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 procedural review of a work capacity decision made by the Insurer.

2. The applicant suffered injury in the course of his employment as a Council Ranger. He also held a concurrent and incidental appointment as a Special Constable under section 103 of the *Police (Special Provisions) Act* 1901. The injury occurred in 1999, which considerably pre-dates the repeal of the *Police (Special Provisions) Act* 1901 in 2013.[1] The applicant describes the circumstances of his injury as arising out of a self-defence class while attending work with his colleagues and New South Wales police officers.

3. The applicant suffered serious injury to his right knee in 1999 and over the course of the ensuing decade he had several operations on that knee and also developed symptoms in the left knee consequential upon a change of gait and considerably favouring the right knee. He now works in a more sedentary occupation for approximately 28 hours per week.

4. The insurer made continuous weekly payments of compensation from 1999 until 2013. Accordingly the applicant was an "existing recipient of weekly payments" as at 1 October 2012 as defined in Schedule 6, Part 19H Division 1 of the *Workers Compensation Act* 1987 (1987 Act).

5. On 24 April 2013 the Insurer, having completed an assessment of the work capacity of the applicant, purported to issue a notice of a work capacity decision pursuant to Section 43 of the 1987 Act. He was advised that his weekly payments would be varied and that the variation would take effect on 7 July 2013.

6. On 17 June 2013 the Insurer wrote to the applicant advising of the outcome of an internal review of the decision dated 24 April 2013. The letter had the heading, capitalised, as follows:

[1] See *Police Legislation Amendment (Special Constables) Act* 2013, Schedule 2.

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"WORK CAPACITY DECISION FOLLOWING INTERNAL REVIEW."

The Insurer described the internal review process and the outcome of it thus: "In response to your application, we conducted a *new work capacity assessment and have made a new decision.*" Despite these words, the applicant was told that if he were dissatisfied with the outcome of Internal Review he had 30 days to approach WorkCover for a Merit Review.

7. A WorkCover Merit Review was completed and a Statement of Reasons issued on 1 August 2013. The Reviewer upheld the determination of the Insurer.

8. On 14 August 2013, application was made to 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 30 day time-limit imposed by section 44(3)(a), and the *WorkCover Work Capacity Guidelines* and on the relevant form.

9. On the same day on which the applicant made application for procedural review, the Insurer once again wrote to the applicant, this time under the following heading, also capitalised:

"WORK CAPACITY DECISION NOTICE MADE IN ACCORDANCE WITH S54 OF WORKERS COMPENSATION ACT (*NSW*) 1987."

The text of the letter dated 14 August 2013, which post-dates the Merit Review decision by 13 days and which was issued on the same day that the applicant approached the Independent Review Officer seeking procedural review, begins as follows:

"We refer to our telephone conversation on 14/08/2013 where we discussed the *Workers Compensation Amendment Act 2012* (the Act) and the outcome of our review of your work capacity.

"As discussed we have completed the assessment and made a work capacity decision.

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"This letter sets out the work capacity decision that has been made and the reasons for the decision."

The purpose of the letter, referred to in the heading, becomes apparent much later on when the following words appear:

"a) We refer to our previous work capacity decision made on 24/4/2013 (original notice). We note that there was an error in the notice period provided to you. We have made a new decision that is the same as the previous decision, however the effective date has been altered to reflect the requirements of section 54 of the *Workers Compensation Act* 1987 and the notice period is now three months and 7 days from the date of this letter. The seven days allows for the time of this notice in transit to you.

"b) We note that this decision remains the subject of internal review in response to your application. Our Independent Resolution Officer will provide a response ***within the required timeframe***.[2]

"From 21/11/2013 your weekly entitlement will be $221.31.

"You are entitled to claim medical and other treatment expenses until 12 months after benefits cease."

Applicant's Stated Grounds of Review

10. The applicant raises an issue which may well go beyond the jurisdiction of the Independent Review Officer: he asserts that he is not subject to the regime introduced by the 2012 amendments to the 1987 Act by virtue of being a police officer. To be fair to the applicant, he does not assert that he is actually a police officer as that term is defined in either the *Interpretation Act* 1987 or the *Police Act* 1990. Rather, he asserts that he is entitled to the same "advantages" as a police officer of the rank of constable by operation of the *Police (Special Provisions) Act* 1901.

The Legislative Framework and a Question of Law

[2] Emphasis added

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11 If he is entitled to the same treatment as a police officer, then the applicant might be able to rely on clause 25 of Schedule 6, Part 19H, Division 3 of the 1987 Act. Clause 25 is in these terms:

> **25 Police officers, paramedics and firefighters**
>
> The amendments made by the 2012 amending Act do not apply to or in respect of an injury received by a police officer, paramedic or firefighter (before or after the commencement of this clause), and the Workers Compensation Acts (and the regulations under those Acts) apply to and in respect of such an injury as if those amendments had not been enacted.

If the applicant comes within this clause, he cannot be transitioned onto the new benefits regime by the Insurer.

It is possible that the applicant can take shelter from the 2012 reforms by relying upon section 103 of the *Police (Special Provisions) Act* 1901, thus:

> **Section 103 Power of special constables**
>
> Every special constable appointed under this Act shall have, exercise, and enjoy all such powers, authorities, advantages, and immunities, and be liable to all such duties and responsibilities as any police officer of the rank of constable duly appointed now has or hereafter may have by virtue of the common law or of any Act or Imperial Act for the time being in force.

Whether or not he succeeds might well turn on the definition of "advantages" as appearing in section 103.

The Insurer sought to address this issue of whether or not the applicant is entitled to be regarded in the same class of worker as a police officer in the Internal Review letter dated 17 June 2013. They said, relevantly:

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"At the time of your injury you were not a police officer, you did however hold the role of Special Constable in conjunction with your position as a ranger for [the] Council.

"The *Interpretation Act* specifies that where the words *police officer* appear in any Act, the meaning to be given to those words is someone who is a member of the NSW police force within the meaning of the *Police Act*.

"Part 10B, section 207E(1) of the *Police Act* says that a law enforcement officer (this includes a Special Constable) may exercise the functions of a police officer, however section 207E(4) specifies that the *Police Act*, with the exception of specified sections does not apply to a law enforcement officer. As membership of the NSW police service is defined under section 10 of the *Police Act* and this section is expressly excluded from application to law enforcement officers, [the Insurer] has determined that a law enforcement officer (including a special constable) is not a police officer for the purposes of the Act."

This is a novel, and irrelevant, argument. First, the applicant is not asserting that he is a member of the NSW police service. Secondly, he is not asserting that he is a "recognised law enforcement officer" as described in the *Police Act*. To the contrary, he is asserting that he is a Special Constable, which by virtue of the *Police (Special Provisions) Act* 1901 means that he has the same entitlement to such "advantages" as might be available from time to time to police officers (as opposed to 'recognised law enforcement officers').

The insurer is simply incorrect to rely on Part 10B of the *Police Act* 1990, which has no relevance to Special Constables. Relevantly, section 207B refers to the appointment of recognised law enforcement officers:

> **207B Appointment of recognised law enforcement officers**
>
> (1) The Commissioner may appoint any of the following persons as recognised law enforcement officers (whether by appointing all such persons, any class of them or any individual):
>
> (a) members of the Australian Federal Police,

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> (b) members of the police force of another State or a Territory.
>
> (2) An appointment is to be made:
>
> (a) by notice in writing given to each person appointed, or
>
> (b) by notice published in the Gazette.
>
> (3) The notice is to specify any conditions to which the appointment is subject and the term of the appointment if the appointment is for a limited term.
>
> (4) The Commissioner must not appoint any person as a recognised law enforcement officer unless the person is to be, in the opinion of the Commissioner, subject to an appropriate disciplinary system in respect of the exercise of the person's functions as a recognised law enforcement officer.
>
> (5) An appointment as a recognised law enforcement officer may be made subject to conditions, including (but not limited to) conditions as to the kinds of functions conferred and the purposes for and circumstances in which such functions may be exercised.

It is reasonably clear that this provision refers to the recognition of existing law enforcement officers from jurisdictions outside New South Wales, not Local Council Rangers. Without labouring the point, the term "recognised law enforcement officer" is defined in section 3 as follows:

> **"recognised law enforcement officer"** means a person appointed as a recognised law enforcement officer under Part 10B whose appointment is in force.

It must follow that the argument put by the Insurer is misconceived and based on the false premise that a "recognised law enforcement officer" includes a special constable.

It is a question of law whether or not the applicant can be entitled to exemption from the amendments as provided for in clause 25 of Part 19H, Division 3 of Schedule 6 to the 1987 Act. Under section 105 of the *Workplace Injury Management and Workers Compensation Act* 1998 (1998 Act) the Workers Compensation Commission of NSW (WCC) would appear to have exclusive original jurisdiction to decide the point.

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In passing I would add that the definition of "worker" in the 1998 Act does not exclude the applicant even if he is given the same "advantages" as a police officer, since it is only members of the NSW Police Force who are contributors to the Police Superannuation Fund under the *Police Regulation (Superannuation) Act* 1906 who are excluded from the definition of "worker." The applicant is clearly not a member of the Fund.

Process of the Insurer

12. The work capacity decision reached by the Insurer appears to be within the range of available decisions which could have been made, but this is subject to the argument put by the applicant, which challenges the applicability of the 2012 amendments [and the relevant Guidelines] to his case. By a series of letters including one dated 13 days following the completion of a WorkCover merit review, the Insurer has ultimately given the correct notice under section 54 of the 1987 Act for the variation of weekly payments (3 months plus time for postal delivery, with time running from the date of the letter). The worker was advised as long ago as April 2013 that his payments would reduce to $221.31 per week, and following belated correction of the notice period, he will continue to receive his pre-transitional amount until 21 November 2013, which has prolonged his pre-transition payments for a period of four months beyond the initial notice given.

My Reasons:

13. The reasons given by the applicant for procedural review (which were also included in his reasons for merit review) raise a very important question of law. While I am tempted to observe that the applicant has a strong argument, in my view the Independent Review Officer does not have jurisdiction to determine the issue. It is a matter for the WCC. As such, it is a threshold question, which must be answered first in order to determine whether or not the 2012 amendments, including the plethora of related *Guidelines*, are applicable.

14. Since the WCC similarly lacks jurisdiction to determine the issue of whether or not the Insurer properly transitioned the applicant as a result of a work capacity decision, that question must remain unanswered until the outcome of an application to the WCC on a question of law is known.

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My Recommendation:

15. I recommend that the applicant and the Insurer seek legal advice with a view to making an application to the Workers Compensation Commission to determine the question of law as to whether or not clause 25 of Part 19H, Division 3 of Schedule 6 to the 1987 Act applies to Special Constables by virtue of section 103 of the *Police (Special Provisions) Act* 1901.

16. 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
27 September 2013