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*.*

1. The injured worker is the applicant for a review of a work capacity decision made by a licensed scheme agent of the Workers Compensation Nominal Insurer ("Insurer").

2. The applicant suffered injury to his neck and left shoulder in the course of his employment on 5 May 2009. There is no dispute about the injury having occurred in the course of employment. Liability was accepted and the insurer made payments of compensation until 2013. It is therefore likely that the applicant was an "existing recipient of weekly payments" immediately prior to 1 October 2012,[1] however there is nothing in the documents before me which explicitly confirms this.

3. The Insurer completed an assessment of the work capacity of the applicant and purported to issue a notice of a work capacity decision on 12 April 2013 pursuant to Section 43 of the *Workers Compensation Act* 1987 (1987 Act). Any such notice should comply with *WorkCover Work Capacity Guidelines* 5.4.2[2].

4. The Insurer also purported to give the applicant notice pursuant to Section 54 of the 1987 Act of the reduction of his weekly payments to "nil." The applicant was advised that the payments would reduce to "nil" as from 12 July 2013, that is, exactly three months from the date of the letter. He was also told that his entitlement to "medical treatment" would "therefore cease" from 12 June 2014 by operation of "section 59."

5. On 7 June 2013 the Insurer wrote to the applicant advising of the outcome of an internal review of the decision dated 12 April 2013. The internal review upheld the original decision.

[1] As defined in s 32A *Workers Compensation Act* 1987.
[2] As gazetted on 28 September 2012. The equivalent in the current version (gazetted on 9 August 2013) is 5.3.2.

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6. A WorkCover Merit Review was completed and a Statement of Reasons issued on 6 August 2013. The Reviewer upheld the determination of the Insurer.

7. On 12 August 2013, the applicant requested the Independent Review Officer to undertake a review of the decision of the Insurer pursuant to Section 44(1)(c) of the 1987 Act. I am satisfied that the applicant has made that application within the time provided by section 44(3)(a) and *WorkCover Work Capacity Guidelines* 6.4.[3]

Applicant's grounds of review

8. The applicant makes the following points:

   (a) The applicant says that the work capacity decision is invalid because three months notice has not been provided by the Insurer. The letter dated 12 April 2013 was received on 18 April 2013. Since the notice given expired on 12 June 2013, the applicant says that the Insurer has not allowed the time required by the *WorkCover Work Capacity Guidelines* to effect proper service.

   (b) The applicant alleges that the WorkCover Merit Review service made their decision out of time, since WorkCover confirmed receipt of the application for merit review on 4 July 2013, but did not issue a decision until 33 days had elapsed on 6 August 2013. This is contrary to something which appears on the WorkCover web-site in the following terms:

   "*An independent decision maker from WorkCover will conduct a merit review of the work capacity decision and make a new decision on the issues in dispute. The decision maker will send the details of the decision with reasons to the worker and the insurer* ***within 30 days*** *of the merit review being lodged.*"

The Legislative Framework

9. The legislative framework which governs the entitlement to and the transition from the previous benefits is complex and must be difficult for

[3] Numbered 7.4 in the current version (see footnote 2).

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an injured worker without legal assistance to navigate through and to understand its impact. It involves a consideration of the 1987 Act, the *Workplace Injury Management and Workers Compensation Act* 1998 (1998 Act), the *Interpretation Act* 1987, the *Workers Compensation Regulation* 2010 (the Regulation) and various *Guidelines* issued by WorkCover which are themselves so inferential, allusive and opaque as to render a complete understanding all but impossible.

Process of the Insurer

10. The decision reached by the Insurer appears to be appropriate for a worker who was an existing recipient of weekly payments immediately prior to 1 October 2012. The decision maker had regard to an updated physiotherapy report, job logs and a rehabilitation report all supplied by the applicant within two weeks following receipt of a "fair notice" phone call from the Insurer. The totality of documents considered is listed thus:

- Physiotherapy progress report dated 08/04/2013 from R
- Functional Assessment Report dated 10/08/2011 from R
- WorkCover Medical Certificates dated 25/02/2013, 21/12/2012 and 23/10/2012 completed by Dr A-Y (the applicant's nominated treating doctor [NTD])
- Job seeking logs received by the Insurer on 23/10/2012. 8/11/2012, 21/11/20127/12/2012, 11/01/2013, 4/02/2013, 25/02/2013, 13/03/2013, 27/03/2013 and 10/04/2013 from the applicant.
- Statement of Earnings and Employment Status form dated 21/02/2013
- Rehabilitation progress reports dated 31/01/2013 and 28/03/2013 from R
- Earning capacity assessment report dated 18/03/2013 completed by P R Pty Ltd, including worker agreement to vocational options dated 19/11/2012 and NTD approval of vocational options signed by Dr A-Y.

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.

My Reasons:

11. Taking the second of the two grounds raised by the applicant first, I can

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have no regard to the conduct of the merit review of WorkCover. There is nothing in section 44 which would require the Authority to issue a decision within 30 days of receipt of an application; however WorkCover has issued *Guidelines for work capacity decision Internal Reviews by insurers and Merit Reviews by the WorkCover Authority* which were first gazetted on 28 September 2012, with a second iteration gazetted on 7 December 2012. In both versions of those *Guidelines*, the following appears:

> **10.14** The authority shall write to the worker and the insurer within 30-days (*sic*) of receiving the application advising of the outcome of the Merit Review.

As previously stated I can have no regard for the process undertaken during merit review, but it might be observed here that any *Guideline* requiring either the Authority or any other body other than the Insurer to make a decision within 30 days would appear to be beyond power in any event, there being no such requirement in the 1987 Act.[4]

12. Even if the ground relied on in paragraph 8(b) and referred to in paragraph 11 above were relevant to procedural review, it is hard to see any remedy beyond allowing the applicant to go to procedural review immediately following the passing of 30 days. This is the equivalent of the remedy provided for by section 44(3)(b) when a worker is permitted to proceed directly to merit review if an insurer fails to conduct an internal review within 30 days. The words appearing on the WorkCover web-site, while possibly aspirational in terms of merit review performance targets, are not of any legislative force. Therefore nothing of substance turns on this issue.

13. The first ground relied upon by the applicant, as set out in paragraph 8(a), is incontrovertibly correct. In the letter to the applicant dated 12 April 2013 the Insurer advised that under section 54 of the 1987 Act the applicant's weekly payments of compensation would be reduced to "nil" as of 12 July 2013. Section 54 requires that workers in the position of the applicant should be accorded three months clear notice prior to having

[4] An insurer must issue a decision on internal review "within 30 days after an application for internal review is made by the worker" – see s 44(1)(a). See also 44(3)(b) for the remedy when the insurer breaches s 44(1)(a). No similar provisions apply to WorkCover merit reviewers.

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their payments changed. The Insurer was required by 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), postal service is deemed to be effected on the fourth working day after a document is posted.

14. Therefore in order to comply with the requirements of Section 54 of the 1987 Act a notice posted on 12 April 2013 would not permit the reduction in payments until the expiry of three months following four working days (not including the day of posting) after the date of posting, which would set an earliest possible date of 19 July 2013.[5]

15. 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 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.

16. It might be argued that if an insurer pays a worker weekly compensation for the extra time between the wrongly given earlier date and the correct date the worker will have suffered no loss and the problem will have been overcome. This is to misconstrue section 54(3), which is a penalty clause, not a remedial clause. Section 54(3) only applies following the commission of an offence (whether prosecuted or not) and does not overcome the slightly awkward fact that the 1987 Act has no provision enabling an insurer to issue an amended notice. If the notice is invalid due to the wrong date being given because no time was allowed for

[5] Since 9 August 2013 insurers would be bound by *WorkCover Work Capacity Guideline* 6 which requires seven days to be allowed for postal service.

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service in contravention of section 76(1)(b) of the *Interpretation Act* 1987, it must be re-issued, with a further three month period (plus time for service) given to the worker. Equally, it is not possible to "amend" a prior notice.

17. In the current case, the Insurer purported to extend the time to 19 July 2013 in the course of advising the applicant of the outcome of his internal review in a letter dated 7 June 2013. The correct approach would have been to extend the time for notice under section 54 to 14 September 2013, in a letter dated 7 June 2013, which would have then been able to operate as a *new notice* under section 54. This not having been done, any purported notice given under section 54 to date is inadequate and invalid.

18. This insurer has also breached the *WorkCover Work Capacity Guidelines* in the manner and form in which notice of the work capacity decision was provided to the applicant. *Guideline* 5.4.2 says that an Insurer ***must*** adhere to the following decalogue of requirements:

> **5.4.2 Requirements of a work capacity decision notice**
>
> The work capacity decision notice must:
>
> • reference the relevant legislation
>
> • explain the relevant entitlement periods
>
> • 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
>
> • 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
>
> • advise the date when the decision will take effect

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> • detail any support, such as job seeking support, which will continue to be provided during the notice period
>
> • 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
>
> • advise of the process available for requesting review of the decision and how to access the required form, *Work capacity - application for internal review by insurer* (catalogue no. WC03304).

19. The first question which automatically arises in the case of a purported transitioning of a worker's weekly payments is: "Was the worker an '*existing recipient of weekly payments'* as defined in section 32A of the 1987 Act?" In this case, it is very likely. The applicant was apparently paid in excess of 130 weeks, as at 12 April 2013. Had they been consecutive weeks, all doubt would be removed. However, this is never clearly set out and, on the contrary, an incorrect criterion is referred to by the Insurer in the letter dated 7 June 2013 advising the outcome of internal review, thus:

"***As your claim was lodged prior to 1 October 2012***, your deemd pre-injury average weekly earnings (PIAWE) will be the transitional amount of $938.30. This is in line with Schedule 6, Part 19H, Clause 2(1) of the *Workers Compensation Act* 1987." (Emphasis added.)

While it is true that Schedule 6, Part 19H, Clause 2(1) sets out the transitional amount, the definition of an existing recipient is in Schedule 6, Part 19H Clause 1 (and now incorporated into the 1987 Act in section 32A) in these terms:

> **"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.

The test as set out in the letter of 7 June 2013 is incorrect. It is true that

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in order to be an existing recipient a worker would have had to make a claim prior to 1 October 2012, but that is only the first of two necessary steps. The second step is that they would have had to be in actual receipt of weekly payments immediately prior to that date. Because of the Insurer's incorrect statement of the test, it is impossible to confirm that the applicant was in fact an existing recipient at the relevant time.

20. In the current case, as referred to in paragraph 4 above, this applicant was advised that his entitlement to "medical treatment" would cease from 12 July 2014, by virtue of "section 59." In my view this is a clear breach of *Guideline* 5.4.2 which 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.

The applicant was not told that his medical and related treatment expenses would no longer be paid after 12 July 2014, nor was he referred to section 59A(2) of the 1987 Act. He was simply told that his "entitlement to medical treatment" would cease. The Insurer did not improve its position in this respect in the letter dated 7 June 2013 advising the outcome of internal review. In that letter the Insurer came up with this form of words:

> "We can confirm that ***the work capacity decision*** only relates to your entitlements to weekly benefits and ***does not affect other entitlements that you may be entitled to under the Act.***" (Emphasis added.)

This is misleading and in clear breach of the *Guideline* requiring the Insurer to "state the impact of the decision." In the event that the applicant had understood the first letter dated 12 April 2013 to be telling him that his entitlements to hospital, medical and related treatment expenses would cease one year following the cessation of his weekly payments, the second letter dated 7 June 2013 would have told him that this was not the case, since the work capacity decision was said to have no impact on his other entitlements. This is confusing, confounding and unacceptable.

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21. The Insurer in advising that the decision would take effect on 12 July 2013 has also breached *Guideline* 5.4.2 which requires the Insurer to:

    - advise the date when the decision will take effect.

    Given the flaw in the notice period described in paragraphs 13-17 above, the date of 12 July 2013 is erroneous and the *Guideline* has *a fortiori* been breached.

22. When a worker's livelihood is being affected, the Insurer has an obligation to strictly observe the legislation, *Regulation* and *Guidelines* in order to provide fairness.

My Recommendation:

23. I recommend that the Insurer issue a valid section 54 notice, which gives the applicant three clear months notice of variation of his weekly benefits. Such notice should include four clear working days for service by post and comply with *Guideline* 6 which was gazetted on 9 August 2013.

24. I recommend that the Insurer issue a proper notice in accordance with *Guideline* 5.4.2, setting out the full impact of the decision, including the termination of medical expenses 12 months following the cessation of weekly payments and references to the relevant sections of the legislation, including section 59A(2) of the 1987 Act.

25. I recommend that in any new notice of a work capacity decision the Insurer state whether or not the applicant was in receipt of weekly payments of compensation immediately prior to 1 October 2012. The correct test for qualification as an "existing recipient of weekly payments" should be quoted in terms from section 32A of the 1987 Act.

26. Since the applicant was probably an existing recipient of weekly payments as at 1 October 2012, he probably remains entitled to receive his pre-transition rate of weekly payments until such time as he is validly transitioned under the Act. This cannot happen until a valid notice under section 54 is issued and the relevant notice period has expired.

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Accordingly I recommend that the Insurer recommence weekly payments to this applicant at his pre-transition rate.

27. 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 WorkCover Independent Review Officer
18 September 2013