

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the time period was important to ensure that the worker could reorganise his or her affairs.

(b) Failure to give the proper notice is regarded so seriously in the legislation that it is an offence.

(c) There is no provision in the legislation which enables an insurer to amend the notice.

25. Additionally, the Insurer has made an error in advising the applicant of the last date on which he could have expected to have medical expenses paid. By virtue of section 59A(2) he can be paid for 12 months after the cessation of weekly benefits. I am advised that the last payment of weekly benefits was received on 30 May 2013. This would have allowed the applicant to have his medical expenses paid until 29 May 2014. Despite this, he was told that his entitlements would cease from 31 December 2013. In the event that liability to make weekly benefits continues during his partial incapacity until the expiration of 130 weeks by virtue of section 37, the provisions of section 59A(2) are irrelevant until that time has elapsed.

My Recommendation:

26. I recommend that the Insurer recalculate the entitlements of the applicant in accordance with section 37 of the 1987 Act.

27. I recommend that the insurer pay the applicant the relevant compensation due to him under section 37 for all relevant periods from 1 January 2013 until such time as he is no longer eligible.

28. I recommend that the insurer take my views into account, and I recommend that the insurer immediately give effect to them.

Wayne Cooper
Delegate of the WorkCover Independent Review Officer
21 August 2013